

SOUTH AFRICA / JUDGMENT

S v Evans and Another (01/2019) [2019] ZANWHC 17 (9 May 2019)

[2019] ZANWHC 17**COURT**

North West High Court, Mafikeng

BEFORE

R.D Hendricks, J.T Djaje

CASE / FILE NUMBER

01/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST HIGH COURT, MAHIKENG****HIGH COURT REF:**

01/2019

MAGISTRATE

CASE NO: A847/2018

In

the matter between:-

THE

STATE

AND

DONAVAN

EVANS

FRANS

MALINGA

REVIEW

JUDGMENT**HENDRICKS J.**

- [1] Mr. Donovan Evans and Mr. Frans Malinga were arraigned before the District Court in Rustenburg and charged with the offences of theft alternatively contravention of the provisions of Section 36 of the General Law Amendment Act 62 of 1955. It was alleged that they stole a steel pipe valued at R120 00.00, the property of or in the lawful possession of Maxwell Mashoge and / or Sibanye Stillwater mine. In the alternative, that they were found

to be in possession of the steel pipe in regard to which there is a reasonable suspicion that it was stolen and they were wrongfully and unlawfully unable to give a satisfactory account of such possession (possession of suspected stole property).

[2] They both pleaded guilty to the main count of theft and not guilty to the alternative count of possession of suspected stolen property. The presiding Acting Magistrate, Mr. S Makume, question them in order to determine whether they admit all the elements of the offence of theft. Their explanation were to the effect that Mr. Frans Malinga, who saw the pipe lying in the veld, approached Mr. Donovan Evans to arrange for transport in order to collect the pipe and to take it to the scrapyard in order to sell it. This indeed happened. They were arrested by the mine security before they could sell it to the scrapyard.

[3] On the 18th February 2019, I sent the following query to the presiding Magistrate:

“The two accused person’s version is that the pipe was lying in the veld. They don’t admit the contructatio of actually stealing it. They were however on their own version found to be in the possession of it.

Q (1). Can the learned Magistrate please explain why he found that all elements of the offence of theft (main count) had been admitted?

Q (2). Why the accused were convicted of theft and found not guilty on the alternative of possession of suspected stolen property?”

On the 29th April 2019, the Magistrate replied with the following response:

“1. I made a judgment error in finding that all the elements of the crime of theft were admitted. Reference is made herein to the specific responses by both Accused in the relevant pages quoted below. As a result, the Honourable judge is requested to set aside the conviction on the main count and replace it with a conviction on the alternative count for both Accused.

2. After going through the record once more, I have since found out that indeed both Accused have indicated that the pipe was lying in the veld (see Pages 13 (Line 24) and 35 (Line 17)).

Therefore, a conviction on possession of suspected stolen property, which was the alternative count to the main one, is competent under the circumstances.”

[4] The response necessitated that another query be directed to the Magistrate. This query reads thus:

“1. On the 18th day of February 2019 I sent a query to the presiding Magistrate. Today, 29th April 2019, more than two (2) months later, I received the response from the Magistrate dated 23rd April 2019.

(Question) Can the Magistrate please explain why the inordinate long delay on responding to the query, seeing that reviews should be treated as urgent matters?

2. In the response, the Magistrate states:

“1. I made a judgment error in finding that all the elements of the crime of theft were admitted. Reference is made herein to the specific responses by both Accused in the relevant pages below. As a result, the Honourable judge is requested to set aside the conviction on the main count and replace it with a conviction on the alternative count for both Accused.

2. After going through the record once more, I have since found out that indeed both Accused have indicated that the pipe was lying in the veld (see Pages 13 (Line 24) and 35 (Line 17)).

It is apparent from the record and in particular the charge sheet, that both accused pleaded guilty to the main count of theft (count 1) and not guilty to the alternative count of being in possession of suspected stolen property (alternative count). They were both acquitted (found not guilty) on the alternative count.

(Question) In view of the aforementioned, is it competent for this Court (High Court) to accede to the request of the Magistrate as set out in the response?

Please refer to relevant authority and case law in this regard.

3. In conclusion, I reiterate that reviews are urgent matters that need to be dealt with as expeditiously as possible.

(Question) Can the response to this query please be dealt with as a matter of extreme urgency? The response is awaited on or before close of business on Friday, 03rd May 2019.”

The Magistrate responded to the Second query as follows:

“1. The delayed response to the query and receipt of same by the office of the Honorable Judge was caused by the delayed submission of the query to me and most probably the posting of same.

I was informed that the query was received by the office of the Clerk of the Court on the 11th March 2019 as per the entry into the Review Register. Same was only given to me on the 04th April 2019.

Due to the workload in my court, I was unable to attend to the query earlier but did so as soon as I could. The response was then

finalized and given back to the Clerk of Court on the 17th April 2019, as indicated underneath my signature.

I do agree that reviews are urgent in nature as indicated by the Honorable Judge. I humbly apologize for the delay which occurred

between the two offices.

2. After a careful consideration of the query by the Honorable Judge, I am now of the considered view that in this matter, a conviction of both Accused on possession of suspected stolen property is not competent after their acquittal on the alternative count.

As a result, the Honorable Judge cannot therefore accede to the request by myself made in the first response. The Honorable Judge is humbly requested to dispose of the matter accordingly.”

[5] Snyman in the book Criminal Law, 5th edition, define theft as follows:

“1. Definition: A person commits theft if he unlawfully and intentionally appropriates movable, corporeal

property which

- (a) belongs to, and is in the possession of, another;
- (b) belongs to another but is in the perpetrator's own possession; or
- (c) belongs to the perpetrator, but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.'

One of the elements of theft is contrectatio in the form of deprivation. It is quite apparent from the explanation that both accused provided that the pipe was lying abandoned in the veld and was not stolen from the mine or Maxwell Mashoge. By placing this element of the offence of theft in dispute, it was incumbent upon the presiding Magistrate to enter a plea of not guilty in terms of the provisions of Section 113 of the Criminal Procedure Act 51 of 1977, as amended and the State would then be enjoined to prove the guilt of the accused beyond reasonable doubt. This was not done.

[6] In response to the first query, the Magistrate states that the conviction on the main count of theft should be set aside and replaced with a conviction on the alternative count of possession of suspended stolen property. This can however not be done. Both accused pleaded not guilty to the alternative count of possession of suspected stolen property and they were both acquitted on this alternative count.

[7] The question now arises as to what should be done about the conviction on the main count of theft for which they were both sentenced to pay a fine of “R8000.00 (eight thousand rand) or 8 (eight) months imprisonment, half of which is wholly suspended for a period of five (5) years (insofar as Donovan Evans is concerned) [and three (3) years insofar as Frans Malinga is concerned] on condition that the accused is not convicted of theft, attempted theft, possession of / receiving stolen property knowing it to be stolen committed during the period of suspension.” Mr. Donovan Evans was also declared unfit to possess a fire-arm whereas no such order was made in respect of Mr. Frans Malinga. This sentence was imposed on the respective accused persons on the 24th October 2018. It is not indicated on the charge sheet whether the accused paid the fine or whether they served the term of imprisonment of four

(4) months as half of the sentence that was not suspended.

[8] The delay in sending this matter on review was inordinately long. The matter was finalized on the 24th October 2018. The date stamp of the clerk of Court is the 06th February 2019. The date on which this matter was received by the Registrar of this Court is the 14th February 2019. Four (4) days later, on 18th February 2019, I sent a query to the presiding Magistrate. The presiding Magistrate only responded on the 23rd April 2019 which response was received by the Registrar of this Court on the 29th April 2019. On the very same day I caused the second query to be sent to the presiding Magistrate. In an e-mail sent to my secretary on Saturday, 04th May 2019 at 04:55 PM, the presiding Magistrate states:

“Dear Ms Landsman

Herewith please find a copy of the response to the second query by the Honorable Hendricks J as requested.

I did not have access to the network yesterday since it was down. I therefore managed to come through to the office today to try and send same through.

I do not have access to the scanner/fax machine and will only sign off the original on Monday and then transmit it through.

Kindly accept my sincere apology for that.

Kind regards

S Makume

Acting Magistrate: RUSTENBURG”

[9] The delay from the 24th October 2018 until today 06th May 2019, is in excess of six (6) months. This is totally unacceptable. It has been stated by this Court on numerous occasions in the past that reviews from the Magistrate / District Courts and Regional Courts should be treated as urgent matters. This case

illustrates the necessity to do so in the interest of justice. Furthermore, it is incumbent upon the presiding Magistrate to ensure

that all the necessary detail with regard to the matter that is sent on review is brought to the attention of the review court (High Court). The charge sheet must be meticulously completed in order to indicate precisely what the position is with regard to the accused. For example, whether he/she is in custody, serving the sentence, or whether he/she paid a fine.

[10] In the present matter, it will not be in the interest of justice to set the conviction on the main count aside and to order that the matter be proceeded with de novo before another Magistrate or to alter / change the plea to not guilty on the main count of theft in terms of the provisions of Section 113 and to remit the matter for the trial to continue before the presiding Magistrate. Justice will not be done in this way. The maximum “justice delayed is justice denied” finds application in this matter.

[11] I am of the view that the conviction and sentence imposed on the accused should be reviewed and set aside. It must be ensured that the accused are informed accordingly and in the event that they paid the fine imposed, they should be reimbursed.

Order:

[12] Resultantly, the following order is made:

1. The conviction and sentence of the accused (Mr. Donovan Evans and Mr. Frans Malinga) is reviewed and set aside.
2. The Clerk of the Court, Rustenburg must ensure that the accused are accordingly informed and reimbursed in the event that they paid the fines imposed upon them.
3. A copy of this judgment must be sent to the Chief Magistrate of the North West Province; the Head of the Office at Rustenburg and the presiding Acting Magistrate Mr. S Makume.

R.D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

I agree

J.T DJAJE

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

DATED: 09 MAY 2019

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