

A344/2005

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

Date: 14/3/2005

High Court Ref. No.: 185

Magistrate's Serial No.: 2/05

Case No.: H357/04

Magistrate

WHITE RIVER

THE STATE V FANNIE NDLOVU

REVIEW JUDGMENT

SOUTHWOOD J

On 6 January 2005 the accused was convicted in the White River magistrates' court on two charges of theft. The counts were taken together for purposes of sentence and the accused was sentenced to a fine of R2 500 or 250 days imprisonment. A further nine months imprisonment was imposed but suspended for five years. The accused did not pay the fine and commenced serving his sentence.

When the matter came on review a query was directed to the presiding magistrate regarding the correctness of the convictions and the sentence. The presiding magistrate states that he applied the doctrine of recent possession in finding the accused guilty and he considers that the accused was properly convicted and sentenced.

The Director of Public Prosecutions does not support the convictions or the sentence. He has pointed out that neither conviction is justified on the facts.

In count 1 it was alleged that on or about 13-14 August 2004 and at or near Gecko Lodge, Hazyview the accused had stolen three medium bath towels, one small wooden table and one bottle of body lotion which was the property or in the lawful possession of Gerald Merchiers and/or Gecko Lodge. The second count alleged that on or about 14-15 August 2004 and at or near Gecko Lodge, Hazyview the accused had stolen two credit cards which was the property or in the lawful possession of Mr H.A. Smith.

It is clear that the accused was found in possession of three towels, two credit cards, a bottle of body lotion and a coffee table. One credit card was an AA card and the other was a Nedbank ATM card. Both cards bore the name H.D. Smith. When confronted by the witnesses the accused first claimed to have found the items in the bush near the lodge but then changed his explanation to the bus stop. His explanation was clearly not acceptable and rightly rejected. In evidence the accused persisted that he had found the items outside his place of employment.

With regard to the first count there is no evidence that the towels, the table and the body lotion were the property of Merchiers or Gecko Lodge or that they were identified as such. Neither of the state witnesses testified that the items had visible identification marks or labels or names. The fact that the accused did not dispute the ownership did not rectify the sufficiency. There was also no evidence to show how the accused could have gained access to the items or what the accused's normal duties were. There was also no evidence to prove that the goods had in fact been stolen. The period of time during which the accused possessed the items is also not known. Although the witnesses testified about prior break-ins, a list of goods stolen in those break-ins was not placed before the court. An inference can therefore not be drawn that these items were stolen during the break-ins.

Regarding count 2 it was not established how the accused came into possession of the two cards. Mr Smith did not testify that they had been stolen or that they had been lost. There is also no evidence that they were stolen during the break-ins. The state witnesses also did not agree with each other as to where exactly in the accused's possession the cards were found.

I agree with the Director of Public Prosecutions that the facts do not support the convictions of theft.

It is clear however that the accused was found in possession of the goods referred to in count 1 under suspicious circumstances and that he was not

able to give a satisfactory account of his possession. The accused should therefore have been found guilty of a contravention of section 36 of Act 62 of 1955. The fact that this was a competent verdict in terms of section 264 of Act 51 of 1977 was explained to the accused.

The accused had been working for approximately five months at the Gecko Lodge as a security guard at the time of his arrest. He is 24 years old and has passed grade 11. His monthly income was R750. His wife was unemployed and he supported two children. He has no previous convictions. Although section 36 of Act 62 of 1955 carries the same penalties as theft there is no evidence to establish the value of the items. No evidence was led regarding their condition or appearance. A new sentence must be imposed taking the circumstances into account.

The following order is made:

The convictions of theft are set aside and the conviction on count 1 is substituted with a conviction of contravening section 36 of Act 62 of 1955;

II The sentence is set aside and substituted with the following sentence:

'R1000 or six (6) months imprisonment of which half is suspended for five (5) years on condition that the accused is not found guilty of theft or fraud committed during the period of suspension';

- III In terms of section 282 of Act 51 of 1977 it is ordered that the substituted sentence be deemed to have been imposed on 6 January 2005.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

R.D. CLAASSEN
JUDGE OF THE HIGH COURT