

SOUTH AFRICA / JUDGMENT

## Nkantini v S (M78/14) [2014] ZAECHGC 60 (24 July 2014)

[2014] ZAECHGC 60

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen, C Plasket

CASE / FILE NUMBER

M78/14

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: M78/14

REVIEW NO: 20140063

DELIVERED ON: 24 JULY 2014

In the matter between

NCEBA NKANTINI

Accused

And

THE STATE Respondent

Automatic review – s304 of Criminal Procedure Act – Right to a fair trial – court relying on facts presented in argument by prosecutor on sentence contradicting facts accepted as basis of accused' plea of guilty – irregularity in sentence proceedings - sentence set aside and matter remitted to magistrate for imposition of sentence afresh.

REVIEW

JUDGMENT

GOOSEN, J.

- [1] This is a review in terms of section 304 of the Criminal Procedure Act, Act 51 of 1977 (“CPA”). The accused was convicted of stock theft in the magistrates’ court at Maclear. He pleaded guilty to the theft of two sheep valued at R3000. He was sentenced to 18 months direct imprisonment.
- [2] When the matter came before Beshe J 22 on May 2014, the learned judge queried whether the sentence was not too harsh in the light of the fact that the accused is a 27-year-old first offender who pleaded guilty to the charge. The magistrate responded to the query 3 June 2014. In the reasons for sentence, the magistrate indicated that the accused came from Mdeni, Mount Fletcher to Maclear in order to steal sheep. After stealing the sheep he drove back to Mdeni where he slaughtered the sheep and sold them in parts. The magistrate states that when the accused was arrested on 3 May 2014 he had already sold one of the sheep and the other was found cut up in a fridge “ready for sale”. The magistrate therefore found that this was not the work of a “pot-slagter” and that the offence was premeditated and well-planned.
- [3] The matter was placed before Nepgen J on 19 June 2014. The learned judge submitted a query to the magistrate, noting that:

It is clear from the reasons furnished by the Magistrate, in response to the query raised by Beshe, J, that the magistrate relied on what was stated by the public prosecutor on sentence. What the prosecutor said was contrary to what the accused stated when he pleaded guilty, and the record reflects that the prosecutor, not only accepted the plea, but also the facts upon which the plea of guilty was tendered. In addition, and in any event, the accused was at no stage asked whether he accepted the factual information placed before the court by the prosecutor. On what basis did the magistrate take such information into account when sentencing the accused?

- [4] The magistrate’s reply, dated 1 July 2014 and received by the registrar of this court on 18 July 2014, sets out in some detail the magistrate’s approach to the seriousness of the offence. The magistrate further states that “judicial notice” was taken of various facts. The explanation regarding the use of information placed before the court by the prosecutor, contrary to the accepted facts upon which the accused pleaded guilty, is as follows:

The court took judicial notice that it is impossible for one person to have eaten a whole sheep plus 2 intestines in the span of less than 3 days. He was only found in possession of one carcass upon arrest – equation is that he had dispensed of one sheep and only the intervention of the police stopped the “disposal” of the second sheep.

The accused travelled all the way from Mdeni, (30 km single trip – judicial notice) to come and steal sheep in Maclear district. He came prepared, as he told the court the following “I went to the camp, grabbed 2 sheep, “tied” them up outside the kraal one by one – – – and drove them both to Mdeni to my homestead” (another 30 km).

The information placed before court by the Prosecutor only offered clarity as to the frase (sic) “I slaughtered one of the sheep and ate it”.

- [5] The acceptance of the factual basis for a plea of guilty is binding upon the prosecution. Evidence to the contrary cannot be adduced (see *S v Mnisi* 2009 (2) SACR 227 (SCA) where Cloete JA in a concurring majority judgment stated at 238f “... if the State considered that the plea-explanation could be controverted by evidence at its disposal or by cross-examination of the appellant, it was free not to accept it. But the prosecutor did accept it, with the consequence that the facts it contains must be taken as correct.”).
- [6] In the event that the prosecution intends to present evidence contradicting the facts admitted by an accused in his plea of guilty, the proper procedure is for such evidence to be led prior to conviction. Section 112(3) of the CPA cannot be utilised to

contradict the accused’s version as accepted in the plea of guilty. The purpose of that subsection is to enable the presentation

of evidence for the purpose of sentencing (see *S v Swarts* 1983

- (3) SA 261 (C) at 263D; *S v Moorcroft* 1994 (1) SACR 317 (T) at 320g). In any event, no evidence was presented in terms of s112(3) and the accused was not afforded an opportunity to dispute the “facts” upon which the court sought to rely in imposing its sentence.
- [7] The magistrate’s explanation, relying upon the alleged judicial notice of facts, is unsatisfactory. An accused person is entitled at every stage of a criminal trial to a fair trial. In this instance his right to a fair trial on the issue of sentence was breached. It follows that the sentence imposed by the magistrate must be set aside and the matter remitted to the magistrate for the imposition of sentence afresh.

- [8] I accordingly make the following order:

The sentence imposed on the accused is hereby set aside and the matter is remitted to the Magistrate at Maclear for sentence to be imposed afresh.

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G. GOOSEN

JUDGE OF THE HIGH COURT

PLASKET, J.

I agree.

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C. PLASKET

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