

SOUTH AFRICA / JUDGMENT

S v Phooko (A243/2017) [2017] ZAGPPHC 793 (31 August 2017) [2017] ZAGPPHC 793

COURT

North Gauteng High Court, Pretoria

BEFORE

J W Louw, A J Bam

CASE / FILE NUMBER

A243/2017

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IN

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DATE: 31/08/2017
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED

Magistrate: Soshanguve
Case
no: A243/2017
High
court ref no: 240/2017
In

the matter of: THE
STATE
and
MPHO
CLEAVETON PHOOKO
REVIEW

JUDGMENT

LOUW J

[1] The accused in this matter was convicted in the Tshwane North magistrates' court held at Shoshanguve on a count of malicious injury to property and sentenced to 12 months imprisonment. When the matter came before me on review, I concluded that a material irregularity had occurred in the conduct of the trial. It followed that the accused had to be released from prison immediately. Such an order was made by me and confirmed by Barn J. I indicated to the Registrar of Reviews that this judgment would follow.

[2] The malicious damage of which the accused was convicted, was the breaking of windows of a house by throwing stones. The evidence

presented by the State was that of a Mr. Simon Mahlangu. He testified that the accused came to the house in question during the night, looking for his child. Mr. Mahlangu said that he chased the accused away, that the police were eventually called who told the accused to leave, that the accused came back after the police had left and that the accused then threw the stones which broke the windows.

[3] The accused had a different version. He testified that he left the property in question through a small gate in the company of the police, but was then called back by the father of Gugu, the mother of the child. While they were talking to each other, Mr. Mahlangu intervened and proceeded to hit the accused with a baseball bat. The accused ran to the street. Mr. Mahlangu then picked up some stones from the edge of the fence and threw them at the accused. The accused threw the stones back at him, but he ducked and the stones struck a window or windows of the house. It seems that there was one big window which consisted of three sections.

[4] During cross-examination, the accused indicated that he intended calling Gugu's father as a witness who, according to the accused, was present and had witnessed the incident. He also indicated that he wanted to call the police officials who arrived at the scene. His evidence was that while he was exchanging words with Gugu's mother, a police vehicle arrived with two police officials. The police had been phoned by Gugu's sister Phindile. She explained to the police that the accused wanted to fetch the child, but that the mother of the child was not present. The police officials then instructed Phindile to telephone Gugu to confirm whether she knew that the accused was supposed to fetch the child. Gugu unfortunately did not answer her phone. The evidence of the accused was that he had agreed with Gugu on 1 May 2017 to fetch the child on 6 May 2017, which was the child's birthday. The police officials then wanted to see the child to confirm that the child was indeed present in the house. The child was then brought to them by Phindile. They then told the accused that he should come to fetch the child the following day when the mother was present.

- [5] After the cross-examination of the accused, he was asked by the court who he wanted to call as witnesses. He mentioned the name of Gugu's father, Mr. William Mahlangu, who is a brother of Mr. Simon Mahlangu, and
- [8] In my view, this was a material misdirection by the court. If the police officials had been called to testify, and had confirmed that Mr. William Mahlangu had been present, it would have lent credence to the version of the accused. They could also have testified about the time of night when they visited the house in question. The accused's version was that he arrived there just after 21:00, whereas it was put to him by the prosecutor that he went there in the early hours of the morning, around 02:00. If the police officials were called to testify and had also confirmed the time of night when they visited the house, and had confirmed the evidence of the accused of what transpired while they were there, that would also have supported the credibility of the version of the accused.
- [9] By denying the accused the opportunity of calling the police officials to testify on his behalf, the accused was deprived of the right to a fair trial. For that reason, the order was made that the accused be released from prison immediately.

J W LOUW

JUDGE OF THE HIGH COURT

I agree

A J BAM

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