

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

Case No.: 1140/2005

In the case between:

THE STATE

and

ANNA MAKHENDWANE

JUDGEMENT: WRIGHT, J

DELIVERED ON: 6 OCTOBER 2005

[1] The accused was found guilty of theft of R200,00 and sentenced to a fine R800,00 or five (5) months imprisonment. She is a 43 year old female and first offender.

[2] There was only one witness for the state and it is clear from the judgment of the magistrate that he was never evaluated as a single witness. The accused herself gave evidence and also called a witness who corroborated her evidence to a certain extent. What is more, it seems that the accused was never cross-examined by the prosecutor. It was never put to her that she was giving false evidence.

- [3] When the accused asked the state witness whether he had seen her take the money from the people who come to the shop and that she had worked with him for years, helping him and also asked him why she could not do that, he answered that she was talking about things of previous days. In this respect, his evidence is unsatisfactory. For some or other reason the magistrate says the following in his judgment:

“It is also not in dispute that Accused does not have the authority in any transactions within the business. Is not even allowed to have access into and enter behind the counter. She’s at all not permitted to assist in the shop.”

This is in fact not common cause and the magistrate’s finding to this effect, ignores the evidence of the accused.

- [4] The magistrate was asked the following question by the the reviewing Judge:

“Why was the accused’s evidence that she took the money because of the assistants dealing only to hand it to her husband, rejected?”

In his reasons the magistrate set out that according to him the R200,00 concerned was for all material times in the possession of the accused and that she did not part with it. The finding ignores the accused's evidence that she already wanted to give it back the same day but it was not accepted. She also says the following:

“.. I put the money on the counter and I explained to him I'm sent here to come and give you this money. I went outside and started to do my job, so I don't know what has he done and I gave him the money after he had refused it twice to take this money.”

The magistrate's reasons therefore can not be accepted as there is no reason whatever not to accept the evidence of the accused. The magistrate's argument that it is improbable that the owner of the shop would not take the money belonging to his business, takes the matter no further as it is clear, if the accused's evidence is accepted, that he did not want to take the money in any case

probably because he wanted to discredit her.

At the best for the state, there are two contradicting versions and the state has to prove the guilt of the accused.

[5] In paragraph 9 of the magistrate's reasons he states the following:

"The accused bears no onus of proof. Her version or evidence only has to be reasonably possibly true. The latter would have been satisfied had she at least called Mr Sotho to confirm that she approached him to hand the R200,00 over and why the latter would not take it. This failure also was thus devastate to the defence case."

The first two sentences of the above are correct. It was however the state's duty to call Mr. Sotho as it had the onus of proof and if there was doubt with regard to the matter the accused should receive the benefit of the doubt.

[6] There was therefore no reason to reject the accused's evidence which was not disputed by cross-examination and

therefore no reason to convict the accused.

[7] The sentence is also excessive in view of the circumstances of this matter.

[8] The conviction and sentence is therefore set aside and it is ordered that the accused must be immediately released from imprisonment.

G.F. WRIGHT, J

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