

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No. : 09/2008

In the case between:

THE STATE

versus

KHEHLA PAULOS MOLOI

CORAM: MABESELE, AJ *et* MOCUMIE, J

JUDGMENT: MABESELE, AJ

DELIVERED ON: 25 SEPTEMBER 2008

[1] The accused appeared in the Harrismith magistrate's court on a charge of theft. He pleaded guilty, was questioned in terms of section 112 (1)(b) of the **Criminal Procedure Act**, 51 of 1977, and then convicted.

[2] The magistrate imposed a sentence of eight (8) months imprisonment and suspended half of it for a period of three (3) years on certain conditions.

- [3] The matter came before me on automatic review.
- [4] I prepared a query and sent a letter to the magistrate to respond to the following:
- “1. The accused said he intended to return the T-shirts. He said he was apprehended while on his way back to return the T-shirts because he did not have money to pay for them.
 2. Why did the magistrate proceed to question the accused about his intention?
 3. Why was the magistrate satisfied that the accused intended permanently to deprive the complainant of its properties?”
- [5] The magistrate admitted that it was not necessary for him to proceed with the enquiry after the accused said he intended to return the T-shirts to the owner.
- [6] When the magistrate asked the accused why he wanted to return the T-shirts, the accused said he did not have money to pay for them.
- [7] The magistrate then said:

“You took two T-shirts and hide them under your Lumber jacket; what was your intention?”

- [8] The accused ultimately said he intended to steal them.
- [9] According to **Snyman: Criminal Law** (5th ed., p 483) a person commits theft if he unlawfully and intentionally appropriates movable, corporeal property, which belongs to, and is in the possession of another, provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.
- [10] The accused said he was apprehended while he was on his way to return the T-shirts because he did not have money. Quite clearly, it cannot be said that he intended permanently to deprive the complainant of its properties. Therefore, the accused did not admit all the elements of the offence allegedly committed. In my view, a questioning by the magistrate, after the accused had shown a lack of necessary intention, and the subsequent conviction cannot

stand. The magistrate should have acted in terms of the provisions of section 113 of the Act.

[11] Section 312 (1) of the Criminal Procedure Act, 51 of 1977, provides:

“Where a conviction and sentence under 112 are set aside on review ... on the ground that any provision of subsection (1) (b) ... of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.”

[12] In view of the provisions of section 312 (1) the matter should be remitted to the trial court for reconsideration.

[13] **In the premises, the following order is made:**

- 1. The conviction and sentence are set aside.**
- 2. The case is remitted to the trial court.**

3. The trial court is directed to act in terms of section 113 of the Criminal Procedure Act, 51 of 1977.

MABESELE, AJ

I concur.

MOCUMIE, J

ms