

SOUTH AFRICA / JUDGMENT

S v Mashau (17/2015, 13/2014) [2015] ZALMPTHC 4 (20 August 2015)

[2015] ZALMPTHC 4**COURT**

Limpopo High Court, Thohoyandou

BEFORE

A Lamminga, E M Makgoba

CASE / FILE NUMBER

17/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(functioning as LIMPOPO LOCAL DIVISION, THOHOYANDOU)

Review Case No.: 17/2015

Magistrate Serial No.: 13/2014

DATE: 20 AUGUST 2015

In the matter between

THE STATE

And

MASHAU MASHUDU ALBERT.....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 22 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. Patel was broken into and various Items, to a total value of R4 880.00 were stolen.

[3] The accused elected to conduct his own defense and pleaded guilty on his first appearance in the district court. He was convicted and sentenced on the same day to 12(twelve) months direct imprisonment.

[4] When the matter came before Masipa, J for review on 23 March 2015, the trial magistrate was requested to respond to the following:

"6. In trying to ascertain if the accused was admitting all the elements of the crime that was committed the learned magistrate referred to breaking and entering.

7. There was no explanation of what that phrase might mean. The accused was also not given an opportunity to explain in his own words

what he did and how he gained entry to the shop.

8. The conclusion whether there was breaking and entering should be based on the facts. The accused did not place such facts before

the court."

[5] The magistrate responded in his letter dated 22 may 2015, received by the registrar of this court on 7 June 2015, as follows:'1. In page 3 line 15 I did ascertain to the accused understand the charge of housebreaking with intent to steal and theft and he said he understand in line 16.

2. I did ascertain from the accused admitted that he did breaking and entered the shop of complainant and he had no permission to enter the shop of Patel the complainant at page 4"

[6] On 23 June 2015 Collis AJ referred the remarks by Masipa J and the magistrate's reply to the Deputy Director of Public Prosecutions

for comment, which comment was received on 8 July 2015 by the registrar of this court. The essence of the comment is that the magistrate committed an irregularity by not enquiring from the accused how he gained entry to the premises, which irregularity resulted in a failure of justice.

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

"Section 112(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 whether the accused did indeed commit the act of breaking and entering as required.

[12] In addition, the questioning consisted of leading questions, sometimes followed by a response by accused that did not make sense,

but which was apparently taken to be confirmation of what was put to him by the court.

[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)).

[14] The extent of the magistrate's questioning comprised the following:

Court : The charge of house breaking with intent to steal and theft did you understand it when it was read to you?

Acc I did understand

Court : And the items which the state is alleging that they were stolen did you understand all these items and do you concur that these were the items which was stolen on the date in question?

Acc Understood

Court : Ok, do you confirm that this break in it happened at the shop of Mr Patela M I?

Acc Confirmed

Court : And you never had any permission to enter the shop of Patela?

Court : You entered there by breaking and entered the shop and stole the items mentioned in the charge sheet? Do you understand?

Court : Do you understand that what you did it was wrongful?

Acc I confirm

Court : Were you perhaps forced by any other person to enter there or you entered there yourself intentionally

Acc I entered there

Court ; And the property that you took are the property of Patela?

Acc Yes

[15] From the questioning by the court it is clear that the accused:

15.1 admits that he understands the charge, (not that he understands what constitutes breaking and entering for purposes of this offence);

15.2 understands the items the State alleges were stolen and are the items stolen, (not that he indeed took the items listed and intended to deprive the owner permanently of the items);

15.3 confirms that the break in happened at the shop of Mr Patela and that accused did not have permission to enter the shop;

15.4 understands that the court states that the accused entered the shop by breaking and entering and stealing the items mentioned (not

that he admits that he had done what the court stated);

15.5 confirms that he understands what he did was wrongful (not that he knew at the time he committed the offence, that his actions were wrong and punishable as an offence);

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

16.1 Jurisdiction - Where was the shop?

16.2 Facts to establish elements of housebreaking - How did accused gain access to the building?

16.3 Facts to determine mens rea - What did he do once inside?: Why did he do what he did?: What did he intend to do with the items?

16.4 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(1)(b) of Act 61 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

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALMPTHC/2015/4.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-mashau-unknown-topic-almpthc-2015--6a3ea5123b1caa912980a56d>

Prepared on 12 October 2026 · Esheria