

SOUTH AFRICA / JUDGMENT

Nkantini v S (CA&R 80/2020) [2020] ZAECHGC 48 (22 April 2020) [2020] ZAECHGC 48

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi, J Roberson

CASE / FILE NUMBER

CA&R 80/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN
CAPE DIVISION-GRAHAMSTOWN)
Case No: CA&R
80/2020

Delivered: 22 April 2020
In

the matter between: NCEBA
NKANTINI
Applicant
vs
THE
STATE
Respondent
REVIEW

JUDGMENT

MALUSI J:

- [1] This is a special review initiated at my direction. It is necessary to provide a background of the peculiar circumstances which led to the special review.

- [2] The accused made his first appearance before the magistrate's court, Maclear on 20 November 2019. A co-accused, Xolani Nameka was added to the case on 2 December 2019. Both accused were required to plead to the charge of stock-theft on 5 December 2019. Each accused elected to conduct his own defence.
- [3] The allegation against both accused was that they stole two sheep from Stockenstroom farm, Maclear. The accused elected to plead guilty to the charge. He was convicted on his plea and sentenced to 18 months imprisonment of which 6 months was suspended on conditions.
- [4] Nameka tendered a not guilty plea. He was convicted and sentenced to a term of imprisonment. His matter was placed before me on automatic review. The record indicates that he called the accused as a defence witness in his trial. The public prosecutor in cross-examining the accused put it to him that he had been convicted of theft. I was perturbed as evidence in that matter clearly established that the offence of stock-theft regarding both sheep had not been completed. I directed that the record of the proceedings against the accused be placed before me.
- [5] The record indicates that the accused was questioned by the magistrate as provided in s112(1)(b) of the Criminal Procedure Act 51 of 1977 (the Act). The gravamen of her questioning is captured in the following extract:

"Q: What happened that lead to this charge against you?"

A: I came from Mdeni, it was night-time, I went to the farm of Mr O'-Mullane , went to where the sheep was, selected one of the sheep, caught it, tied it up and was driving it to get off the premises, the securities then approached me, and I managed to run away from them, leaving the sheep behind, they gave chase, apprehended me and took me to the owner of the farm, from there I was taken to the hospital to get stitched on my head, from there to police station, charged and then appeared in court." (Own emphasis)

- [6] The record had been placed before Jaji J on automatic review due to the sentence imposed by the magistrate. The learned judge certified the proceedings to be in accordance with justice on 20 December 2019.
- [7] It has been held that the questions and answers in s112(1)(b) proceedings must at least cover all the essential elements of the charge preferred against the accused.[1] Didcott J stated that "the test is what the accused person has said, not what the court thinks of it." [2] A material element of the offence cannot be admitted by way of inference drawn on the answers given. [3]
- [8] Appropriation is an element of the crime of theft. The learned author, C R Snyman has described appropriation as the removal of property. The actions of the accused must cause the owner / possessor to be deprived of the property and the accused exercising the rights of an owner in respect of the property.[4]

- [9] The learned Makgoka J (as he then was) considered an appeal with similar facts. The appellant's bakkie and trailer were stuck in mud in the complainant's farm. About 200 metres away two cattle were tied to a pole. He had been convicted in the court a quo of stock-theft. The learned judge held that the appellant had merely assumed control over the property. The owner had not been excluded from his property as the cattle were still on the farm / camp. The court found that the accused actions only amounted to acts of consummation or execution which constitute attempted theft.[5]
- [10] It is clear from the statement in paragraph 5 above that the accused actions were interrupted by the security officers who chased him causing the sheep to be abandoned. No questions were directed to the accused by the magistrate to establish where exactly was he positioned when he abandoned the sheep. There is no indication that the accused had left the farm with the sheep when interrupted. In these circumstances the element of appropriation has not been proven. The accused is guilty of attempted stock-theft on his plea.
- [11] It is necessary to reconsider the sentence imposed on the accused. I did not deem it prudent to remit the matter to the magistrate for sentencing as all the relevant facts are on record. The accused is 31 years old, single with one child. The 3 year old is in primary care of her mother. The accused has a standard 3 education. He was employed as a brick-maker earning R1 900.00 per month. He was a first offender. He expressed remorse for his actions.
- [12] The complainant testified in aggravation of sentence that he incurred expenses in employing security officers to guard his stock. Despite such measures, stock-theft was an ongoing problem with losses still suffered. The public prosecutor submitted that stock-theft had a deleterious impact on the economy. He argued the accused plea was not a sign of remorse as he was caught in the act.
- [13] In my view a sentence of four months imprisonment is appropriate in the circumstances.
- [14] The last issue relates to the earlier certification by Jaji J. In my respectful view the certificate cannot stand and must be revoked. I am satisfied that I have the power to withdraw the certification.[6]
- [15] In the circumstances and for the above reasons, the following order will issue:
- 15.1 The certification by Jaji J dated 20 December 2019 is hereby revoked;
- 15.2 The conviction and sentence imposed on the accused is set aside and replaced by the following:
- "The accused is found guilty of attempted stock-theft. He is sentenced to undergo 4 (four) months imprisonment."*
- 15.3 The sentence is antedated to 5 December 2019.

T MALUSI

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

J ROBERSON

[1] S v Mkhize 1978

(1) SA 264 (W); S v Mbebe 2004 (2) SACR 537 (Ck).

[2] Mkhize supra at 2688.

[3] S v Londi 1985

(2) SA 248 (E) at 251E-G.

[4] C R Snyman, Criminal Law, 6th Ed, at 479.

[5] S v Nkosi 2012

(1) SACR 87 (GNP).

[6] S v Maseko 1971

(4) SA 475 (T); S v Katu 2001 (1) SACR 528 (ECD); S v Goliath 2014 (2) SACR 290 (ECG); S v Masomola

[2014] ZAGPPHC 955; Msiya v S

[2018] ZAKZPHC 41.

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Prepared on 10 October 2026 · Esheria