

SOUTH AFRICA / JUDGMENT

S v Malgas (11/16) [2016] ZAECHGC 49 (14 June 2016)

[2016] ZAECHGC 49

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S Jacobs, M Makaula

CASE / FILE NUMBER

11/16

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

REVIEW NUMBER: 11/16

CA&R: 137/2016

Date

delivered: 14/06/2016

In

the matter between:

THE

STATE

and

ANDILE

MALGAS

REVIEW

JUDGMENT

JACOBS, AJ

- [1] The accused in the above matter was convicted in the magistrate's court of East London on theft of 4 wooden planks and 3 zinc sheets with a total value of R6 000-00. He pleaded guilty to the charge. The accused was unrepresented throughout the proceedings. An enquiry in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977 (the CPA) followed. The magistrate was satisfied that the accused admitted all the elements of the offence and convicted the accused of theft.
- [2] The accused was sentenced to twelve (12) months imprisonment of which six
- (6) months imprisonment was suspended for five years on condition the accused is not convicted of theft committed during the period of suspension and where imprisonment without the option of a fine is imposed. The matter came before me on review pursuant to the provisions of s 302 of the CPA.
- [3] On perusing the record based on the thin line between theft and attempted theft, I addressed the following query to the magistrate:

"Magistrate must urgently indicate whether the accused was correctly convicted of theft and if the conviction of attempted theft is not proper. Taking the above into consideration if sentence imposed is reasonable under the circumstances."

- [4] The Magistrate replied as follows:

"Mr Malgas indicated inter alia that he and a friend were on the roof and 'loosening the planks and zincs' already by the time their other friends arrived. He further stated 'we had taken off the items.' (From his original language and the body language used, it was clear that the accused was indicating by this that the zinc sheets had been removed and some planks already loosened and this all set aside.) He admitted further that his intention at the time of doing this was to take the zinc sheets and planks for himself as he intended extending his own shack. He confirmed that he knew that what he was doing was wrong. The reason he stopped taking these items was because security guards arrived and he and his co-perpetrators ran away. Unfortunately for him, the accused was caught."

- [5] The magistrate proceeded to define the offence of theft and discussed various authors' views on the topic and postulated whether an act of appropriation constitutes completed or merely attempted theft. She endeavoured to clarify this and stated:

"It is humbly submitted that the crucial consideration was not getting away with the goods, but rather whether the accused had gained control over the goods and had exercised such control. It is further submitted that Mr Malgas had removed the items from the roof with the distinct intention to deprive the owner of said goods and appropriate or take said items for his personal use. It is further submitted that he had exercised control over the said items and exercised the rights of an owner in respect of the property by removing them from the roof and throwing them down in order to remove them from the scene. He did not fail in this removal due to the physical inability to remove the zinc sheets and purlines. He was foiled in his plans by the vigilance of security officers."

- [6] The circumstances that gave rise to the accused conviction gleaned from the transcribed record can be summarized as follows: The accused and his friends agreed to steal certain planks and zinc sheets from the roof of an old vacant building, the Amalinda fish farm belonging to the Department of Public works, in East London. He together with one friend loosened the planks and zinc sheets at the time the other two arrived. The record reflects “we had taken off the items”. He was on top of the roof when the security guard confronted them. His friends ran away but he was unable to get away and was arrested.
- [7] It is essentially on these facts that the magistrate convicted the accused of theft.
- [8] It is clearly correct that the accused had every intention to steal the planks and zinc sheets, and, had the security guard not observed his intended theft he would have left the premises with these items.
- [9] Implicit in the magistrate’s reasoning, by loosening some of the planks and zinc sheets and setting them aside, the accused excluded the owner from the control of his property and the accused assumed control over the stolen property, this to me is an error.
- [10] The magistrate relying on *S v Ncube en ‘n Ander* 1998 (1) SACR 174 (T) (Ncube) submitted that completed theft had been established. The magistrate failed to take note of *S v Nkosi* 2012 (1) SACR 87 (GNP) where Makgoka, J sets out two reasons why Ncube should not be followed:

“firstly, the authorities are not harmonious on the shop-lifting cases. There are conflicting judgments. The court in Ncube cited two old South West African cases, S v Xinwa 1970 (2) PH H 171 (SWA) and Uirab v S 1970 (2) PH H 172 (SWA). There are cases which are in conflict with the two mentioned, for example S v Khumalo 1975

(4) SA 345 (N) and *Mqambuzana* 1976

(1) SA 212 (EC) where it was decided that such conduct merely amounts to attempted theft.

Secondly, one should be cautious not to lavishly apply the shoplifting principle to all other cases where a determination has to be made between completed and attempted theft. Theft out of self-service shops constitutes, in my view, special form of theft in that “by die self- bedieningswinkel - gevalle bestaan daar dan altyd die risiko dat ’n voornemende dief wat ’n artikel byvoorbeeld onder sy klere sou versteek, met die handeling sal wegkom en so die versteekte item suksesvol sou kon steel”- *Stafford J* (as he then was) in *S v Tau* 1996 SACR 97 (T) at 102 h-i.”

- [11] The magistrate also failed to consider a decision of this division *S v Mekula* 2012 (2) SACR 521 ECG wherein the thin line between theft and attempted theft was enunciated.
- [12] *Snyman Criminal Law* sixth Edition page 475 defines theft as:

“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."

[13] Concerning the Act of appropriation Snyman declares at page 479:

"In theft in the form of the removal of property the act of appropriation consists in any act in respect of property whereby X:

(

- i) deprives the lawful owner or possessor of his property; and
- (ii) himself exercises the rights of an owner in respect of the property.

X thus behaves as if he is the owner or person entitled to the property whereas he is not, and in so doing he exercises control over the property himself in the place of the person having a right to it."

[14] The owner, through the security guard, continued to exercise effective control over the zinc sheets and planks even at the stage when the accused tried to evade the security guard. No evidence was presented that any of the zinc sheets and planks were taken by any of the suspects or that the accused after being detected tried to get away with the zinc sheets or planks. The act of appropriation was not completed as the accused had not succeeded in depriving the owner of the zinc sheets and planks. The conviction should therefore be set aside and replaced with one of attempted theft.

[15] I now turn to the aspect of sentence. The record reflects from the judgment of the magistrate:

"According to you it was just an old building. And this is the problem that we have in this country, that when the public regard a building as dilapidated or old, they somehow believe that they have the right to make it look even worse by stripping it of anything that is useable still attached to that building. It becomes a free for all, everybody seeming to ignore the fact that it must belong to somebody and that for it to be reinstated into its previous condition would cost somebody money. And it is exactly this sense of entitlement that the Courts need to put a stop to. Nothing in this world is for free. Everything has to be worked for."

[16] The Magistrate's generalisation in this regard caused her to over emphasize the seriousness of the offence and is a clear misdirection on her part. This Court is at liberty to consider afresh an appropriate sentence, due to the conviction of theft being set aside.

[17] In the result I make the following order:

17.1 The accused is convicted of attempted theft.

17.2 The accused is sentenced to six (6) months imprisonment, of which 3 months are suspended for a period of five (5) years, on condition that the accused is not convicted of theft or attempted theft committed during the period of suspension and where imprisonment without the option of a fine is imposed.

17.3 The sentence is antedated to 17 March 2016.

S. JACOBS

ACTING JUDGE OF THE HIGH COURT

MAKAULA J:

I agree, it is so ordered.

M. MAKAULA

JUDGE OF THE HIGH COURT

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