
SOUTH AFRICA / JUDGMENT

S v Mekula (CA&R 147/2012) [2012] ZAECHGC 40; 2012 (2) SACR 521 (ECG) (16 May 2012) [2012] ZAECHGC 40

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, G G Goosen

CASE / FILE NUMBER

CA&R 147/2012

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, GRAHAMSTOWN

C.A. & R.: 147/2012

Review No.: 120061

Date Delivered: 16 May 2012

In the matter between:

THE STATE

and

SABELO MEKULA

REVIEW JUDGMENT

EKSTEEN J:

- [1] The accused herein was convicted in the Magistrates' Court in Port Elizabeth of the theft of a bottle of whisky and was sentenced to six months' imprisonment. The matter comes before us on review pursuant to the provisions of section 302 of the Criminal Procedure Act, 51 of 1977 (herein referred to as the Act).

- [2] The accused was unrepresented at the trial and elected to conduct his own defence. He pleaded guilty to the charge that he had on 1 March 2012 stolen a bottle of Jameson whisky to the value of R274,99 from a Shoprite Liquor Store in Port Elizabeth. An enquiry in terms of section 112(1)(b) of the Act followed. In response to questions from the magistrate the accused described the events which occurred as follows:

“Okay you say you clearly remember what transpired. You took the bottle of the Jameson and you walked to the paypoint. --- I took it and concealed it on my person and I acted as if I’m going to the paypoint.

Where was the Jameson when you were at the paypoint? --- It’s tucked under my clothes, Your Worship.

Did you have monies to pay for this Jameson, sir? --- I had not ... it was not the full amount.

How much was the Jameson? --- I think it was R279,00.

You say you saw the security noticed you. You went back. --- Yes Your Worship.

And the bottle broke? --- The bottle broke when I took it out from where it was tucked in on my person with the hope of putting it back into those crates and that’s how it broke.

Why did you want to place it back? --- I was frightened because I noticed that the security guard saw me.

If the security had not seen you, would you have put it back? --- No certainly I was going to go out without putting it back.

So what were you doing with that Jameson, sir? --- I was stealing it Your Worship.

Did you have the permission of the authority of Shoprite or Craig Swarts to steal this item from their store without paying for it? --- No I did not have Your Worship.”

- [3] It is essentially on these facts that the magistrate convicted the accused of theft.

- [4] When the matter came before me I enquired from the magistrate whether the accused should not have been convicted of attempted theft. She replied as follows:

“4. In respect to my finding the accused guilty of theft and not attempted theft, the following was taken into consideration.

4.1 The accused concealed the item beneath his clothing.

4.2 The accused did not have the means to pay for the item

4.3 The accused clearly indicates that if the security guard had not seen him, he would have left the store with the whiskey.

4.4 When the accused concealed the item beneath his clothing the owner of the shop no longer exercised control of the said item.

5. I was satisfied that the accused had the necessary intention to steal and would have completed his actions had it not been for the security guard who spotted him.”
- [5] It is clearly correct that the accused had every intention to steal the bottle of whisky and, had the security guard not observed his intended theft, he would have left the shop without paying for it. That much he admits expressly. It is, however, implicit in the magistrate’s reasoning that the accused “would have completed his actions” that she recognised that his actions were not yet complete.

[6] In *S v Tau* 1996 (2) SACR 97 (T) Stafford J at 102a-b stated as follows:

“Wat betref die toe-eieningshandeling, contrectatio, verklaar Snyman Strafgereg 3de uitg op 491:

‘... (B)y diefstal in die vorm van saakonttrekking bestaan die toe-eieningshandeling uit enige handeling ten opsigte van ‘n saak waardeur X (i) die regmatige eienaar of besitter uitsluit van sy saak en (ii) self die bevoegdhede van ‘n eienaar ook (sic) die saak uitoefen. ...”

(See also Snyman, *Criminal Law* 4th ed at 477.)

- [7] For an act of appropriation to constitute theft it is accordingly necessary that both these elements be satisfied, namely that the rightful owner or possessor must be excluded from his property and the offender must assume the control over the stolen item.
- [8] I have no doubt that the magistrate is correct in her conclusion that the latter requirement is satisfied. I consider, however, that she errs in concluding that when the accused concealed the item beneath his clothing the owner of the shop no longer exercised control over the said item. On the contrary the evidence establishes that the security guard at the premises had observed the intended offence and the accused recognised that it would not be possible for him to leave the premises with the bottle of whisky. It was precisely because he recognised that the owner, through the security guard, continued to exercise effective control over the bottle that he resolved to retrace his steps and to replace the bottle to the position from which he had taken it. He made no attempt to remove the bottle from the building, clearly because he realised that he could not do so without surrendering the

bottle to control of the security guard. In these circumstances I consider that the accused ought to have been convicted of attempted theft.

- [9] The accused was sentenced to six months imprisonment. He has a lengthy record extending over many years during which he has been convicted of theft repeatedly. No doubt this consideration weighed heavily with the magistrate in imposing a period of direct imprisonment. She has given a full and well-reasoned judgment in imposing sentence and has set out fully the personal circumstances of the accused and the interests of society. I do not intend to traverse all of these considerations herein. Nevertheless, whereas the conviction of theft falls to be set aside this court is at liberty to consider afresh an appropriate sentence. I consider that a sentence of six months imprisonment of which three months is suspended for a period of five years on condition that the accused is not again

convicted of theft or attempted theft committed during the period of suspension would constitute a fair sentence which would satisfy all the objections of punishment.

- [10] There is one further matter of concern. The accused was sentenced on 11 April 2012. The proceedings, which were mechanically recorded and which were subsequently transcribed, amount to a mere 37 pages. Section 303 of the Act requires the clerk of the court to forward the record of proceedings to the registrar of the High Court within one week of determination of the case. The review proceedings were signed off by the magistrate on 26 April 2012 and were received by the registrar of the High Court in Port Elizabeth on 5 May 2012, almost four weeks after the determination of the matter.
- [11] The review procedure set out in the Act constitutes an integral part of the accused's right to a fair trial and it demands an expeditious process. Compare *S v Raphatle* 1995 (2) SACR 452 (T); *S v Manyonoyo* 1996 (11) BCLR 1463 (E); *S v Lewies* 1998 (1) SACR 101 (C) at 104a-c.

[12] In *S v Maluleke*

- (2) SACR 577 (T) at 582e-h Webster J stated as follows:

"[12] The consequences of failing to comply with the provisions of s 303 have not, from the limited research I could undertake, authoritatively

been dealt with. Its import needs no emphasis. Failure to comply with the section is certainly an infringement of the rights of an accused person. That right cannot be compromised, hence the view that accused persons whose review matters are not forwarded timeously may sue for damages. That viewpoint reflects a fairly tentative sanction against the failure to comply with the provisions of the section. The other view, which has not been explored, probably because its consequences would mark a radical departure from the procedure that has hitherto been followed, is that where the delay in forwarding the record exceeds the prescribed time-limit and no cogent and convincing reason is advanced for the delay, the proceedings should be set aside. ..."

- [13] It follows that any failure to comply with the provisions of section 303 of the Act calls for a cogent explanation. In the circumstances in every instance where the delay in forwarding the record exceeds the prescribed time-limit the record must be accompanied with a proper explanation setting out the reasons for the delay and the inability to comply with the time periods as set out in the section.
- [14] In the result the conviction and sentence of the accused are set aside and the following is substituted therefor:
1. The accused is convicted of attempted theft.
 2. The accused is sentenced to 6 (six) months imprisonment of which 3 (three) months is suspended on condition that the accused is not again convicted of theft or attempted theft committed during the period of suspension.

3. The sentence is ante-dated to 11 April 2012.

J W EKSTEEN

JUDGE OF THE HIGH COURT

GOOSEN J:

I agree.

G G GOOSEN

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Prepared on 9 October 2026 · Esheria