

SOUTH AFRICA / JUDGMENT

Gumede v S (CA&R181/2011) [2011] ZAECHGC 88 (17 November 2011)

[2011] ZAECHGC 88

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N Dambuza, J W Eksteen

CASE / FILE NUMBER

CA&R181/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – GRAHAMSTOWN)

Case No.: CA&R181/2011 Date heard: 26 October 2011 Date delivered: 17 November 2011 In the matter between: SIMPHIWE GUMEDE Appellant and THE STATE Respondent

J U D G M E N T

DAMBUZA, J:

The appellant appeared before the magistrate in Jeffrey's Bay where he was charged with a count of housebreaking with intent to steal and theft and a count of robbery with aggravating circumstances as provided in section 1 of Act 51 of 1977. He was convicted as charged in respect of count 1 and was sentenced to 5 years imprisonment. In respect of count 2 he was convicted of theft and assault with intent to do grievous bodily harm and was sentenced to a further term of 5 years imprisonment. The trial court ordered that two years of the sentence in respect of count 2 run concurrently with the sentence imposed in count

1. The effective sentence therefore was to be 8 years imprisonment. Leave to appeal against the convictions and sentences imposed was refused by the trial court, but this court, on petition, granted the appellant leave to appeal against the convictions of theft and assault with intent to do grievous bodily

harm and the two sentences imposed by the court a quo.

The conviction in respect of count 1 arose from an incident that occurred at a shop known as Sams Clothing in Jeffreys Bay on 4 November 2009. The evidence on which the appellant was convicted was that during that night the shop was broken into and goods valued at R2,686.80 were stolen. The second and third convictions related to an incident that occurred at about 1 in the afternoon of 26 November 2009 at a business known as True Technologies in Central Jeffreys Bay.

The complainant in this count, being the owner of True Technologies, was at the business premises when the appellant entered the shop, grabbed from the shelves a notebook computer valued at R5,000.00. As he tried to run away with it the complainant grabbed it from him. The appellant

then made his exit and as he did so one of the shop assistants, referred to in the record as Mohammed, tried to grab his arm,

whereupon the appellant drew a knife and threatened to stab Mohammed on the arm. The appellant then successfully ran out of the shop but was chased and eventually arrested. The computer was covered.

In convicting the appellant with regards to count 2, the magistrate found as follows:

“Myns insiens is dit duidelik dat hy wel skuldig is aan diefstal. Die misdryf was al voltooi. Hy het dit onder sy baadjie weggesteek

hierdie skootrekenaar. Hy was oppad na die deur. Toe hy gekonfronteer was het hy op ’n stadium ’n mes uitgetrek en die getuie, die klaagster gedreig daarmee of hy het dit in ’n dreigende houding gehou. Wat hierdie aspek betref die Aanklaer asook mnr Van Wyk is van mening dat hy skuldig is aan aanranding, diefstal en aanranding.”

In granting leave to appeal against the convictions of theft and assault with intent to do grievous bodily harm this court directed that submissions should be made regarding the competency of convicting the accused of these offences when he had only been charged with robbery.

In the appellant’s Heads of arguments, however, it is conceded, correctly in my view, that the convictions of theft and assault were competent verdicts. Mr Els who appeared on behalf of the state supported this view. The convictions find support in section 260 of the Criminal Procedure

Act 51 of 1977(the Act) which provides that:

“If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery, or, as the case may be, attempted

robbery, but-

- (a) the offence of assault with intent to do grievous bodily harm;
- (b) the offence of common assault;
- (c)
- (d) the offence of theft;
- (e)

the accused may be found guilty of the offence so proved, or, where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, both such offences.”

At 26-6 of The commentary to the Criminal Procedure Act, the authors Du Toit and other, remark that:

“this provision does not amount to some form of duplication of convictions permitted by statutory law, but really only acknowledges the practical reality that the evidence on a charge of robbery might not disclose a causal link between the violence and the taking or removal of the object.”

The magistrate was therefore correct in convicting the appellant of the two offences as he did.

Sentence

At the hearing of the appeal, Mr de Jager, who appeared on behalf of the appellant, having made submissions on the merits of the appeal on sentence, brought to our attention that there could be uncertainty about the age of the appellant. The appeal against the sentences imposed by the magistrate is, in the main, based on the appellant’s age being 18 years at the time of sentence. Before us submissions made on behalf of the appellant were that the sentences are excessively harsh for a youngster of the appellant’s age.

According to the charge sheet which forms part of the record on 4 November 2010 the appellant was 26 years when he was charged. The magistrate, starts his judgment on merits by stating that: “Die beskuldigde Simphiwe Gumede is 26 jaar oud,...”. On the appellant’s record of previous convictions the appellant’s date of birth appears as “1983-09-16”, thus setting his age at 26 years at the time of committing the offences for which he was convicted. However, the following

submission was made during address on sentence:1

“MNR VAN WYK BETOOG VOOR VONNIS: Wat my kliënt se persoonlike omstandighede betref Edelagbare, anders as wat op die klagstaat staan is hy inderdaad 18 jaar oud.

HOF: 18 jaar oud.

MNR VAN WYK: Ja ons het dit nou net bevestig en een van sy ou dossiere. Ek weet presies Edelagbare, want ek het met van daardie vorige sake van hom was hy as ’n jeugdige behandel gewees. Dit was (onduidelik) daar is nie ’n manier dat hy 26 kon wees nie.

Hy is tans 18 Edelagbare.”

In his judgment on sentence the magistrate states that the accused is:

“n jong man, u is maar 18 jaar oud.”.

No proper inquiry was made into the appellant's correct age and there does not appear to be any clear explanation of how the discrepancy regarding his age was occasioned. There is no explanation as to why his age would appear as it does in his record of previous convictions. The magistrate does not state the reasons on which he finds the appellant's age to be 18 years and not 26 years.

In some instances, such as this case, the age of an accused may be vital in respect of sentence. In *S v Kamfer* 1969 (4) SA 250 (C) it was held that there are two steps in ascertaining the age of an accused:

Firstly the judicial officer must enquire as to whether evidence as to age is available or not.

If there is insufficient or no evidence, then recourse must be had to Section 337 of the Criminal Procedure Act 51 of 1977 (estimating age of person) and an estimate must be made. In all instances the accused must be informed and be afforded an opportunity of rebutting a finding that he is over the age of 18 years. But estimates ought to be the last resort where there is no evidence as to age available. See *Du Toit et al* (supra) at 33-11.

I am of the view that in the light of the uncertainty as to the appellant's age the magistrate should have held an inquiry to determine his correct age. In the context of this uncertainty regarding the appellant's age the propriety of the sentences cannot be determined on appeal. The matter should revert to the magistrate for determination of the appellant's correct age.

Consequently the following order shall issue:

[12.1] The convictions are confirmed;

[12.2] The sentences imposed are set aside;

[12.3] The matter is referred back to the magistrate for a determination of the appellant's correct age and a re-consideration of the sentences in the light of the appellant's properly determined age.

N. DAMBUZA

JUDGE OF THE HIGH COURT

EKSTEEN, J

I agree.

J.W. EKSTEEN

For the appellant: Adv A De Jager instructed by Grahamstown Justice Centre

For respondent: Adv D Els instructed by the National Prosecuting Authority

1 See p 71 to 72 of record.

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Prepared on 10 October 2026 · Esheria