Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Review Number: 15968
Magistrate's Court Serial Number: C486/2015
Magistrate's Court Case Number: 32/15

In the matter between:

THE STATE

and

CHRIZELDA MURTZ

REVIEW JUDGMENT DATED 20 APRIL 2016

RILEY AJ:

[1] This is a review from the magistrate at Caledon who convicted the accused on 15 May 2015 on a count of robbery and thereafter on 12 June 2015 sentenced her to 3 years imprisonment in terms of the provisions of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (*'the Act'*).

[2] The state alleged that on 9 April 2015 and at Kleinmond the accused did wrongfully and intentionally assault Christiaan Jooste and with violence take

from his property or his lawful possession the amount of R800,00 cash.

[3] The accused who was unrepresented pleaded guilty to the charge. The magistrate then proceeded to question the accused in terms of the provisions of s 112(1)(b) of the Act so as to determine whether the accused admitted all the elements of the offence. When requested by the magistrate to explain what had happened after she arrived at the house of the complainant the following exchange took place between the accused and the magistrate:

> *'BESKULDIGDE: Edelagbare ek het geklop aan die deur, die deur was oop. Hulle het gesit en drink binne, toe het ek ingekom toe vra ek meneer ek kom haal gou die geld wat meneer vir my gesê het. Toe staan hy op, hy was – daar was twee Bruin meisies by hom in die woning, want ek het vir hom gesê hy weet ek het niks by die huis nie en ek het nie gekom vir moeilikheid nie. Toe vlieg die een meisie eerste op om vir my in te vlieg en te stoot. Toe praat ek nou saam met hom toe staan hy op edelagbare en sê hy nog hy het nie geld nie, maar toe sien ek hy het geld in sy hemp se sak en toe haal ek dit uit, maar hy het my nie gestoot of aangegaan nie. Toe sien die een meisie en toe kom hulle twee toe stoot hulle vir my daar. Toe kom Du Preez verby toe gee ek die geld dieselfde tyd weer terug edelagbare. Ek het dit nie gevat en gehardloop nie.*
>
> *HOF: So u was in die klaer se woning?*
>
> *BESKULDIGDE: By die deur. Hy het my uit – ek het eers geklop en toe sê hy ek moet inkom. Toe kom ek in toe sit daar twee dronkies by hom.*
>
> *HOF: Het die klaer gesit of gestaan?*
>
> *BESKULDIGDE: Hy het gesit edelagbare.*
>
> *HOF: Het hy gesit of gestaan toe u die geld vat?*
>
> *BESKULDIGDE: Toe het hy gestaan ja.*
>
> *HOF: U wys u het die geld uit sy bo-hempsak geneem.*
>
> *BESKULDIGDE: Hempsak – ja edele.*
>
> *HOF: Het hy gekeer toe jy probeer om die geld uit te haal?*
>
> *BESKULDIGDE: Nee hy het so gestaan so hy het nie nog gekeer of*

aangegaan nie, maar die twee meisies het aangegaan edelagbare.

HOF: So hulle het hom probeer beskerm?

BESKULDIGDE: Ja.

HOF: So u het u hand ingesit en die geld uit die sak uitgevat?

BESKULDIGDE: Ja edelagbare.

HOF: En iemand anders het probeer keer dat u dit doen?

BESKULDIGDE: Die twee meisies ja.

HOF: Het u u hand vining in en uit gesteek?

BESKULDIGDE: Nee ons het net gestaan en praat en toe druk ek my hand in, maar nie soos in … (tussenbeide).

HOF: Druk u dit in?

BESKULDIGDE: Wild nie.

HOF: U het dit ingedruk en uitgehaal?

BESKULDIGDE: Sy hemp het so gestaan, toe staan en praat hy toe haal ek dit uit edelagbare.

HOF: Nou verduidelik die teruggee – verduidelik die teruggee, was die ondersoekbeampte buite, wat is die storie?

BESKULDIGDE: Nee die ondersoekbeampte was op pad na sy huis se kant toe. Hy bly so by die hoek se kant met die wit kar en toe het ek eers nie vir hom eers gelieg nie en toe agterna toe gee ek dit terug ja.

HOF: So het u eers vir hom gelieg?

BESKULDIGDE: Ja.

HOF: Wat was u plan wat sou u met die geld maak?

BESKULDIGDE: Ek wou vir ons gaan kos koop het edelagbare, want ek het niks gehad nie en dit was vir my en my kinders wat ek wou kos gekoop het.

HOF: Die aanklaer sê die bedrag is R800,00. Stry u?

BESKULDIGDE: Ja dit was soos hy gesê het was dit 'n R800,00 ja.

HOF: Die aanklaer sê verder dat dit die eiendom van Christiaan Jooste was – stry u?

BESKULDIGDE: Nee.

HOF: Die aanklaer sê die klaer se naam is Christiaan Jooste – stry u?

BESKULDIGDE: Ja mevrou.

HOF: Is dit 'n bejaarde persoon?

BESKULDIGDE: Dit is 'n ouerige mannetjie, maar hy is baie lief vir Bruin vrouens edelagbare.

HOF: En hoekom het hy vir u geld geskuld?

BESKULDIGDE: Edelagbare om eerlik te wees hy hou daarvan om vroumense te betas, hoe noem 'n mens die woord, as hy aan jou vat dan betaal hy vir jou en so. Nou hy het daardie dag nie geld gehad nie. Jy kan maar slaap ook daar by hom en so. Nou as ek weet ek het nie daardie dag gewerk nie of so, my kind makeer iets miskien soos Kimbies of daar is nie iets nie dan gaan ek na hom toe om nou moeilikheid te vermy dan laat hy my inkom dan betas hy en so. Hy vat aan jou borste en jy moet uittrek voor hom en dat betaal hy vir jou R400,00 en so edelagbare.
HOF: Het u reg of toestemming gehad om die geld te neem?
BESKULDIGDE: Nee edelagbare.
HOF: Het u besef u doen verkeerd en kan gestraf word?
BESKULDIGDE: Ja…'

[4] After the magistrate had questioned the accused in terms of s 112(1) (b) of the Act the magistrate inquired from the prosecutor whether the state accepted the facts as conveyed by the accused. When the prosecutor indicated that the state would accept the plea of guilty on the basis as explained by the accused the magistrate in a brief judgment found as follows.

'Die hof is oortuig dat die beskuldigde al die elemente van die misdryf erken en is tevrede dat die manier hoe sy beskryf die klaer van die geld ontneem is dat dit wel neerkom op die definisie van roof en beskuldigde word dan aan roof skuldig bevind. Die beskuldigde het ook verduidelik en vir die hof gewys die handbewegings wat sy gemaak het om die geld uit te haal…'

[5] When the matter was presented to me on a review, and after having considered the record of the proceedings; I directed a query to the magistrate as I was concerned about whether or not the accused had been convicted correctly of robbery. The query read as follows:

'Volgens die beskuldigde het sy saam met die klaer gepraat "toe staan hy op edelagbare en sê hy het nie geld nie, maar toe sien ek hy het geld in sy hemp se sak en toe haal ek dit uit, maar hy het my nie gestoot of aangegaan nie". Op verdere ondervraging deur die landdros sê die beskuldigde dat klaer nie gekeer het toe sy probeer om die geld uit te haal nie. Sy het verder verduidelik dat sy nie haar hand "wild" in die klaer se sak gedruk het en dat "...sy hemp het so gestaan toe staan en praat hy toe haal ek dit uit edelagbare".

In die geheel gesien blyk dit dat die beskuldigde na die klaer is omdat hy haar geld geskuld het vir seksuele dienste wat sy aan hom gelewer het.

Daar word opgemerk dat die landdros by uitspraak meld dat: "Die beskuldigde het ook duidelik en vir die hof gewys die handbewegings wat sy gemaak het om die geld uit te haal". Daar is egter niks wat dit uitbeeld op die rekord nie.

Inteendeel word die indruk deur die beskuldigde geskep dat sy net die geld uit die klaer se sak gevat het sonder die toepassing van enige geweld. Moet die landdros se opmerkings by uitspraak as "getuienis" beskou word?

Die landdros word gevolglik versoek om volledige redes te verstrek oor waarom die landdros van mening was dat die beskuldigde skuldig is aan roof en nie diefstal nie.'

[6] On 4 April 2016 the magistrate responded as follows to my query:

'Geliewe sy Edele die Hersieningsregter van die volgende kommentaar te voorsien:

Die hof kan ongelukkig nie 'n afskrif van my aanvanklike antwoord van Edele se navraag spoor nie, nadat dit op 'n onverklaarbare wyse van die oorspronklike dokonde verdwyn het.

Hier volg my redes:
Die hof het in ag geneem die spesifieke omstandighede waaronder die voorval plaasgevind het. Beskuldigde het verduidelik dat sy na die klaer se huis was om geld af te haal.

Die twee vroulike persone wie by die klaer gekuier het was in 'n onderonsie met die beskuldigde betrokke oor haar versoek.
Dit blyk asof die klaer passief was "hy het net so gestaan" en die twee vroulike persone, soos deur die beskuldigde verduidelik, hom wou beskerm.
Klaer het geen weerstand gebied nie.
Dit het vir die hof die indruk geskep dat die beskuldigde op 'n manier opgetree het wat die ander laat glo het dat die klaer beskerming nodig gehad het, dws dat sy aggressief opgetree het.
Dit is onder hierdie omstandighede dat die beskuldigde die geld uit die hempsak van die klaer verwyder het.
Die hof stem saam met Sy Edele dat die hof nie op rekord die spesifieke aksie wat die beskuldigde gewys het in die oorkonde ingelees het nie en die oorsig word betreur.
Die hof laat egter die bevinding in Sy Edele die Hersieningsregter se hande.'

[7] From the explanation given by the accused, the complainant is an elderly white male who she describes as being *'...baie lief vir Bruin vrouens...'*. It appears that she had gone to the house of the complainant on a previous occasion as she needed money to buy necessities such as nappies for her child. She explained that the complainant would let her undress herself and then touch her breasts, in exchange for which he would pay her the amount of R400,00. The complainant however did not have money to pay her and she returned on the day of the incident to collect her money. On her arrival she knocked and entered the house as the door was open. She found the complainant sitting drinking alcohol with two 'coloured' girls. She then told the complainant that she had nothing in her house and that she was there to collect her money as he had told her. She told him that she was not there to cause trouble. One of the girls who was with the complainant then started to push her. She spoke to the complainant who then told her that he did not have money. She however saw

that he had money in his shirt pocket which she then took from his pocket. She stated that the complainant did not try to prevent her from taking the money from his pocket and that she had removed it whilst she was chatting to him. Although the record reflects that *'...die twee meisies het aangegaan...'* and that they had tried to protect the complainant – it is not clear precisely what they had done in this regard. The magistrate did not clarify these issues during questioning.

[8] According to the version of the accused she had merely put her hand into the complainant's pocket and then removed the money. It is clear from her explanation that she did not do so in a *'wild'* manner. Even though the two females may have been involved in an argument with the accused there is no basis for a finding that *'die beskuldigde op 'n manier opgetree het wat die ander laat glo het dat die klaer beskerming nodig gehad het, dws dat sy aggresief opgetree het'*. Such a finding is not supported by the admissions made by the accused during questioning by the magistrate. On the version of the accused she had not gone there to argue and did not behave aggressively. On her version the *'aggression'* came from the complainant's female companions who appeared to have been under the influence of alcohol.

[9] It is however not clear what the extent of their aggression was as this was not properly clarified by the magistrate during questioning.

[10] It is accepted law that the questioning by the magistrate in terms of s 112(1)(b) of the Act remains *'primarily a safety measure against unjustified convictions*

and is applied with care and circumspection'. (S v Naidoo 1989 (2) SA 114 (A) at 121E). See Hiemstra's Criminal Procedure, LexisNexis issue 7 at 17-3. According to the learned author:

> *'The purpose of the questioning is twofold: first to determine whether the accused admits the allegations in the charge upon which there was a guilty plea; and secondly, to enable the court to conclude for itself whether the accused is, in fact, guilty.'*

[11] The court should not, as appears to have happened in the present case, during the second leg of the enquiry regard the answers in the first leg as evidence and draw from them the inference that the accused is guilty. (See *S v Nagel* 1998 (1) SACR 218). The court must convince itself of the guilt of the accused where there is a plea of guilty. In my view the magistrate accordingly erred and misdirected herself in drawing inferences from the explanation given by the accused as opposed to making a proper determination of the guilt of the accused by proper questioning.

[12] The further issue to decide is whether the magistrate was correct in finding that the accused had either used violence or force in taking the money from the complainant's pocket.

[13] According to C R Snyman Criminal Law 6th ed: *'Robbery consists in theft of property by unlawfully 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'

[14] The elements of the crime of robbery are the following: (a) the theft of property, (b) through the use of either violence or threats of violence, (c) a causal link between the violence and the taking of the property, (d) unlawfulness and (e) intention (see Snyman at 508).

[15] In *Minister of Justice: in re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A) Schreiner ACJ held at 238D that:

> *'...For robbery the violence must aim at reducing the victim to impotence or submission. The victim need not be physically incapacitated; it is enough that his will is overborne by fear, so that the villain can safely take possession of the goods. It seems unreasonable, in the submission type of case, to hold that there is robbery if the pistol is poked into the victim's ribs but none if it is pointed at his forehead without contact. I cannot think that such a distinction is supportable.'*

[16] According to J R L Milton, South African Criminal Law & Procedure Vol II ed (Juta), the term "violence" in describing robbery means no more that the use of force of any significant degree. In *S v Mati* 2002 (1) SACR 323 Ngwenya J in dealing with the concepts of violence and force in relation to robbery held at 328d-i that:

> *'Violence, on the other hand, involves the exercise of physical force so as to inflict injury or damage to persons or property. Thus, the concept of violence has connotations of vigorous hostility and aggression which are not necessarily a feature of force. (A T H Smith* Offences against Public Order *(1978) at 3.)*

*violence includes a threat of violence provided the person threatened apprehends immediate personal harm. (*R v Cele *1958 (1) SA 144 (N) at 153C-D.)*

The fact that the perpetrator acted swiftly or took his victim by surprise does not in my view elevate mere force to violence. Similarly, whether the victim would have resisted the taking of his or her item does not change the character of force into violence. Victims react differently to aggression. To some the use of force or violence will induce submission to the taking while to some it would induce resistance regardless of the consequences. Once the Court is satisfied about the nature of the force used – whether it is force per se *or violence, the question remains then whether it was merely intended to enable the perpetrator to obtain possession of the object or whether it is aimed at his victim. While this distinction is not always easy to discern, it seems to me that the clearer the picture emerges as to how the taking was executed, the easier it is for the court to decide.*

Where there is doubt in the court's mind as to whether violence has been shown beyond reasonable doubt surely, in that instance, the court should find that the crime committed is that of theft. Probably a strong case may be made here that the greater the force used, the greater are the probabilities that the perpetrator's intention was to commit robbery rather than theft. I must hasten to add that this does not follow automatically. Each case will be decided on its own merits.'

[17] The learned judge also referred to *S v Gqalowe* 1992 (2) SACR 172 (E) where the accused was convicted of robbery by the magistrate and stated the following:

'...The review Judge sent a query inquiring from the magistrate whether the accused's explanation in terms of s 112(1)(b) *of the Act did not amount to the admissions to the crime of theft. After the magistrate furnished his reasons, the Court dealt with the matter and held that the accused was guilty of theft. The relevant admissions by the accused were:*

> *"Die klaer het van voor gekom. Ek het 'n banksakkie by sy baadjie se sak sien uitsteek. Ek het verby hom geloop en die geld uit sy sak geruk. Ek het daarmee weggehardloop. Naby Spargs se Winkel het twee polisiebeamptes my gearresteer."*

Mullins J, with whom Jones J agreed, at 174f-g said:

> *"It is clear from the authorities that the mere fact that the complainant is dispossessed of an article carried on his person does not* per se *amount to robbery. Obviously, in every case, if the complainant were aware of the removal of such article eg from his pocket, by stealth, he would seek to prevent such removal. Theft of goods from a house is not robbery, however, merely because the complainant would notionally offer resistance to such removal if he were aware thereof."*

[18] I associate myself with the views of Ngwenya J in *Mati* (*supra*) and Mullins J in *Gqalowe* (*supra*). If the sound principles referred to hereinbefore are applied to the facts in the present matter, I am not persuaded that the element of violence or force was present when the accused took the money from the complainant's pocket. Accordingly the accused has not committed the crime of robbery. I am however satisfied that the admissions made by the accused constitute the crime of theft. Consequently the conviction of robbery falls to be reviewed and set aside and replaced with a conviction of theft.

[19] In the present matter the magistrate imposed a sentence of 3 years imprisonment in terms of s 276(1)(i) of the Act on the basis that the accused was guilty of robbery. The further issue to decide is whether the sentence imposed by the magistrate is reasonable and balanced considering that the conviction for robbery is to be substituted with that of theft. S 276(1)(i) of the Act provides for the imposition of imprisonment from which such a person may be

placed under correctional supervision in the discretion of the Commissioner or a Parole Board. In considering sentence the magistrate had the benefit of a report from a correctional officer of the Department of Correctional Services which stated *inter alia* that the accused was 31 years old, that she was unmarried and had 3 children respectively aged 14, 10 and 2 years. At the time of sentence the children had been taken from her care and were being cared for by her family members. The accused admitted to having a problem with drugs in the past. What is however aggravating is that the accused had previous convictions for theft. She had received the benefit of paying a fine in 2010 and in 2013 she was given a suspended sentence of 12 months imprisonment together with 12 months correctional supervision in terms of s 276(1)(h) of the Act, on two counts of theft.

[20] The effect of the sentence imposed by the magistrate in the present matter is that the accused will effectively be required to serve 6 months direct imprisonment and thereafter be released on a program of correctional supervision. The magistrate has advised that the accused was released from prison in January 2016. In my view the sentence imposed by the magistrate is a reasonable and balanced sentence considering all the relevant factors to be taken into account when sentencing. It is accordingly not necessary to interfere with the sentence.

[21] In conclusion there is one further issue that requires comment. The magistrate imposed sentence on 12 June 2015. The J4 (i.e. the covering sheet which is attached to the record of the proceedings on review) bears the date stamp of

the Caledon magistrate's court as 19 August 2015. I received the record on 9 September 2015 and immediately addressed my query to the magistrate. The date stamp of the registrar of criminal appeals in this office indicates that the query was sent to the magistrate on 10 September 2015. Due to my concerns that there was a delay in the magistrate responding to my query, I requested the registrar of criminal appeals as well as my registrar to enquire from the magistrate why I had not received a response to my query. On 10 March 2016 the magistrate advised *inter alia* that:

> *'The case record which was posted definitely included my reasons together with the case record. I do not understand how the cover sheet could be separated from the record in one sealed envelope.*
>
> *I do not have a copy of the correspondence as was explained to Judge Riley's office. The typed transcript and query must be scanned and emailed to me urgently so that I can again answer the Reviewing Judge's query…'*

[22] On 30 March 2016 the registrar of criminal appeals at my request addressed a further email to the magistrate in which he states *inter alia*:

> *'As* [sic] *the judge's request, im checking that review. How far* [sic] *will you send me the reply copy of the query.'*

[23] On 4 April 2016 the magistrate eventually provided a response to my query as is set out hereinbefore.

[24] Section 303 of the Act provides that:

> *'The clerk of the court in question shall within one week after the determination of a case referred to in paragraph (a) of s 302(1) forward to the registrar of the provincial or local division having jurisdiction the record of the proceedings in the case or a copy thereof certified by such clerk, together with such remarks as the presiding judicial officer may wish to append thereto, and with any written statement or argument which the person convicted may within three days after imposition of the sentence furnish to the clerk of the court, and such registrar shall, as soon as possible, lay same in chambers before a judge of that division for his consideration.'*

[25] Of course it may not always be possible to comply strictly with the provisions of s 303 of the Act in so far as forwarding the record of the proceedings to the High Court, due to the fact that the record may have to be transcribed and prepared. In this matter the record was relatively short. It is not clear why it took more than 2 months to prepare the record.

[26] I further understand that there may be other systemic delays which result in reviews of this nature not being finalised on an urgent basis. It must however be emphasised that the automatic review process provides urgent protection to the large number of unrepresented accused who are given relatively severe sentences in the district courts. When the judge directs an inquiry, it means that he or she is *prima facie* not satisfied that justice has been done properly. The interest of justice therefore demands that the inquiry should be disposed of as soon as possible. See Hiemstra's Criminal Procedure (*supra*) at 30 – 15. Our courts have long since held that it is important to deal with reviews of this nature

on an urgent basis. See *S v Raphatle* 1995 (2) SACR 452 (T); *S v Manyonyo* 1996 (11) BCLR 1463 (EC) and *S v Lewies* 1998 (1) SACR 101 (C) at 104a-c.

[27] There can be no doubt that the failure to deal with reviews urgently can cause irreversible prejudice particularly where the accused has been sentenced to imprisonment without the option of a fine. Apart from the fact that non-compliance could result in private law consequences, delays may also result in a violation of the accused's constitutional right to a fair trial which includes his/her right to have the matter finalised in a reasonable time (inclusive of the review process).

[28] It is accordingly necessary that magistrates and those persons involved in the preparation of matters which are required to be sent on automatic review constantly remind themselves of the principle of urgency and the fact that they must at all times have regard to the constitutional rights of the accused when dealing with these kind of reviews.

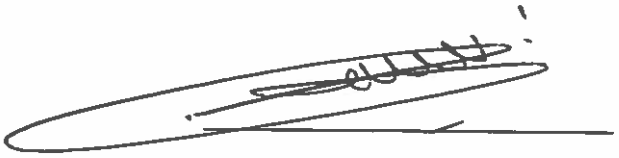
[29] In the result I make the following order:

1. **The conviction of robbery is reviewed and set aside and substituted with the conviction of theft.**
2. **The sentence of 3 years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 is confirmed.**

RILEY A J

ERASMUS J

I agree. It is so ordered.



ERASMUS J