

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

Case No.: 631/2008

In the case between:

THE STATE

and

BAZEARI MATHYS

CORAM: WRIGHT, J *et* MOCUMIE, J

JUDGEMENT: MOCUMIE, J

DELIVERED ON: 4 DECEMBER 2008

REVIEW JUDGEMENT

[1] This is an automatic review in terms of section 302 read with 304 of the Criminal Procedure Act, No. 51 of 1977 (“the CPA”). The accused appeared on 27 August 2006 in the Bloemfontein Magistrate court on a charge of robbery. He was convicted as charged and was sentenced to 12 (twelve) months imprisonment of which 6 (six) months was suspended for a period of 3 (three) years on certain conditions.

[2] I was of the view that the conviction may not be correct and that in any event the sentence was too harsh in the circumstances of this case. The presiding officer responded and I thank her.

[3] The accused pleaded guilty and the presiding officer asked him questions in terms of sections 112 of the CPA. From the questions and answers provided by the accused it was not clear that the accused was guilty of robbery. For the purposes of this judgment it is convenient to quote the questions and answers verbatim as reflected on the transcribed record on page 3 to 8:

COURT: Do you plead guilty to this charge freely and voluntarily without any undue influence?

ACCUSED: Yes.

COURT: Were you on the ... (indistinct) the charge sheet?

On the 5th day of August 2008 ... (door) near ... (indistinct; door) Bochabela in the district of Bloemfontein?

ACCUSED: I am staying there.

COURT: Did you meet Elisa Nthabiseng Motshoeneng?

ACCUSED: ... (intervenes).

TOLK: Nee, antwoord net die vraag meneer. Dié dag van die 5de ...

BESKULDIGDE: Ja.

TOLK: Het jy met Ntabiseng ontmoet het?

BESKULDIGDE: Now wie is Nthabiseng?

TOLK: Die klaer, die persoon wat gesê het jy het haar selfoon gesteel.

BESKULDIGDE: ...(onduidelik)

ACCUSED: (Through interpreter:) no, I did not, met Nthabiseng Elisa Motshoeneng.

COURT: Whom did you meet?

ACCUSED: ... (reply not interpreted).

TOLK: Ken jy die vrou wat jy haar selfoon gegryp het?

ACCUSED: It is only this lady or the complainant whom I met at night and grabbed her cellphone and ran away.

COURT: ...(indistinct) exactly what I am asking, did you, met the complainant?

ACCUSED: ...(intervenes).

COURT: ... (speaking simultaneously).

TOLK: Ken jy die persoon wat die klagte of wat u laat vang het, het jy daardie persoon wat haar selfoon gegryp het of weggevat het, ontmoet?

BESKULDIGDE: Nee.

COURT: Okay, what happened that you were arrested?

ACCUSED: It is only two gentlemen that I met who hit me with kieres an took me to Mangaung Police Station and alleged ... (intervenes).

COURT: Sir, what did you do on that day ... (interpreter intervenes) that led to your arrest?

ACCUSED: I took the cellphone or brought the cellphone ... (intervenes).

COURT: Explain in detail what, how did you take the cellphone from the complainant?

ACCUSED: Hit and run.

COURT: ... (indistinct) hit and run here. You can hit and run only when ugh, ugh ... (intervenes).

INTERPRETER: In a car.

COURT: In a car ... (indistinct) what did you do?

ACCUSED: I was coming from behind this person or this complainant, the lady, this lady, who was playing with her cellphone. Then while she was this cellphone in her hand I grabbed the cellphone and ran away with the cellphone.

COURT: You are saying you grabbed the cellphone from behind or ...?

INTERPRETER: He came from behind while the lady whom he was following was playing with her cellphone.

COURT: Uhm.

INTERPRETER: Then he grabbed the cellphone and after grabbing it ran away with it.

COURT: Did you have the right to take the, to grab the cellphone from her hand?

ACCUSED: No.

COURT: Why did you do it?

ACCUSED: I was under the influence of liquor.

COURT: What did you do with the cellphone?

ACCUSED: I sold it.

COURT: Sold it?

INTERPRETER: Yes, your honour.

COURT: Did you know what you were doing was wrong ... (indistinct) the cellphone of the complainant without her consent?

ACCUSED: Yes.

COURT: Did you know that your conduct was ... (indistinct) and punishable by a court of law?

ACCUSED: I do not know.

COURT: ...(indistinct) do not know ... (indistinct) repeat the question?

TOLK: Meneer, moet die vraag gevra word, het hy geweet dat dit onwettig is om iemand goed te vat ...?

BESKULDIGDE: Ja.

TOLK: Sonder die ...

ACCUSED: Yes, I do know that is unlawful.

COURT: What cellphone, what was the name of the cellphone?

ACCUSED: A Nokia.

COURT: Do you confirm or ... (indistinct) that the value of that cellphone was R600,00?

ACCUSED: The value, it is R400,00 of that cellphone.

COURT: According to you it is R400,00, sir ... (indistinct)?

ACCUSED: What I saw in the pamphlets it was, the value of that cellphone was R400,00.

COURT: How much did you sell it for?

ACCUSED: It is one fifty. I said R200,00 but they offered me one fifty.

COURT: State?

PROSECUTORS: Your worship, the value of the phone is plus minus four hundred, six hundred. So I will accept that four hundred.

JUDGMENT

Sir, after questioning you in terms of section 112(1)(b) of the Criminal Procedure Act (51 of 1977) I am satisfied that you admit all the elements of the offence.

You are, therefore found **GUILTY AS CHARGED.**"

[4] **CR Snyder in Criminal Law, 5th Edition**, 517 defines robbery as follows:

“Robbery consists of theft of property by unlawfully and intentionally using.

- (a) violence to take the property from somebody else; or
- (b) threats of violence to induce the possessor of the property to submit to the taking of the property.”

[5] From this definition it is clear that the elements of the crime are the following:

- (a) the theft of property
- (b) through the use of either violence or threats of violence
- (c) causal link between the violence and the taking of the property
- (d) unlawfulness and intention.

[6] The courts have in the past not been able to draw a clear distinction between robbery as defined above and theft committed in a situation where the victim was not assaulted or threatened with assault to induce submission. The so-

called “bag-snatching” cases similar to this case. In these cases there is no violence against the person or victim. The perpetrator simply grabs the item(s) he wants to steal from the victim when the latter least expects. This situation is distinguishable from robbery and has been recently recognised as theft in **Snyman Criminal Law, 5th Edition**, 519. See also **S v Gqulowe** 1992 (2) SACR 172 (E) at 174; **S v M** 1996 (2) SACR 127 (T) at 132.

- [7] The facts of this case as accepted by the state and as gleaned from the section 112 questions and answers is that the accused ran from behind the complainant and without any violence directed at her snatched her cellphone “as she was playing with it” and ran away. She did not have the cellphone in her grip as was the case in **S v Gqulowe** and **S v M** *supra*. The accused did not use any force or violence or threats of any nature to threaten or assault her in order to take the cellphone. He did it unexpectedly for the complainant not to be able to offer any resistance. The conviction on robbery in these circumstances of this case stands to be vitiated. As already indicated in the paragraphs above what the accused committed, was theft.

[8] Having come to the conclusion that the conviction on robbery which is a more serious offence does not stand, it goes without saying that the sentence imposed is inappropriate as it was imposed on the basis that the accused had committed robbery. I may just add that even if the accused was correctly convicted of robbery the sentence imposed would still not have been appropriate in the particular circumstances of this case taking into account all the mitigating factors in favour of the accused. The sentence imposed is in my view inappropriate and ought to be set aside.

[9] It appears that there have been inordinate delays in this case on the side of both the court *a quo* and this Court due mainly to administrative errors. I am of the view that this matter should be disposed of in the manner in which I do hereunder to prevent more injustice perpetuated against the accused.

[10] In the circumstance I make the following order.

Order

1. The conviction of robbery by the presiding officer on 27 August 2006 is hereby set aside and substituted with the following:

“The accused is found guilty of theft.”

2. The sentence imposed by the presiding officer on 27 August 2006 is hereby set aside and substituted with the following:

“R800,00 (eight hundred rand) or 8 (eight) months imprisonment of which R400,00 (four hundred rand) or 4 (four) months imprisonment is suspended on condition that the accused is not convicted of theft or attempt therefore committed during the period of suspension.”

3. ***This judgment should be made available to Correctional Services Mangaung and the accused immediately.***

B. C. MOCUMIE, J

I concur.

G. F. WRIGHT, J

/em