

SOUTH AFRICA / JUDGMENT

Ndlazi v S (CA&R272/2016) [2017] ZAECHGHC 23 (23 February 2017) [2017] ZAECHGHC 23

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem, P T Mageza

CASE / FILE NUMBER

CA&R272/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. CA & R 272/2016

In

the matter between:

SIZWE

NDLANZI

Appellant

and

THE

STATE

Respondent

JUDGMENT

Bloem J.

- [1] The main issue in this appeal is whether the policeman who arrested the appellant should have had a reasonable suspicion that the goods in his possession had been stolen before the appellant was searched and before he was required to give a satisfactory account of the goods in his possession.
- [2] The appellant was charged in the magistrate's court, East London with the contravention of section 36 of the General Law Amendment

Act[1] (the Act). It was alleged that he was found in unlawful possession of a cellphone and four bank cards which were reasonably

suspected of having been stolen. The appellant was allegedly unable to give a satisfactory account of such possession.

Despite his plea of not guilty the magistrate convicted him and imposed a sentence of 36 months' imprisonment. It is with the magistrate's leave that he now appeals against the conviction and sentence.

[3] Section 36 of the Act reads as follows:

"Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such

possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

[4] The elements of the offence are that:

4.1. the suspect must be found in possession of goods;

4.2. a suspicion must be founded on reasonable grounds existing in the mind of the finder (or possibly some other person) that the goods had been stolen; and

4.3. there must be an inability on the part of the suspect (the person found in possession) to give a satisfactory account of such possession[2].

[5] The material facts are that on 17 December 2015 sergeant Nosilela and a colleague were patrolling the Quigney area in East London at about one o'clock in the morning when they saw two men walking along Moore Street. They looked suspicious. They looked around when they saw the marked police van driven by sergeant Nosilela. He stopped the van and asked permission from the two men to search them. They agreed.[3] He searched the appellant while his colleague, sergeant Mbagathi, searched the other man. Sergeant Nosilela testified that the appellant had a cellphone in his hand. He found another cellphone in the appellant's pocket, a knife and a wallet containing bank cards. He asked the appellant to explain his possession of the above goods. There were four bank cards in the wallet belonging to a certain Dr Udugwa. Two of the cards were issued by First National Bank, one by Absa and the other by Capitec Bank. The appellant said that he received the cards from a male relative who was at an initiation school at the time. The appellant explained that the cellphone in his hand was his and the one in his pocket, a Samsung Galaxy which was off, belonged to his girlfriend. While they were engaging one another the cellphone in the appellant's hand rang. It turned out that the call was from his girlfriend. Sergeant Nosilela requested to speak to her. It emerged that she was not far from where the policemen were. She offered to join them.

- [6] Upon the arrival of the appellant's girlfriend sergeant Nosilela showed her the Samsung cellphone. She did not know whose cellphone it was. It was not hers. She recognised the other cellphone as her boyfriend's. Sergeant Nosilela switched on the Samsung cellphone. He noticed a number which had been called the previous day. He called that number from his cellphone. The person who answered the call identified himself as Siya who said that he knew Chantelle, the person from whom that cellphone was stolen. Siya also went to where the policemen as well as the appellant and his friend were.

He took them to Chantelle's house but she was not at home. Sergeant Nosilela then arrested the appellant for being in possession of suspected stolen property.

- [7] Sergeant Mbangathi's evidence corroborated sergeant Nosilela's evidence regarding their search of the appellant and his friend, the possession of the cellphones, knife and bank cards, his explanation for such possession, the girlfriend's denial of ownership of the Samsung cellphone, the telephone call to Siya, his arrival at the scene and the arrest of the appellant and his friend.
- [8] The appellant's evidence did not materially differ from the state's evidence. The main difference is that, according to him, when he was called upon to explain his possession of the two cellphones and the bank cards he told the policemen that the one in his hand was his whereas he purchased the Samsung cellphone two days earlier from two men for R150.00. The policemen assaulted him because they said that they did not believe his explanation. As a result of the assault he said that the Samsung cellphone belonged to his girlfriend. The appellant did not testify about the bank cards which were found in his possession. His evidence related only to the knife and cellphones found in his possession.
- [9] The state proved beyond reasonable doubt that the appellant was found in possession of the Samsung cellphone and a wallet containing four bank cards. Mr Geldenhuys, counsel for the appellant, did not submit that the appellant gave a satisfactory account of his possession of the Samsung cellphone and bank cards. What he submitted was that there was a duty on the appellant to satisfactorily account for his possession of the Samsung cellphone and bank cards only if the policemen had a suspicion, based on reasonable grounds, before they were found, that they had been stolen. For that submission Mr Geldenhuys relied on *S v du Preez*[4] where van Reenen J had the following to say at 137b-d:

“Die reg om rekenskap vir die besit van goed te eis en die verpligting om dit te gee ontstaan eers nadat daar 'n redelike verdenking ontstaan het dat dit gesteel is. (Sien: S v Valentyn 1930 KPA 175 op 178; R v Ngubane 1933 NPA 748 op 752; R v Hunt 1957 (2) SA 465 (N) op 468D; S v Essack 1963 (1) SA 922 (T) op 924D; S v Khumalo 1964 (1) SA 498 (N) op 505F, 511C; en vergelyk R v May 1924 OPD 274 op 280.) Daardie beskouing hang saam met die siening dat die bepalings van art 36 drasties van aard is, beperkend uitgelê moet word en eng toegepas behoort te word.”

- [10] He also relied on *S v Mathila*; *S v Mbali*[5] which, in my view, does not assist the appellant because at 299g Daniels J had the following to say:

“Met betrekking tot art 36 van Wet 62 van 1955 is die gesag duidelik dat daar getuienis moet wees van 'n verdenking wat ontstaan het ten tyde van 'n beskuldigde se besit van die artikels. Dit is nie verdenking wat by die hof kan ontstaan na die aanhoor van getuienis nie. (Sien R v May 1924 OPD 274; S v Du Toit 1966 (4) SA 627 (A) en R v Ismail 1958 (1) SA 206 (A).” (own underlining)

- [11] The headnote of *S v Mathila*; *S v Mbali* correctly translated what Daniels J stated in the judgment, namely that the reasonable suspicion required for proof of a contravention of section 36 is the suspicion which exists at the time of the accused's possession of the goods and not the suspicion which arises in the mind of the presiding officer after the hearing of evidence.
- [12] Daniels J referred to *R v Ismail* and another[6] wherein the then Appellate Division found that *Rex v May*[7] was correctly decided. In the latter case de Villiers JP held that the reasonable suspicion must come into existence in the mind of the person either at the time of the finding in possession or possibly at any time during the accused's possession. In *R v Ismail* and another Fagan CJ emphasised that the contemporaneity of the suspicion founded on reasonable ground and the possession of the goods is an essential ingredient of the offence created by section 36[8].
- [13] The Appellate Division had another opportunity to examine the provisions of section 36 in *S v Rubenstein*[9] wherein Ogilvie Thompson JA held that, as a prerequisite to conviction under section 36, the state had the onus to prove that there was a suspicion founded on reasonable grounds that the goods of which the appellant was found in possession had been stolen.

The learned Judge stated at 483H that:

“What the State had to prove was the existence in the mind of the finder of the goods of 'a suspicion founded on reasonable grounds then appearing' that the drugs and goods in issue had been stolen. (See R v May, 1924 OPD 274; R v Ismail and Another, 1958 (1) SA 206 (AD).”(own underlining)

- [14] It is clear from the above authorities that the interpretation given to section 36 by the Supreme Court of Appeal is that the reasonable suspicion that the goods were stolen must be formed any time before the accused ceases to be in possession of the goods. It follows that an accused may be convicted of the contravention of section 36 if the finder forms a reasonable suspicion after the goods were found in the accused's possession; provided that, at that stage, the goods are still in his possession and he is unable to give a satisfactory account of such possession.
- [15] I am bound by the decisions emanating from the Supreme Court of Appeal. Save for *S v Rubenstein*, it appears that van Reenen J was not referred to *R v Ismail* and another. In the circumstances, Mr Geldenhuys' submission, that the reasonable suspicion that the goods were stolen must be formed before the goods are found, cannot be upheld.

- [16] Whether or not sergeant Nosilela's suspicion that the cellphone and bank cards were stolen was founded on reasonable grounds must be objectively assessed. The facts from which that assessment must be made are that the appellant and his friend were confronted by the policemen at approximately one o'clock in the morning, the incident occurred on 17 December 2015 which was described by sergeant Nosilela as a busy period, the appellant was found in possession of a knife, the Samsung cellphone and four bank cards issued to Dr Udugwa while his friend was found in possession of wet clothing in a bag. Sergeants Nosilela and Mbagathi testified that they stopped the police van because of the way in which the appellant and his friend were looking at the van. Sergeant Nosilela testified that "that is when I saw that they were suspicious" and sergeant Mbagathi testified that, because the appellant and his friend were looking around "you could see that there was something that they were up to". The explanation that the appellant gave to sergeant Nosilela for being in possession of the bank cards was that they were given to him by a relative who was at an initiation school. He did not explain what he was required to do with those cards. Objectively he must have realised that those four cards, issued by three different banks to Dr Udugwa, must have been stolen from him. When he was found in possession of the Samsung cellphone his explanation for his possession was that it belonged to his girlfriend. A few minutes thereafter his girlfriend said that she did not know that cellphone. His explanation in court was that he purchased that cellphone two days earlier from two males for R150.00. He later testified that the police assaulted him because they did not believe that he purchased the cellphone. When they were cross-examined, it was not put to sergeants Nosilela and Mbagathi that they had assaulted the appellant.
- [17] The appellant's explanation for being in possession of the Samsung cellphone and bank cards was, in my view, correctly rejected by sergeant Nosilela and subsequently the magistrate. The appellant's inability to give a satisfactory account of his possession of the Samsung cellphone and bank cards and the circumstances under which those items were found in his possession constitute reasonable grounds upon which sergeant Nosilela's suspicion, that those items were stolen, was based. In the circumstances, I am of the view that the state proved all the elements of the offence created by section 36 beyond reasonable doubt. The appeal against conviction must accordingly be dismissed.
- [18] The appellant was sentenced to 36 months' imprisonment. Although she did not deal with the appellant's personal

circumstances in detail, the magistrate undertook to take them into account when imposing a sentence. Those circumstances are that he was born on 1 January 1984, a bachelor, has no children, left school in grade 11 and is unemployed. On 2 July 2003 the appellant was convicted of theft. The passing of sentence was postponed for 3 years. On 25 July 2005 he was convicted of housebreaking with intent to steal and theft and sentenced in terms of section 276 (1) (i) of the Criminal Procedure Act[10] to 18 months' imprisonment from which he could be placed under correctional supervision in the discretion of the Commissioner of Correctional Services or a parole board. On 15 March 2007 he was convicted of robbery, attempted robbery and attempted

rape and sentenced to five years' imprisonment in respect of the robbery and attempted robbery and ten years' imprisonment in respect of the attempted rape. The sentences were ordered to run concurrently. On 8 July 2013 the appellant was convicted of housebreaking with intent to steal and theft and sentenced to 12 months' imprisonment. The magistrate said that she took the interests of the community into account. She commented that members of the community will lose faith in the courts if appropriate sentences were not imposed.

[19] In *S v Bogaards*[11] Khampepe J had the following to say regarding the power of a court of appeal to interfere with sentences imposed by courts below:

"Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

[20] The appellant does not rely on an irregularity. His case is that the magistrate overemphasised the seriousness of the offence and the interests of society at the expense of the appellant's personal circumstances. He also contends that the sentence is shockingly inappropriate. It must be borne in mind that two persons were deprived of their property; the owner of the Samsung cellphone and Dr Udugwa. It is accepted that the absence of the Samsung cellphone and bank cards caused their owners or lawful holders severe inconvenience. It is not the evidence that the appellant stole those items. However, he was in possession of them and was unable to give a satisfactory account of such possession. He accordingly committed an offence under section 36. A person convicted under section 36 shall be liable to the penalties which may be imposed on a conviction of theft.

[21] Despite the appellant's list of previous convictions, the imposition of a sentence of 36 months' imprisonment under the circumstances set out above *prima facie* induces a sense of shock. After referring to the fact that he has been sentenced on many occasions, the magistrate said to the appellant "but you still have a chance, it is still early for you to change your ways" and thereafter, expressed the "hope that the sentence that I am about to impose on you is an appropriate sentence that will deter you and would be offenders". The appellant was convicted of an offence which is prevalent in the jurisdiction of this court. He deserves to be sentenced to serve a period of imprisonment. I am of the view that the period of imprisonment that the magistrate imposed is not in proportion to the offence committed and accordingly inappropriate. Although Jones J dealt with a petty offence theft of articles valued at R21.89 from a supermarket in *S v Baartman*, [12] the following comments made at 305d-e are apposite to this matter:

"In a case such as this it is necessary to be aware of three considerations:

(a) the accused should be sentenced for the offence charged and not for his previous record;

- (b) the public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence; and
- (c) while it may be justifiable up to a point to impose escalating sentences on offenders who keep on repeating the same offence, there are boundaries to the extent to which sentences for petty crimes can be increased.

Thus, a thief who steals a loaf of bread should not have to go to gaol for 10 years because he has stolen countless loaves of bread, one at a time, in the past. His sentence should never escalate with the passage of time from a few weeks for initial offences, to a few months, eventually to years, and then to many years; the offence remains a petty offence no matter how often it is repeated.

It all comes down to the basic principle that the punishment should fit the crime. Where the crime is petty theft, and the offender's

previous record makes imprisonment rather than some alternative form of punishment imperative, the period must still be in proportion to the petty nature of the crime. There is a limit beyond which a sentence is no longer a proportionate or reasonable sentence.

The upper limit is probably somewhere between four months' and six months' imprisonment. Anything above that should usually be reserved for offences which are not petty. In my view a sentence of nine months' imprisonment is a substantial sentence. In rare and exceptional circumstances it might be appropriate for a petty offence. This case is neither rare nor exceptional."

[22] Although the appellant has once again been convicted of an offence involving dishonesty, he was not convicted of housebreaking with intent to steal and theft, robbery or attempted robbery. He was convicted of an offence which carries the same sentences imposed on a conviction of theft. It is for that offence that he must be sentenced, not his previous convictions. Had the magistrate sentenced the appellant for having contravened section 36 and not for his previous convictions, she would have imposed a much lesser period of imprisonment. She has misdirected herself by placing too much emphasis on the appellant's previous convictions and the interests of society. The term of imprisonment that the magistrate imposed is so excessive that interference with that sentence is justified on appeal.

[23] Regard being had to the inconvenience caused by the appellant's conduct to the owner of the bank cards and the owner or lawful holder of the Samsung cellphone, the appellant's personal circumstances (inclusive of his previous convictions) and the interests of society, I am of the view that justice will be served if the sentence of 36 months' imprisonment is set aside and replaced with a sentence of 12 months' imprisonment of which 6 months are suspended on condition that the appellant is not again convicted of a contravention of section 36 committed during the period of suspension.

[24] In the result, I make the following order:

24.1. The appeal against conviction is dismissed.

24.2. The appeal against sentence is upheld.

24.3. The sentence of 36 months' imprisonment is set aside and replaced with the following sentence:

“The accused is sentenced to 12 months' imprisonment of which 6 months are suspended for three (3) years on condition that the accused is not again convicted of a contravention of section 36 of the General Law Amendment Act, 1955 (Act No. 62 of 1955) committed during the period of suspension.”

G H BLOEM

Judge of the High Court

Mageza AJ,

I agree

P T MAGEZA

Acting Judge of the High Court

For the appellant:

Adv D P Geldenhuys of the Grahamstown Justice Centre, Grahamstown.

For the state:

Adv D Els of the office of the Deputy Director of Public Prosecutions, Grahamstown.

Date of hearing:

1 February 2017

Date of delivery of the judgment:

23 February 2017

[1] General Law Amendment Act, 1955 (Act No. 62 of 1955).

[2] Osman and another v Attorney General, Transvaal 1998 (4) SA 1224 (CC) at 1228E-F.

[3] Whether or not the search was lawful was not an issue during the trial or on appeal. In this regard see Magobodi v Minister of Safety and Security and another 2009 (1) SACR 355 (Tk) at 360i.

[4] S v du Preez 1998 (2) SACR 133 (C).

- [5] S v Mbali 2000
(1) SACR 298 (T) at 299g.
- [6] R v Ismail and another 1958
(1) SA 206 (A).
- [7] Rex v May 1924 OPD 274.
- [8] At 212H-213A.
- [9] S v Rubenstein 1964 (3) SA 480 (A).
- [10] Criminal Procedure Act, 1977 (Act No. 51 of 1977).
- [11] S v Bogaards 2013 (1) SACR 1 (CC) at paragraph 41.
- [12] S v Baartman 1997 (1) SACR 304 (E).
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