

SOUTH AFRICA / JUDGMENT

S v Lipharawia (23/2015, 08/2015)

[2015] ZALMPTHC 3 (20 August 2015)

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COURT

Limpopo High Court, Thohoyandou

BEFORE

A Lamminga, E M Makgoba

CASE / FILE NUMBER

23/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT, GAUTENG DIVISION PRETORIA

(functioning as LIMPOPO LOCAL DIVISION, THOHOYANDOU)

Review Case No.: 23/2015

Magistrate Serial No.: 08/2015

DATE: 20 AUGUST 2015

In the matter between

THE STATE

And

LIPHARAWIA LANGANANI.....Accused

REVIEW JUDGMENT

LAMMINGA AJ

- [1] This matter came before us on automatic review in terms of section 302 of Act 51 of 1977.
- [2] The accused, a 29 year old male, was charged in the Magistrate's Court, Dzanani with one count of housebreaking with intent to steal and theft arising from an incident which occurred on 28 November 2014 when the shop of Mr. MakadeniSteven Maridzeni was broken into and various items, to a total value of R1120.00 were stolen.
- [3] The accused, elected to conduct his own defense and pleaded guilty. He was convicted and sentenced on 9 February 2015 to 3(three) years direct imprisonment.

[4] When the matter came before Raulinga J for review on 17 April 2015, the trial magistrate was requested to respond to the following;

"1. On page 4 of the record, the following questions were put to the accused in terms of section 112(1)(b):

"When you break and enter did you do it intentionally?"

Accused: "No"

"So you did it with the intention to break and steal"

Accused: "Yes"

2. On page 5 of the record the following question was put to the accused:

"So your conduct of taking the properties was unlawful and wrongful?"

3. Don't these questions amount to leading the accused to admit guilt?

4. Was the presiding officer not over hasty, when he convicted the accused of the offence without ascertaining that the accused's plea of guilty satisfied all the elements of the offence? "

[5] The magistrate responded in his letter dated 7 May 2015 as follows:

H1. AD PARAGRAPH 1, 2 and 3 thereof I asked those questions as follow up questions on accused explanation on why he is pleading guilty, to satisfy myself if the accused is admitting all the elements of the offence or not.

2 AD PARAGRAPH 4 thereof I convicted the accused after being satisfied that he had admitted all the elements of the offence and there was no ground of justification in his conduct.*1

[6] On 29 May 2015 Raulinga J referred the matter to the Deputy Director of Public Prosecutions for comment, which comment was received on 3 July 2015 by the registrar of this court. The essence of the comment is that the magistrate erred in finding that the accused satisfied all the elements of the offence and that the leading questions put to the accused by the magistrate resulted in a unfair trial. It was further submitted that the magistrate should have noted a plea of not guilty in terms of section 113 of Act 51 of 1977.

[7] It is clear from the above response that the magistrate had no appreciation for the purpose and importance of the questioning provided for in Section 112(1)(b) of Act 51 of 1977.

[8] Section 112(1)(f) has as its main purpose to protect an accused, especially an undefended accused, from the adverse consequences of an ill-considered plea of guilty (S v Baron 1978 (2) SA 510 (C) at 512G),

[9] In S v Naidoo 1989 (2) SA 114 (A) Botha JA considered the meaning of section 112(1)(b) of the CPA and held as follows at 121F-G:

"I would merely observe that it is well settled that the section was designed to protect an accused from the consequences of an unjustified plea of guilty, and that in conformity with the object of the Legislature our courts have correctly applied the section with care and circumspection, and on the basis that where an accused's responses to the questioning suggest a possible defense or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence."

[10] In *\$ v Nyanga* 2004 (1) SACR 198 (C) at 201 b-e Moosa J explained the procedure as follows:

"Section I12(1)(b) questioning has a twofold purpose: firstly to establish the factual basis for the plea of guilty and, secondly to establish the legal basis for such plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning. The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, actus reus and mens rea. These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge on which he pleaded guilty"

[11] In this case the learned magistrate failed to enquire sufficiently to determine:

11.1 whether the accused did indeed commit the act of breaking and entering as required as there is no indication how he gained entry to the premises;

11.2 whether the accused's actions satisfied the requirements for a finding that he actually stole anything and if so, which items were stolen

11.3 whether the accused understands the legal terminology of unlawfulness and wrongfulness

[12] In addition, the questioning consisted of leading questions, sometimes followed by a response by accused that necessitated further enquiry such as:

Court: Do you perhaps know the shop of Maridzani Steven Makadeni?

Acc: It is not his shop. But, he is the police official who found me inside the shop.

[...]

Court: There inside the shop did you find properties?

Acc: Yes

Court: Were you given permission to take the items which were inside the shop?

Acc: No

Court: So your conduct of taking the properties was unlawful and wrongful?

Acc. Yes

[13] Leading questions should, as far as possible, be avoided and as Broome J remarked in *S v Mkhize* 1981(3) SA 585 at 586H it is 'totally inadequate for the court simply to ask the accused whether, one by one, he admits each of the allegations in, or each of the individual components of, the charge' (See also *S v Gwenya* 1995 (2) SACR 522 (E)). The appropriate questions would be for example:

13.1 What did you do to gain entry to the shop?

13.2 Why did you decide to enter the shop?

13.3 What did you do inside the shop?

13.4 What were you doing when the complainant found you inside the shop?

13.5 What did you want to do with the items you found in the shop?

[14] At the end of the questioning by the court the following is not yet established:

16.1 Facts to establish elements of housebreaking

16.2 Facts to determine mens rea

16.3 Unlawfulness - Did he at the time he committed the offence know that what he was doing was wrong and punishable as a crime?

[17] The questioning by the magistrate is inadequate and not in compliance with the requirements of Section 112(i)(b) of Act 51 of 1977 and therefore the Conviction and sentence must be set aside.

[18] Accordingly, I make the following order;

18.1 The conviction and sentence are set aside.

18.2 In terms of Section 312 of Act 51 of 1977 the matter is remitted to the magistrate's court and the presiding magistrate is directed to comply properly with the provisions of section 112(1)(b) as set out above and, if appropriate, thereafter to act in terms of section 113,

A LAMMINGA

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

E M MAKGOBA

JUDGE PRESIDENT: LIMPOPO DIVISION

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