

**IN THE SOUTH GAUTENG HIGH COURT  
JOHANNESBURG**



**REPORTABLE**

**REVIEW CASE: HIGH COURT REF NO: 186/2011  
MAGISTRATE'S SERIAL NO: 27/2011  
JOHANNESBURG CASE NO: 69/6076/2010**

In the matter between:

**THE STATE**

and

**TEBOGO MALAPANE**

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**JUDGMENT: SPECIAL REVIEW**

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**WILLIS J:**

[1] This matter has been referred to me for “special review” in terms of s 304(4) of the Criminal Procedure Act, 51 of 1977, as amended (“the Criminal Procedure Act”).

[2] The accused had been charged in the Johannesburg District Court held at Protea, Soweto with one count of assault with intent to do grievous bodily harm and another count of theft. The two offences were allegedly committed on 12 December 2010. There were no alternative charges.

[3] The case involved an altercation between rival street vendors. On 5 April, 2011 the learned magistrate convicted the accused on the count of assault but on the count of theft convicted him not of theft but malicious injury to property. The evidence supported the conviction of assault. The reason for the magistrate not convicting on the count of theft is that the accused did not, in fact, steal the property of the complainant but threw his merchandise, which consisted of vegetables, on to the ground where it was trampled upon by the accused and passers by. Some of the persons who were passing by helped themselves to the merchandise on the ground.

[4] The complainant estimated his damage at just under R2000,00. When asked by the magistrate if he would be willing to accept compensation, the complainant said; "I would settle for R1500,00, your worship." On count one the magistrate sentenced the accused to a fine of R3000, 00 or three months' imprisonment, suspended for five years on condition that he was not convicted of assault during the period of suspension. In respect of the conviction for malicious injury to property the magistrate acted in terms of s 297 (1) (A) of the Criminal Procedure Act and postponed the sentence for three months on condition that the

accused paid the complainant R1200,00 in compensation which he was ordered to do in instalments. The magistrate ordered the accused to return to court on 5 July, 2001 with proof that he had paid the complainant in accordance with the court order.

[5] During the course of a routine inspection, the senior magistrate came across this matter and doubted the correctness of the conviction of malicious injury to property as a competent verdict on a count of theft. The senior magistrate referred a query in this regard to the trial magistrate who agreed that the matter should be sent to this Court on special review in order to obtain clarity.

[6] Ever since the case of *R v Mashanga*<sup>1</sup> it has been clear in our law that malicious injury to property consists in the unlawful, intentional damaging of the property of another. All those elements were present in the proven facts before the learned magistrate. But, was the verdict competent in terms of s 270 of the Criminal Procedure Act?

[7] Section 270 of the Criminal Procedure Act reads as follows:

If the evidence on a charge for any offence not referred to in the preceding sections of this chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.

Malicious injury to property does not appear in the preceding sections of the chapter as a competent verdict on a charge of theft. The relevant

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<sup>1</sup> 1924 AD 11

question is this: are essential elements of the offence of malicious injury to property included in the offence of theft with which the accused was charged?

[8] Ever since the case of *R v Elling*<sup>2</sup> it has been clear in our law that theft consists in an unlawful and intentional appropriation (*contrectatio*) of a thing capable of being stolen with intent to deprive the owner of ownership. In the crime of malicious injury to property the intention is to damage property rather than to deprive the owner of ownership, as is the position in the case of theft. Although both offences are 'property related', the essential elements of malicious injury to property, on the one hand and theft, on the other are different. The point raised by the senior magistrate was, accordingly, well founded.

[9] The conviction of malicious injury to property and the sentence imposed in respect thereof must be set aside. What of the compensation which the magistrate ordered the accused to pay the complainant? It seems to me that the magistrate conducted the proceedings in a manner reminiscent of a chief in a *lekgotla* in days gone by. The proceedings overall were firm, fair and expeditious. Although there must be interference with the conviction and sentence in these review proceedings, there was no serious injustice done. Accordingly, if the accused did pay the compensation as he was ordered to do, no special measures are necessary in order to ensure a refund of the money. Nevertheless, this judgment should be brought to the attention of the accused.

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<sup>2</sup> 1945 AD 234

[10] The following order is made:

The conviction of malicious injury to property and the sentence imposed in respect thereof are reviewed and set aside.

**DATED AT JOHANNESBURG THIS 19<sup>th</sup> DAY OF SEPTEMBER,  
2011**

**N.P.WILLIS**

**JUDGE OF THE HIGH COURT**

I agree.

**F.H.D VAN OOSTEN**

**JUDGE OF THE HIGH COURT**