

SOUTH AFRICA / JUDGMENT

S v Mokgou (11/11) [2011] ZANWHC 36 (22 August 2011)

[2011] ZANWHC 36

COURT

North West High Court, Mafikeng

BEFORE

Kgoele, Hendricks

CASE / FILE NUMBER

11/11

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NORTH

WEST HIGH COURT

HIGH

COURT REF: 11/11

In

the matter between:

THE
STATE
and
ABEL
TUMELO MOKGOU

REVIEW

JUDGMENT

KGOELE J.

- [1] The accused, a 22 year old male, pleaded guilty to the charge of assault with intent to do grievous bodily harm. The allegation against him was that he on the 22 December 2010 at Rustenburg unlawfully and intentionally assaulted Simo Mokgau by punching him with clenched fists and kicking him with bootied feet with the intention to cause him grievous bodily harm.
- [2] The inquiry i.t.o. section 112 (1) (b) held by the presiding officer were as follows as seen from page 1 and 2 of the record of proceedings:-

Court: Pertaining to the said charge the Court feels that the procedures of Section 112(1)(b) is more applicable in this sense.

Prosecutor: As the court pleases

Court: Sir you pleaded guilty voluntarily and without undue influence?

Accused: Voluntarily Your Worship

Court: Can you explain to the court what happened on that day?

Accused: Yes

Court: Can you explain?

Accused: Your Worship the person whom I have assaulted did not want me to go out because he said that when we go out we create problems, so I did not go out instead I invited my friends and we were busy partying at my place so when that person came, - when he came back he switched off the music and he said that my friends had to leave. We had this agreement but verbally and then I assaulted him.

Court: Did he make any attempt to hit you sir?

Accused: No he did not

Court: Do you think that you could have sorted the problem out without hitting him?

Court: The court is then satisfied that you admit to the allegations in the charge sheet against you and that you are guilty of the offence to which you pleaded guilty.

[3] The matter served before Hendricks J who directed a query to the presiding officer in regard to the manner in which the inquiry was held and the sentence imposed.

[4] The presiding officer responded as follows:-

“(1) I did not question pertaining to unlawfulness but was satisfied pertaining to wrongfulness the accused could resolve the matter without assaulting his father. The fact that his father reprimanded the accused without lifting his hand to him and the son then assaulted his father came to me that it is unlawful without saying or questioning.

(2) I acknowledge that I did not question to establish the extent of the assault and just took it from the charge that the accused also kicked his father. He referred to his father as ‘that person’.

(3) A wholly suspended sentence was considered on behalf of the accused at first. The state requested 3 years imprisonment. The SAP 69 that was submitted after it was requested a few times indicated previous convictions. Attempted murder in 2008 that was suspended for 5 years. I also discussed the case with fellow colleagues that presented that views that 2 to 3 years would be proper. I consider the sentence of 1 year and 6 months to be just and proper.

- [4] Correctional supervision was considered for it was specifically requested. This route was not an option for the accused has previously violated his correctional supervision conditions and was send back to the correctional center to complete his sentence.

I acknowledge the mistakes I have made during his plea and would request the Learned Judge that the matter be set aside and referred back.

- [5] The relevant provision of sec 112(1)(b) reads as follows:

“(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.”

- [6] It is quite clear from the provisions quoted above that, the inquiry remains “a factual one”.

- [7] As seen from numerous decisions of the various High Court divisions, it is generally accepted that the duty of a judicial officer in terms of this section are twofold:

to “question the accused with reference to the alledged facts of the case in order to ascertain whether he admits the allegations in the charge; and

to satisfy himself that the accused “ is guilty of the offence of which he has pleaded guilty. (Mkhize v The State and another 1981 (3) SA 585 (N); Heugh, Dingele, Mlindeshweni, Mtyalelwa 1998 (1) SACR 83 (E); S v Gwenya 1995 (2) SACR 522 (E). It has also been generally accepted that the best way of establishing these facts is to allow the accused to explain fully and in his own words what transpired during the commission of the offence.

- [8] In this matter, the presiding officer did allow the accused to explain in his own words what transpired during the commission of the offence.

The presiding officer failed to establish through questioning the elements of wrongfulness and unlawfulness of the actions of the accused. So took, was the extent of the assault with intent to do grievous bodily harm or only assault common.

- [9] Of great significance is the fact that no questions whatsoever were asked whereby the presiding officer could form a basis that the accused intended to cause the complainant grievous bodily harm.

All of the above mentioned are questions that relates to the crucial factual determination of whether the accused were indeed guilty of the charge he was charged with.

[10] Du Toit et al in book “Commentary on the Criminal Procedure Act” on page 17 – 8?? of Service issue 44 of 2010 discuss the court’s approach to the answer tendered under the following heading:-

“Evaluation of an accused’s answers

The answers given by an accused are not ‘evidence’ from which inferences may be drawn (S v Naidoo 1989 (2) SA 114 (A))

In S v Mkhize 1978 (1) SA 264 (N) 268 A-B Didcott J concluded that it is not the function of the court to evaluate the answers as if it were weighing evidence or to judge the truthfulness or plausibility of the answers (See also S v Jacobs 1978 (1) SA 1176 (C); S v Molauzi 1984 (4) SA 738 (T) 740 I and 741A-B and S v Londi 1985 (2) SA 248 (E)). ‘The test, said Didcott J in S vs Mkhize (supra) 268B, ‘is what the accused person has said, not what the court thinks of it’. See also S v Mtayi 1991 (1) SACR 412 (Tk). Conflicting answers should, however, be cleared up (S v Molaudzi (supra) it was held that there can as a rule be no question of a finding that a material element had been admitted by way of an inference.”

[11] It is quite clear from the manner in which the presiding officer conducted the section 112 (1) (b) inquiry and also from the concession he made in his reply that the questioning in this matter fell short of the standard required in the application of this section.

[12] I therefore come to the conclusion that the plea of the guilty of the accused and its resultant conviction and sentence by the trial court cannot, as correctly admitted by the presiding officer, stand as such.

[13] Consequently the following order is made:-

13.1 The conviction and the sentence of the accused is hereby set aside;

13.2 The matter is referred back to the magistrate court of Lichtenburg to start de novo before another presiding officer different from the one that presided in this matter.

A.M. KGOELE

JUDGE OF THE HIGH COURT

I agree

R.D. HENDRICKS

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