



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**DATE: 15/3/2016**

*A186/16.  
7/4/16.*

**High Court Ref no: 65/16**

**Magistrate's Serial No: Special Review 8/2015) (Lydenburg)**

**Review case no: LC315//2015**

**In the matter between:**

**THE STATE**

**and**

**NOLUVIWE JEANET NGXOBONGWANA**

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**REVIEW JUDGMENT**

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**RABIE J :**

1. This matter came before me on Special Review in terms of section 304 (4) of the Criminal Procedure Act, Act 51 of 1977. The matter was sent on review by the

Acting Judicial Head for the Magisterial District of Lydenburg who stated in an accompanying letter that the matter came to his attention during the ordinary course of his duties.

2. The accused was charged with one count of theft in that on or about 4 June 2014 at or near Lydenburg Shoprite Store she wrongfully and intentionally stole an amount of R1 100,00 , the property of or in the lawful possession of Eva Letsoalo. The accused was convicted as charged and was sentenced as follows: "accused is ordered to pay the complainant one thousand and one hundred Rands as compensation, or in default of payment to undergo thirty days imprisonment. Payment must be effected on 16/11/2015 at the Clerk of the Court, Lydenburg. In terms of section 103 (2) of Act 60 of 2000 accused is not declared unfit to possess a firearm."
3. In the aforesaid accompanying letter the Magistrate, firstly, noted that the accused appeared in person, pleaded not guilty and that the trial Magistrate dealt further with the matter in terms of section 115 of the Criminal Procedure Act. Secondly, regarding the sentence, the Magistrate stated that in his opinion the trial Magistrate had erred in imposing the aforesaid sentence for the reason that "it is not in accordance with justice as it is not authorised in terms of section 276 (1) of Act 51 of 1977 - the nature of punishments."
4. I agree with the view of the Magistrate and consequently the sentence has to be set aside.

5. The Magistrate, however, went further and stated that in his submission the proceedings in terms of section 115 of the Act were not conducted in accordance with justice for the following reasons:
  1. As the accused contacted her own defence, her right to access to information was not explained.
  2. Her right to making a statement disclosing the basis of her defence was not properly explained.
  3. Her right to cross examination was not properly explained - section 166 of Act 51/1977.
  4. Her rights at the end of the State case was not properly explained."
6. The Magistrate stated that he was *functus officio* in regard to the matter and consequently referred the matter on review to this court.
7. I agree with the aforesaid submissions of the Magistrate and I consequently agree that the trial was inherently flawed and not according to justice. For this reason the conviction should be set aside.
8. There is a further reason which was not mentioned by the Magistrate but which in my view also leads to the setting aside of the conviction of the accused. In this regard it is necessary to refer to a few facts of the matter. According to the complainant she deposited the amount of R1 100,00 at a branch of Shoprite in Johannesburg for collection by her sister-in-law at a branch of Shoprite in Lydenburg. After making the deposit she telephoned her sister-in-law informing her of the deposit and informing her of the reference number of the transaction.

She told her sister-in-law that she would advise her of the PIN number once she is in the shop ready to make the withdrawal.

9. On her arrival at the shop in Lydenburg the sister-in-law was unable to withdraw the money. She was informed by the relevant personnel that the money had already been withdrawn that same morning.
10. On further investigation, presumably by the police, it was stated on behalf of the shop in Lydenburg that a copy of the identity document of the accused was used to withdraw the money. This led to the charge against the accused.
11. From the evidence of the complainant, her sister-in-law, an employee of the shop in Lydenburg, which was called by the trial Magistrate, and also from the evidence of the accused, it appeared that in order to make a withdrawal of money deposited at a different branch of the shop, the person making the withdrawal has to present that person's identity document as well as the reference number and the PIN number relating to the particular transaction. It appeared that the shop in Lydenburg was only in possession of a copy of the accused's identity document and that no evidence could be presented that either the reference number or the PIN number had been presented when the withdrawal was made.
12. The accused testified that she had in the past received money from this particular shop which had been deposited in her favour from another branch and that the shop consequently had a copy of her identity document in their records. She denied, however, that she withdrew the amount deposited in this instance by the complainant and also denied that she could have been able to do so since she did not possess the reference number nor the PIN number relating to this deposit.

by the complainant. It was common cause that the accused and the complainant and her sister-in-law were not known to each other.

13. The main reason for the trial Magistrate to convict the accused was because the shop in Lydenburg was in possession of a copy of her identity document which proved, according to the trial Magistrate, that the accused must have been the person who withdrew the money from the shop.
14. The difficulty with this finding is that it totally ignores the evidence by the complainant, the sister-in-law and the official from the shop, that it was impossible to make a withdrawal without submitting the reference number as well as the PIN number relating to this specific deposit. The sister-in-law's evidence was different from that of the complainant in that she testified that the complainant gave her the reference number as well as the PIN number when she telephoned her. The sister-in-law also testified that she informed her family members of the money that was being sent but she denied that she gave any of her family members the reference number and/or the PIN number.
15. The fact remains that on the State's own evidence, the accused would not have been able to withdraw the money from the shop without presenting the shop with the reference number as well as the PIN number before doing so. On the State's own version the accused was accordingly incapable of withdrawing, and thus stealing, the amount deposited in this matter. The accused could, consequently, not have been convicted on a charge of theft.
16. In the result and for all the aforesaid reasons the conviction was not according to justice and should be set aside.

17. In the result, the following order is made:

1. The conviction and sentence of the accused is hereby set aside.
2. If the accused had paid any amount in consequence of the order of the trial court, the accused is entitled to repayment of such amount.



**C.P. RABIE**

**JUDGE OF THE HIGH COURT**

**I agree**



**H.J. DE VOS**

**JUDGE OF THE HIGH COURT**