

SOUTH AFRICA / JUDGMENT

S v Tshabalala (278/2011) [2011] ZAFSHC 150 (1 September 2011) [2011] ZAFSHC 150

COURT

Free State High Court, Bloemfontein

BEFORE

E.M. Kubushi, M.B. Molemela

CASE / FILE NUMBER

278/2011

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Review No. : 278/2011

In the review between:-

THE STATE

and

SIFISO ALFRED TSHABALALA

CORAM: MOLEMELA, J et KUBUSHI, AJ

DELIVERED ON: 1 SEPTEMBER 2011

KUBUSHI, AJ

- [1] This is a Special Review in terms of section 304 of the Criminal Procedure Act 51 of 1977 (“the CPA”). The matter was placed before this court by H.B Breyll, a Judicial Head in the Magistrates’ Office Harrismith, with the following remarks:

“1. Bovermelde saak het tydens ‘n routine inspeksie onder my aandag gekom en het ek die betrokke Voorsittende Beampte op sekere aspekte gewys en sy kommentaar gevra. Hy het met my saamgestem.

2. Geliewe die oorkonde aan sy Edele die Hersienings Regter voor te le vir ‘n spesiale hersiening...”

- [2] The aspects which the Judicial Head referred to the presiding officer were stated as follows:

“1. You convicted the abovementioned accused on 14 March 2011 and sentenced him on 16 March 2011.

2. The charge against the accused was one of contravening section 36 of The General Law Amendment Act 62 of 1955.
3. Accused was represented and a plea of guilty was entered where after a statement in terms of section 112
- (2) Act 51 of 1977, was read out and handed in on strength of which you convicted the accused.
4. I am of the opinion that all the allegations in the charge to which he pleaded guilty was not covered:
 - (i) There is no indication that there was a reasonable suspicion that the goods had been stolen and that it was based on reasonable grounds.
 - (ii) He gave a satisfactory account of his possession anyway? (See S v Mahlasela 2005 (1) SACR 269 NPD)
5. I intend to send this matter for special review in terms of section 304 (4) Act 51 of 1977. Your comments will be appreciated.”

[3] The presiding magistrate responded as follows:

“1. In this case the accused was convicted and sentenced by me on 14/03/2011.

2. The charge against the accused was one of contravening section 36 of the General Law Amendment Act 62/1955.
3. I agree with my Judicial Head that not all the elements of the offence were covered.

S v Martins 1986 (4) SA 934 (T)

S v Malinga 1986 (4) SA 296 (E)

S v Sepiri 1979 (2) SA 1168 (NC)

4. As the trial Magistrate is now functus officio he is of opinion that the Honourable Reviewing Judge should direct that the statement of the accused should be retaken properly.”
- [4] The accused person was charged with the crime of contravening the provisions of section 36 of the General Law Amendment Act 62 of 1955 in that upon the 6th day of January 2011 and at/near the dumping site in the district of Harrismith, the accused was found in the unlawful possession of goods other than stock or produce as defined in section 1 of the Stocktheft Act 57 of 1959, to wit a 1 x wheelbarrow (R320-00), safety boots (R150-00) the total value of which amounted to R475 -00, in regard to which there was a reasonable suspicion that the said goods had been stolen and the accused person was unable to give a satisfactory account of such possession.

- [5] The accused was represented at the trial. He pleaded guilty and handed in a statement in terms of section 112 (2) of the Criminal Procedure Act, 51 of 1977 (the statement). The statement was read out in court and admitted in the record as exhibit "A". The relevant part of the statement read as follows:

"Statement in terms of section 112 (2) of the Criminal Procedure Act, 51 of 1977.

I the undersigned,

SIFISO ALRED TSHABALALA

Do hereby declare that:

I am the accused in this matter and I plead guilty to the charge of possession of stolen property.

I make this statement freely, voluntarily and without any undue influence. The facts upon which I plead guilty are as follows:-

2.

On the 06th of January 2011 at Intabazwe Location in the district of Harrismith I was unlawfully and wrongfully found in possession of stolen property to wit old wheel barrow and pair of safety boots.

3.

On the 06th of January at around 12:00 noon I met with Thabiso and I bought the said items from him. Before the transaction I asked him where exactly he got the items and he said that was his. I believed him since it is the old items.

4.

I admit that I acted wrongfully hence I plead guilty.

5.

I plead to the honorable Court of its mercy and give me a chance to amend my ways."

The statement was signed by the accused and a witness. The accused was found guilty on the basis of this statement and on the 16 March 2011 sentenced to twenty four (24) months imprisonment.

- [6] Section 36 of General Law Amendment Act 62 of 1955 provides as follows:

"Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft." (my underlining)

The elements which must be proved for a conviction in terms of this section are the following:

A person must be in possession of goods;

There must be a reasonable suspicion that the goods have been stolen; and

The person concerned must be unable to give a satisfactory account of such possession.

- [7] According to the Judicial Head, in this instance the accused person admitted only the element of the possession of the goods and provided a satisfactory account of such possession. I agree with the Judicial Head that the statement by the accused person does not indicate that there was a reasonable suspicion that the goods were stolen and that such suspicion was based on reasonable grounds. On the contrary, the accused person gave an account as to how he came to be in possession of the goods.
- [8] The provision of this section has been interpreted in various judgments as requiring the “reasonable suspicion” to have existed in the mind of the person finding the goods in the possession of the accused person, at the time when he so found them in his or her possession. However, it has also been held that an accused person can make an admission in terms of section 112 of the Criminal Procedure Act in regard to facts which are not in his or her personal knowledge. In such cases, the court has to take into account other consideration like for instance the sufficiency of the accused person’s source of knowledge and the probative value of the admission. See *S v MALINGA* 1986 (4) SA 296 (E) at 299F – G; *S v NAIDOO* 1985
- (2) SA 32 (N) and *S v MAHLASELA* 2005 (1) SACR 269 (N) at 271.
- [9] Since there was no admission made by the accused regarding reasonable suspicion, it was therefore expected of the state to prove that there was a reasonable suspicion that the goods were stolen. Since the element of reasonable suspicion was not admitted by the accused person nor proved by the state, the trial magistrate erred in finding the accused person guilty. The trial magistrate ought to have entered a plea of not guilty.
- [10] The accused person also provided an account of his being in possession of the goods. This account, to me, was reasonable and the trial magistrate should have entered a plea of not guilty even on this basis. The state did not prove the accused person’s inability to give a reasonable account either at the time he was found in possession of the goods or at the trial. His explanation as stated in the statement was accepted by both the state and the trial magistrate. It has been held that if the accused person gives an explanation which may reasonably be true and which, if true, would be a satisfactory account of his or her possession, he or she must be acquitted. See *S v KHUMALO* 1964 (1) SA 498 (NPD) at 501C.
- [11] In the premises I would grant the following order:
1. The conviction is set aside.
 2. The case is remitted to the trial court to be heard afresh before a different magistrate.

E.M. KUBUSHI, AJ

I concur (and it is so ordered).

M.B. MOLEMELA, J

/sp

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