



GAUTENG DIVISION, PRETORIA

Appeal No. A 124/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

25/4/2017

25/4/17
DATE SIGNATURE

In the matter:

TERENCE NDONGOMA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MIA AJ:

- [1] The appellant was charged in the District Magistrates Court, Cullinan with theft of 6 m copper cable valued at approximately R1000 (Count one) and contravening the provisions of section 49(1)(a) of the Immigration Act 13 of 2002 read further with section 250 of the Criminal Procedure Act 51 of 1977(Count two). He pleaded guilty on count two only and was convicted

on both counts. This is an appeal against count one, the conviction of theft of copper cable. The trial court granted leave to appeal.

- [2] The trial court considered the plea explanation tendered in terms of section 115 of the Criminal Procedure Act 51 of 1997 of the appellant that he was a motor mechanic and was well known in the community. On the day he had been assisting a client and was on his way home, in possession of his toolbox and cellphone when he was arrested. He tried to communicate this to the police and requested that they call his client whose number was on his cellphone, to no avail. He explained that his work suit was covered in oil stains from his work earlier in the day on the vehicle. He denied stealing or being in possession of copper cables. The state had led the evidence of three security employees Mr. Werner Smit (Smit), Mr. Dimakhatso Mathabe (Mathabe) and Mr. Vincent Baloyi (Baloyi) regarding the theft.
- [3] Mr. Moeng argued on behalf of the appellant that there were material contradictions in the State's case which resulted in the State not proving its case beyond reasonable doubt. He referred to the discrepancy between the witness Mathabe and Baloyi regarding the existence of the pick and argued that it was not possible for the appellant to have wielded a pick and for it not to be on the scene. He highlighted the difference in time between the witnesses Mathabe and Baloyi, one witness referring to a period of two hours while the other referring to a period of 5 minutes that they observed the three men digging before pursuing and arresting them.
- [4] He also argued that it was unlikely that the persons digging the hole would not have heard the witnesses who testified that they were 7 meters away

from the hole whilst there were no obstructions. Under these circumstances such persons would have been alerted to the presence of the security guards Mathabe and Baloyi and would have fled. He argued that it was thus unlikely that the evidence of the Mathabe and Baloyi was credible and could be relied on and the trial court ought not to have accepted this evidence.

[5] Mr. Molatudi argued on behalf of the State that it was not likely that security officers would blow their cover by making a call where they could be heard and it was entirely plausible that they made the call without being heard. He argued that the toolbox referred to by the appellant was never found on the scene to confirm his version that he was on route home from work. It was also convenient that his phone was not available to check his story that he was assisting a client. The contradiction with regard to the pick being used and the time difference were not of such a nature so as to reject the real evidence of the spade and hacksaw being found on the scene. It was also not disputed that the appellant was on the scene. He argued that the spade was used to dig the hole and was found on the scene. The contradictions regarding the pick and time difference were not material when compared to the evidence of the spade, the hacksaw and the presence of the appellant.

[6] The trial court considered the evidence of the persons effecting the arrest namely Mathabe and Baloyi as well as their supervisor Smit. Whilst the trial court noted some contradictions between the state witness Mathabe and Baloyi, the evidence of Smit clarified the time difference and supported Baloyi's version that they were posted on duty at 19h00 and the call was made at 21h00. Clearly Mathabe must have been mistaken about the time he observed the men and the time they called.

[7] The second issue related to Mathabe's mention of the pick and the unlikelihood of someone running off with a heavy pick whilst attempting to flee. The pick was not found on the scene. Both Mathabe and Baloyi were present and observed the persons at the hole and apprehended the appellant. The issue relating to the difference in time was clarified by Mr. Smit who referred to the time of the call and corroborated Baloyi's evidence. The court accepted the identification of the appellant by the witnesses and their apprehension of the appellant whilst at the hole. The court also considered the authorities which held that witnesses are not to be discredited due to contradictions *per se* but depending on their importance and bearing on the evidence. See *S v Makhole* 1990(1) SACR 95(A) 98 F-G.

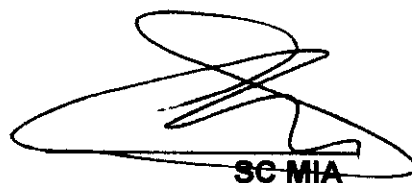
[8] The trial court considered appellant's evidence and the probabilities of his version. The appellant put forward a version that he was on his way from assisting a client but could not furnish the name of the petrol attendant who summoned him for assistance or the client. His phone and toolbox which were allegedly with him were never booked in with the tools and implements found on the scene. The trial court considered that the appellant's version ought only be accepted if it was reasonably possibly true referring to the dictum in *S v Mhlambo* 1957(4) SA 727 (A) at 738B-C where the court noted:

"An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

[9] Having regard to the totality of the evidence, the trial court considered that the appellant failed to place positive evidence forward despite making reference to the petrol attendant and a client who he alleged could support his version. This was in contrast to the States witnesses who positively testified that the appellant was at the hole where cable had been removed, was covered in soil and had been found digging at the site of the cable. I am not persuaded that the trial court incorrectly accepted that the State discharged the onus on it to prove the guilt of the appellant beyond reasonable doubt, in spite of the various contradictions mentioned above. Such contradictions do not detract from identification of the appellant, where he was found and in what position he was found on the scene. The appellant's version was correctly rejected by the Magistrate as not possibly true for the reasons indicated above.

[9] In the circumstances, I propose that the following order be made:

1. The appeal against conviction on count one is dismissed.



SC MIA

Acting Judge of the High Court

I agree

IT IS SO ORDERED.



PM MABUSE

Judge of the High Court

On behalf of the Appellant:

Instructed by:

On behalf of the Respondent:

Instructed by: