

SOUTH AFRICA / JUDGMENT

S v Kelly (CA & R 2/2023) [2023] ZANCHC 35 (14 April 2023)

[2023] ZANCHC 35

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Phatshoane

CASE / FILE NUMBER

CA & R 2/2023

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: Special Review CA & R 2/2023

Delivered on:

14/04/2023

Reportable:

YES / NO

Circulate to Judges:

YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE STATE

APPLICANT

and

ASHLEY KELLY

ACCUSED

Coram: Mamosebo J et Phatshoane DJP

JUDGMENT ON SPECIAL REVIEW

MAMOSEBO J

[1] The accused stood trial on four counts. Counts 1 and 2 was assault. The State's case was that he assaulted his mother and step father with intent to cause them grievous bodily harm. On count 3, he stood accused of malicious damage to property. The latter charge, the record shows, the prosecutor withdrew against the accused. On count 4, the accused is said to have contravened s 18 of the Protection of Harassment Act 17 of 2011.

[2] The matter comes before us by way of a special review in terms of s 304

(4) of the Criminal Procedure Act 51 of 1977 (the CPA) following a routine judicial quality assurance process through which it was

discovered, that although the record of the proceedings reflected that the prosecutor withdrew count 3, malicious damage to property,

against the accused and that he was never convicted on that charge, the Presiding Magistrate, Ms Bedford, sentenced him for malicious

damage to property. The effect of this is that the accused was not sentenced for contravening the harassment Protection Order, count 4.

[3] The accused pleaded guilty in terms of s 112(2) of the CPA which plea the State accepted. The Magistrate convicted the accused as follows:

'Mr Kelly, the court finds [that] you admitted all the elements of the offence. You are accordingly found guilty on count 1, assault with the intend to cause grievous bodily harm, count 2, assault with intend to cause grievous bodily harm, count 3 is withdrawn against you and you are convicted of count 4 contravention of the harassment protection order.'

[4] On 14 November 2022 the presiding magistrate proceeded to sentence the accused, taking counts 1 and 2 as one for purposes of sentence, to twelve (12) months imprisonment [wholly] suspended for a period of five (5) years on specified conditions. She then pronounced:

'For count 4, malicious injury to property, you are sentenced to a fine of R4,000.00 (Four Thousand Rand) or two (2) months imprisonment

suspended for a period of five (5) years on condition that the accused is not convicted of malicious injury to property committed

during the period of suspension.'

[5] As foreshadowed in magistrate's sentence, there was an obvious error on her part, which she admits, in specifying the nature of the offence with which the accused was charged on count 4 which is contravention of the harassment protection order. As a consequence of the error, the accused was sentenced for malicious damage to property, a charge which had been withdrawn against him. As I see it, it would be in the interests of justice to intervene so as to

prevent a failure of justice. It follows that the sentence passed on count 4, incorrectly worded by the Magistrate as malicious injury to property, ought to be set aside and the matter should ordinarily be remitted to the trial court to sentence the accused afresh in respect of count 4, namely, the harassment Protection order. I make the following order.

Order:

1. The sentence in respect of count 4, which the Magistrate incorrectly worded as malicious damage to property as opposed to contravention of the Harassment Protection order, is set aside; and
2. The matter is remitted to the trial court for sentencing in respect of count 4.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

I concur

MV PHATSHOANE

DEPUTY JUDGE PRESIDENT

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