

IN THE HIGH COURT OF SOUTH AFRICA



(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No A289/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
(4)	
.....	
DATE	SIGNATURE

In the matter between:

NXUMALO, FRANCIS

First Appellant

SIBANDA, ABSALOM

Second Appellant

And

THE STATE

Respondent

JUDGMENT

MAILULA, J:

1. The appellants were convicted by the Regional Magistrate, Johannesburg, of housebreaking with intent to steal and theft. They were each sentenced to 6 (six) years' imprisonment. In addition both appellants were declared unfit to possess a firearm in terms of section 103 of The Firearms Control Act No 60 of 2000.
2. Subsequent thereto, the appellants lodged and filed an application for leave to appeal against both the conviction and sentence. On 26 February 2015, leave to appeal against the conviction was granted and leave to appeal against the sentence was refused. The appeal is in the premises directed against the conviction only.
3. The grounds of appeal may be summarised as follows:
 - 3.1 That the learned Magistrate erred in accepting the evidence by the state in light of improbabilities and inconsistencies/contradictions between the state witnesses.
 - 3.2 That the learned Magistrate failed to apply cautionary rules in respect of single witnesses.
 - 3.3 That the learned Magistrate totally disregarded the appellants' version.
4. It was common cause at the hearing of this matter in the court below:
 - 4.1 that the complainant's Fani Ehapi's (Ifeanyi Iheanetu's) shop was broken into through the roof;
 - 4.2 the shop is situated at the corner of President and Delvers Streets, Johannesburg;
 - 4.3 that the incident occurred between 18 May 2013 and 20 May 2013;

4.4 that the following items were stolen from the shop: 1500 pairs of jeans, 32 watches, 80 belts, 102 jackets and R3150,00 cash; and

4.5 the appellants were arrested on 20 May 2015 in the early hours of the morning, by security guards and later handed over to the police.

5. The real issue which the trial court had to decide was the identity of the appellants.

6. The state led the evidence of the complainant, Fani Ehapi (Ifeanyi Iheanetu), the security guard Joseph Thaba as well as the two policemen Simon Malitsa Ramakolo and Oscar Bhekikhaya Duma, respectively.

6.1 The complainant testified to the effect that on Saturday, 18 May 2013, he closed his shop at about 15h00. Everything was locked and secured. He went home and the following evening just before 20h00 he received a call from ADT security company, informing him that the alarm at the shop had been triggered. He was told that a unit will be sent to the premises and that he would be advised if all is in order. The security company never came back to him. The following Monday he arrived at his business at about 08h30. He found that there was a break-in. Entry was gained through the roof. Both the iron/sink roof and the ceiling had been damaged. The items listed in the charge sheet had been stolen. He estimated that the value of the goods stolen was approximately R1 341 000,00. He recovered 310 pairs of jeans with an approximate value of R93 000,00. These jeans were given back to him by the police. He does not know who broke into his shop. He indicated that he knew the second appellant. The latter used to come to his shop.

6.2 Joseph Thaba is employed with Fasda Protection Security Services. He testified that on 20 May 2013 at about 01h30 he was at the corner of President and Von Wielligh streets, when he saw a male person clad in a green jersey and blue jeans crawling/climbing up a water pipe towards a

shop. He called his colleagues and they also went up the pipe to the rooftop. They found two male persons busy folding jeans. When the two males saw them they started running away. He noticed that there was a hole on the roof. It appeared that the metal roofing sheet had been removed and the ceiling cut out. He realised that the jeans had been removed from the shelves through that hole. The two men ran down the stairs to the residential building next to the shop. Thaba and his colleague(s) gave chase. They caught up with the two men who he identified as the first and the second appellant. The male person he had initially seen going up the waterpipe was not between the two. The appellants reported that the male person is in the lift. All three were apprehended and later handed over to the police. The jeans were also handed over to the police.

6.3 Ramakolo, a constable in the South African Police Service, testified that on 20 May 2013 he was doing patrol duties together with Constable Duma. They were stopped by an unknown person who reported that there was a break-in at a shop at the corner of Delvers and President Streets. They drove to the place and found Thaba, who reported that they had apprehended three suspects who had allegedly broken into the shop through the roof. The jeans stolen from the shop were still on the rooftop. They collected these items and later booked them into the SAP 13 register. The three suspects, including the appellants, were arrested.

6.4 Constable Duma confirmed that he together with his colleague, were patrolling around President Street. They were stopped by an unknown male who reported a break-in into one of the shops. They rushed to the shop where they found five security officers from Fasda. Thaba informed them that he had apprehended three suspects for allegedly breaking into business premises. They were handed over to them. They put the suspects in the van. The items of clothing which they had allegedly stolen were also put in the van and later booked into the SAP 13. He stated that it was about 01h00 to

01h30. They did observe that the culprits gained entry into the shop through the roof.

7. The appellants were the only witnesses for the defence.

7.1 The first appellant stated that on 20 May 2013 he was with the second appellant. They were busy sewing hats in preparation of an order which was placed by a lady from Utopia (Ethiopia) by the name of Lee. They had to deliver the order the following morning. The needles on the sewing machine broke. They decided to go and fetch some from their residence, namely Anderson House in Von Brandis Street. When they reached the corner of Pritchard and Delvers streets they saw two security officers together with accused 3 at the hearing of the matter in the court below. The security officers called them. They then approached. The security officers wanted to know where they were going to. They explained that they were going to fetch needles at their residence. There was a "misunderstanding" as the officers wanted to handcuff them. The officers pepper sprayed them and started assaulting them. Other people also joined. They could not see as a result of the pepper spray. He denied that he was involved in the break-in and stated that he knew nothing about it. He was resident at Anderson house. The second appellant resided at corner Nugget and Commissioner streets. He did not know accused 3.

7.2 The second appellant testified that he was with the first appellant at Cambridge Flat. They, the first and the second appellants, had spent the night sewing. The sewing machine needles broke. They proceeded to the first appellant's residence to fetch needles. When they reached the corner of Delvers and Pritchard streets, the security officers from Fasda approached them. They asked where the two were going and they explained that they were going to fetch needles from home, but the security officers did not accept that. They wanted the appellants to admit that they are the ones who

broke into and stole items from the shop. The officers pepper sprayed them. He lost sight. They were handcuffed and assaulted. They were then put in the motor vehicle and taken to the police station. He denies that he broke into the shop. He denied that he stole items from the shop. He insisted that he was apprehended whilst walking in the street. He did not know accused 3.

8. As alluded to earlier, the issue the trial court had to decide was identity.

9. Ms Maharaj, on behalf of the appellants submitted that the court below failed to attach due weight to the contradictions and/or inconsistencies in the state's case. According to Thaba the appellants accessed the adjacent building via the staircase. He is contradicted by Ramakolo who stated that there was no staircase but a wall and that one did not need a staircase to get to the adjacent building. Further, that the witness Thaba, could not have had ample opportunity to properly observe the appellants as on his version the appellants were on the rooftop, immediately they saw him they ran away, it was at night, and when they were later arrested no housebreaking implements or any of the stolen items were found on either of them. No fingerprints were found on the crime scene and no video footage placing the appellants on the scene was produced. It was argued further that the state relied on the evidence of a single witness in respect of the appellants' identity. The learned Magistrate failed to apply rules of caution, as required when considering the evidence of a single witness. Relying on the dictum in **S v Makobe** 1991 (2) SACR 456 (W), the appellants' legal representative submitted that the trial court erred in simply rejecting the appellants' version because it accepted the state's version. The court should have found that the defence version is reasonably possibly true as the appellants did not contradict themselves and no objective evidence placing them on the scene was placed before the court.

10. Mr Mongwane submitted that Thaba was a reliable witness and the defence version was not reasonably possible in light of the contradictions between them. In the premises, the appeal against the conviction should be dismissed.

11. The appeal is directed against the factual findings by the trial court. It is trite that the court of appeal will only interfere if it is convinced that the trial court is wrong. "The appellate court should not seek anxiously to discover reasons adverse to the conclusion of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered." per Davis AJA in the case of **R v Dhlumayo and Another** 1948 (2) SA 677 (AD).

12. The trial court was alive to the fact that the real issue to be decided was identity of the perpetrators. The learned Magistrate specifically remarked in his judgment that the main issue was whether the appellants and the co-accused were responsible for the break-in at the complainant's premises. After summarising the evidence placed before him he correctly observed that the State is the party that bears the onus of proof and that the standard of proof to be satisfied is proof beyond reasonable doubt. He further in evaluating the evidence relies on the principles propounded in **S v Mthetwa** 1972 (3) SA 766 (AD) relating to evidence on identification. He observes further that Thaba is the one who positively identified the appellants. The fact that he does not refer to him as a single witness does not detract from the fact that he is dealing with identification by a single witness. The criticism leveled against the trial Magistrate is in my view without merit. He clearly warned himself to approach the evidence with caution at both the level of a single witness as well as identification.
 Most importantly, Thaba testified that the appellants ran away when they saw him and his colleague(s) and that he never lost sight of them. There is therefore no room for mistaken identity. This ground of appeal should therefore fail.

13. On the issue of the contradictions between Thaba and Ramakolo whether there is a staircase leading to the adjacent residential building, I must state that Ramakolo's evidence is somewhat confusing and in some respects non-sensical. The following appears from the record:

"And your evidence is that they came with those suspects from the residential, or rather from the side of the residential place? Is that correct? --- From that entrance. Yes because on the side of the shop entrance they could not enter it. So they came at the residential.

....

:Okay. This residential place that you have testified about, how far I [sic] it in relation to this particular shop? --- It is there by the wall, because the other side is the residential place and the other side is the shop. They said they jumped that place at the time.

When you said, you, you, you say they said the jumped over to, to the residential place, did you see anything upon your observation that they could have used to cross over into the residential place? Moving from this particular shop? --- You do not need to use anything to cross over to that residential. You use your feet.

Okay. Are there any staircases leading to this residential place leading from the business in question? Are there any staircases? --- Steps from the residential to the business?

Yes? --- No. It is the roof of that place, and the wall and the roof of that place.

Okay meaning that the only way in which one can, can move from, from this particular shop to the residential place, is through jumping over the wall? And there is no method which one can use except that? --- Yes there is no other way to jump, to get to that place. In the manner that

Just for a second Your Worship. Do, do you manage to see as to how the suspects or the accused were clamed? --- I cannot recall how they were clamed?"

See: Record page 57 line 2 to page 58 line 19.

14. Be that as it may, from the excerpt above it is clear that what he was asked was whether there is a staircase from the shop to the residential place and he understood the question to be whether there is a staircase from the residential building to the business, to which the appellants agreed, and his answer was no. However, it appears from his evidence that they had to go through the residential building in order to gain access to the rooftop of the shop. After he was asked where the security officers and the appellants as well as the co-accused came from, he responded:

“Because the shop was closed and then they went to the side, where there is a residential place. That is here they came. From that entrance of the residential place, that is where they managed to get to the top.” (My emphasis)

See: Record page 56 lines 18 – 21.

15. I find that the seemingly contradiction is not material. What is common cause between Thaba and Ramakolo is that as the shop was at the relevant time closed they got to the top of the roof where the burglary occurred through the adjacent residential building. Accordingly this ground of appeal should also fail.

16. The last ground of appeal is whether the trial court erred in rejecting the appellants’ version. As correctly pointed out by Mr Mongwane it is trite that the state must prove its case beyond reasonable doubt and that if the accused’s version is reasonably possibly true, he is entitled to his acquittal.

S v T 2000 (2) SACR 658 (Ck)

S v V 2000 (1) SACR 453 (SCA)

S v Van As 1991 (2) SACR 74 (W)

S v Van der Meyden 1999 (1) SACR 447 (W)

S v Tellingan 1992 (2) SACR 104 (C)

17. In evaluating the evidence the court should adopt a holistic approach. It should not look at the evidence in a piecemeal fashion. It would be entitled to look at the probabilities of the case.

S v Radebe 1991 (2) SACR 166 (T)

Sv Abrahams 1979 (1) SA 203 (A)

18. In casu the trial court did look at the evidence as a whole. It also considered the probabilities of the state as well as the defence case.

19. After analysing the evidence, the trial court correctly accepted the evidence of Thaba. He was found to be a credible witness, and that he was corroborated by other state witnesses. It came to the conclusion that the defence version is false because the appellants contradicted each other as to whether they were advised of the reason why the security officers wanted to handcuff them. The trial court further found it improbable that the security officers would have wanted to apprehend them whilst walking innocently in the street. The submission that he rejected the defence version simply because he accepted the state version is devoid of merit.

20. In the premises, I would dismiss the appeal.

21. Accordingly, I make the following order:

“The appeal against the conviction is dismissed.”

ML MAILULA
JUDGE OF THE HIGH COURT

I agree.

IS MLABA
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellants: Ms N Maharaj

For the Respondent: Mr VH Mongwane

Date of Hearing: 11 August 2016

Date of Judgment: 19 August 2016