

A1228/2005

/ES

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 22/8/2005

NOT REPORTABLE

Magistrate  
CULLINAN

Case no: 205/05  
Supreme court ref no: 1926

THE STATE v (1) JOHANNES MAHLANGU AND (2) JAN NKOANA

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REVIEW JUDGMENT

MYNHARDT, J

The two accused were charged with theft. It was alleged that they had stolen R770,00 in cash from the complainant, Mr Malobela. Because they pleaded not guilty the state called a number of witnesses to prove its case. The two accused also testified and one witness was called by accused no 1. The magistrate considered all the evidence and came to the conclusion that the state had proved its case beyond a reasonable doubt. I agree with that finding. The state, in my view, proved that the complainant was searched at the shebeen where he and the two accused, *inter alia*, had been drinking on

the night in question and when the complainant had fallen asleep, probably as a result of the liquor he had consumed.

The sentence imposed by the magistrate was that each accused was to undergo ten months imprisonment which was suspended for five years on condition, firstly, that he be not convicted of theft or attempted theft committed during the period of suspension and, secondly, that "ito sec 300" they compensate the complainant "in an amount of R500,00 each which will amount to R1 000,00". The compensation had to be paid to the complainant on or before 31 May 2005 at the Cullinan magistrate's office.

The magistrate of Cullinan had his doubts about the propriety of the compensatory order and has requested this court to amend the amount thereof to R770,00.

It is unfortunate that the matter has taken so long to finalise. The 31<sup>st</sup> of May 2005 has come and gone. It appears from the papers that the transcribed record was received by the magistrate at Cullinan on 13 May 2005. The accused were sentenced on 18 April 2005. The record was laid before me on review on 25 May 2005 and on the same day I referred the matter to the office of the Director of Public Prosecutions, Transvaal ("the Director") for comment. The Director's memorandum, prepared by Adv Maenga and Adv Wait, one of the Deputy Directors of Public Prosecutions, Transvaal, was received by the Registrar of this court on 15 August 2005. I sincerely

hope that queries from judges in review matters will be attended to promptly in future and that this matter will be the last that has taken so long to be attended to.

I agree with Adv Wait's submission that it is not clear what the magistrate had in mind in the formulation of the order in respect of compensation. An order in terms of section 300 of the Criminal Procedure Act, 1977, ("the CPA") cannot be made a condition of suspension of a sentence. Such an order has, in terms of section 300(3)(a)(i) of the CPA, "the effect of a civil judgment of that court" ie a magistrate's court. In terms of section 300(5)(b) of the CPA the complainant in the present matter will not be able to institute civil proceedings for the payment of the amount of his loss if he has not renounced the award within sixty days after the date on which it was made. Because the award was made a condition of suspension in the present case, the complainant would not be able to renounce the award. Furthermore, the magistrate was, in any event, wrong in ordering the accused to pay a total amount of R1 000,00 to the complainant. His loss was only R770,00. The purpose of an award in terms of section 300 of the CPA is certainly not to enable a complainant to make a profit. The magistrate also ordered the accused to pay the compensation by no later than 31 May 2005. Such an order could be made if the payment of compensation was only a condition of suspension of the sentence but not if the intention was that section 300 of the CPA should govern the situation. See *S v Nyathi* 1978 4 SA 26 (T) at 27D-E.

Whether or not the provisions of section 300 of the CPA should be utilised in the present matter is a difficult question. The same applies to the question whether or not

one of the conditions on which the sentence is suspended should be that the complainant should be compensated. The reason for this is that accused no 1 had, according to the record, lost his employment after he was arrested. He was also detained on a charge of robbery which case still has to be finalised. As far as accused no 2 is concerned it is not clear from the record whether or not he has also lost his employment after his arrest on the charge with which he was charged. His ability to pay compensation to the plaintiff was, in any event, not investigated by the magistrate.

It was submitted by Adv Wait that the accused should each be ordered to pay an amount of R385,00 to the complainant and that this condition should be imposed in terms of section 297 of the CPA. In the light of the precarious financial position of both the accused and the fact that accused no 1 must still be tried on the charge of robbery, it seems to me that it would be a futile exercise to impose an obligation on them to compensate the complainant. I therefore think that the condition relating to the compensation of the complainant should be deleted.

In the result the following order is made:

1. The conviction is confirmed.
2. The sentence imposed on each of the accused is set aside and the following is substituted therefor:

"Each of the accused is sentenced to ten months imprisonment which is wholly suspended for five years on condition that the

accused is not convicted of theft or attempted theft committed during the period of suspension."

S J MYNHARDT  
JUDGE OF THE HIGH COURT

I agree

B R DU PLESSIS  
JUDGE OF THE HIGH COURT