

SOUTH AFRICA / JUDGMENT

S v Kwinana (5/8355/2008) [2009] ZAGPJHC 16 (19 May 2009) [2009] ZAGPJHC 16

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mabesele

CASE / FILE NUMBER

5/8355/2008

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

High Court Reference no: 51/09

Magistrate Court Reference no: 56/08

Review Case no: 5/8355/2008

S V S.KWINANA

SPECIAL REVIEW JUDGEMENT

MABESELE AJ:

The accused appeared in the magistrate's Court for the district of Johannesburg, on a charge of theft. The allegation being that on or upon 4 October 2008, the accused did unlawfully and intentionally steal a petrol tag, amounting to R 956, 00, from his place of employment.

The accused pleaded guilty. His legal representative then handed in a statement in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977. The statement is marked "exhibit 'A'."

After the magistrate had formed a view that the accused admitted all the elements of the charge and thus correctly pleaded guilty, he convicted the accused and sentenced him to 24(twenty four) months imprisonment. The sentence was wholly suspended on certain conditions.

Subsequent to the conviction and sentence the matter has now been referred to me on special review on the ground that the provisions of section 112(2) of the Criminal Procedure Act, 51 of 1977, were not properly complied with.

Paragraph 4 of the statement reads:

“I took the abovementioned articles from a desk after my employer told me that he had no money to pay me (sic) refused to give it back to him unless I was paid”

Paragraph 5 reads:

“It was my intention to take the said item and in so doing, deprive the owner permanently of his ownership”

Theft is committed when a person unlawfully and intentionally appropriates the property of another.

Snyman: Criminal Law (4th edition p469) states that the intention to appropriate the property includes an intention permanently to deprive the person entitled to possession of the property, of such property.

The accused refused to give the property back to the complainant unless he was paid what was due to him. In my view, the accused intended to hold the property as security in order to apply pressure to the complainant to pay him.

Taking another's property with the intent to hold it as a security does not amount to theft. (See R v Hendricks, 1938 CPD, 456; S v van Coller, 1970(1) SA, 417)

In my view, the accused did not intent permanently to deprive the complainant of his property despite a further averment to such effect.

From what the accused stated in paragraph 4 of his statement, the magistrate ought to have entertained a doubt as to whether the accused was in law guilty as charged.

In the light of the foregoing, it cannot be said that the finding of guilty by the magistrate on the basis of section 112(2) statement which was handed in as exhibit 'A,' is correct, as the accused did not admit all the essential elements of

the offence. In the result, the conviction for theft cannot stand.

Therefore, the following order is made:

The conviction and sentence are set aside.

The matter is remitted to the court a quo

The court a quo is directed to comply with the provisions of section 112(2) of the Criminal Procedure Act, or to act in terms of section 113 of the Criminal Procedure Act.

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