

SOUTH AFRICA / JUDGMENT

S v Thetha (CA&R165/2017) [2017] ZAECHGC 73; 2017 (2) SACR 363 (ECG) (9 June 2017) [2017] ZAECHGC 73

COURT

Eastern Cape High Court, Grahamstown

BEFORE

N G Beshe, JM Roberson

CASE / FILE NUMBER

CA&R165/2017

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: CA&R165/2017

DELIVERED: 9 / 6 / 17

In the matter between:

THE STATE

And

ZOLANI THETHA

REVIEW JUDGMENT

BESHE J:

[1] This review first served before Lowe J who raised the following queries:

“Whilst technical was the accused, having led evidence on sentence, given the opportunity of addressing the court in argument?”

At the commencement of sentencing should the accused’s right to representation not have been explained afresh, he having been

convicted? If so was this done?”

[2] In response to the query the Magistrate stated as follows:

“Having perused the court record (as I was of the view that I always allow accused persons to address me) I noticed that I ask them whether there is anything else they wish to tell me whilst still in the witness stand [see page 36 line 13] and not, after he/she has returned from the witness stand where he/she had testified in mitigation of sentence.”

- [3] The relevant part of the transcription records the following exchange between the Magistrate and the accused after the latter had testified in mitigation of sentence:

Court: Is there anything else that you want to tell me Mr Thetha that you would like me to take into consideration before you are sentenced?

Accused: No, Your Worship.

- [4] Section 274 of the Criminal Procedure Act provides that:

“Evidence of sentence

- (1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
- (2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of sentence, and thereafter the prosecution may likewise address court.”

- [5] As to when it is appropriate for the parties to address the court on sentence in *S v LM*, [1] Tshiki J pointed out that:

“... ... where the state and / or the defence elects to do so they should be allowed to lead evidence in both mitigation and aggravation of sentence before any party is allowed to address the court on the appropriate sentence to be imposed.”

- [6] In *S v Mokela* [2] the point was made that it is trite that both the accused and the state have a right to address the court regarding the appropriate sentence. Further that, even though the use of may in Section 274 may suggest that the sentencing court has a discretion whether to allow the parties to address it on sentence “... ... a salutary judicial practice has developed over many years, in terms thereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise”. Later on the same paragraph the learned judge of appeal continues: “This in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court”.

- [7] Clearly the manner in which the accused was invited to address the court did not make it clear that he was required to address the court as to what type of sentence, in his view would be appropriate and why. The fact that the question was asked whether there was anything else that the accused wanted the court to take into account before sentence, at the stage when he was still in the witness stand could be construed to have meant any other factor apart from those already mentioned in his evidence. This is also indicated by the fact that the Magistrate thereafter called upon the prosecutor to cross-examine the accused. When

there was no cross-examination, the Magistrate proceeded to ask the accused whether he had any other witnesses to call. Accused being unrepresented could not have insisted on his right to address the court on sentence.

[8] This brings me to the next query raised by Lowe J. Namely, whether accused's right to legal representation should not have been explained afresh, he having been convicted.

[9] Section 35 (3) of the Constitution provides that:

"Every accused person has a right to a fair trial, which includes the right-

(a)

(b)

(c)

(d)

(e)

(f) to choose, and be represented by a legal practitioner, and to be informed of his right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and be informed of this right promptly."

[10] From the record of proceedings it transpires that accused's rights to legal representation were explained before the start of the trial. He elected to apply for legal aid. A representative was accordingly provided to him. Having been out on bail, accused at some stage skipped bail resulting in the legal aid attorney having to withdraw. Accused's bail was accordingly forfeited to the state. Upon his re-arrest and appearance accused insisted that he was going to conduct his own defence.

[11] In my view this was sufficient to satisfy the requirements of a fair trial as advocated for in Section 35 (3) of the Constitution.

[12] I have already alluded to the unsatisfactory manner in which the Magistrate went about regarding what is expected of her in terms of Section 274 of the Criminal Procedure Act. The accused, a male aged forty two (42) years was convicted of theft of four wheel nuts he unscrewed from complainant's trailer. This, after he had scaled a high perimeter wall into complainant's premises at about 22h00. As the Magistrate rightly pointed out, the four wheel nuts could not have been particularly expensive. What weighed heavily against the accused was the fact that he had a long list of previous convictions dating as far back as 1997. The latest being a conviction for theft in 2013. A total of eleven (11) previous convictions comprising two of housebreaking with intent to steal and theft, one of attempted housebreaking, seven of theft and one of unlawful possession of drugs (dagga).

[13] The sentence of thirty six (36) months imprisonment with twelve (12) months thereof suspended conditionally appears to be appropriate in the circumstances. Be that as it may, in light of the Magistrate's failure to comply with Section 274, it will be appropriate, in my view for the matter to be remitted back to the Magistrate to comply with the provisions of Section 274.

[14] In the result, the conviction is found to be in order, but the sentence ought to be set aside and the matter remitted back to the Magistrate to comply with Section 274 of the Criminal Procedure Act.

It is so ordered.

N G BESHE

JUDGE OF THE HIGH COURT

ROBERSON J

I agree.

JM ROBERSON

[1] 2015 (1) SACR 422 ECG at [7].

[2] 2012 (1) SACR 431 SCA at [14].

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