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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal number: A70/2017

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

CRONIN-DENE JANTJIES

Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, J et CHESIWE, AJ

HEARD ON: 21 AUGUST 2017

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 14 SEPTEMBER 2017

[1] The appellant, a 37 year old man and police reservist at the time, was arraigned on a plethora of charges in the Regional Court, Welkom. Despite his plea of not guilty, he was convicted of the crime of theft of the following items to wit, 1 x 9mm Parabellum Calibre Semi-Automatic Pistol with serial number [...], 1 x R5 assault Automatic Rifle with serial number [...]x R5 rounds and 15 x 9 mm rounds. He was sentenced to eight (8) years imprisonment of which two (2) years was suspended for a period of five (5) years on condition that he is not convicted again of theft or attempted theft during the period of the suspension. No order was made in terms of section 103 of Act 60 of 2000. He is now approaching this court on appeal, with leave to appeal granted by the learned magistrate, against both conviction and sentence.

[2] The facts can be summarized as follows. On the 18th August 2013, Warrant Officers W[...] and F[...] together with the appellant were part of a police contingent patrolling the area around the Welkom-Virginia Road. It was approximately 23H00 pm. A light at the nearby substation attracted their attention and they headed there to investigate. They were confronted by Eskom security personnel who informed them that they have been robbed of copper cable(s).

[3] All three (3) of them decided to follow the drag marks in an effort to locate the suspects. They later split in different directions trying to fine comb as much area as possible. On their return to where their motor vehicle was parked, they noticed that the appellant was missing. They went to look for him and even sounded the hooter but without success. Warrant Officer F[...] called him on his cell phone but that did not yield any positive results as well. They later found him next to the substation with his jersey and the buttons of his shirt torn. His clothes were full of grass and sand. He had no visible injuries. The appellant informed them that he had been robbed of his service R5 rifle and 9 mm pistol. They summoned a backup and despite a thorough search of the area they could not find the suspects and/or firearms. The next day the torch and the cell phone belonging to the appellant were recovered in the same area.

[4] On the 14th November 2013 at around 8H30 am, Warrant Officers Scott and Cilliers proceeded to the residence of the appellant situated at [...] G. S., B., Welkom.

They were armed with a search warrant to search the premises. After exchanging pleasantries with the appellant, they proceeded to execute it going from room to room. The appellant was always present and gave his full co-operation.

[5] In the bathroom he encountered a case which had a loose top. Immediately he discovered a R5 rifle. The circumstances with the appellant quickly deteriorated when he suddenly became aggressive and attempted to wrestle it away from him. He was immediately handcuffed and placed under arrest. The search continued and in the box containing clutter and placed outside the house, he found a 9 mm pistol with magazine and one (1) R5 magazine. He secured the safety of the firearms and summoned help from other members of the police.

[6] Warrant Officer De Bruin attended the scene and took the photographs of the firearms, seized the exhibits and packed them in the forensic bag. The R5 magazine was packed in the forensic bag number PW4000268735, 9 mm pistol with magazine in forensic bag number PW4000268736, R5 rifle in forensic bag number PW4000268737 and police radio battery in forensic bag number PW4000268740. All the exhibits were handed in at the police station and stored in the commonly referred SAP 13.

[7] Around the 18th of the same month, he teared the forensic bags in order to extract fingerprints from the firearms. He then put the exhibits in different bags with new numbers. These were later delivered to the Forensic Laboratory in Pretoria for analysis.

[8] The Station Commissioner of Bronville Police Station, Colonel Sehlabaka was called to identify and confirm that indeed those were the same firearms reported to have been robbed from the appellant a few months earlier. According to her she compered the registration numbers on the pocket book of the appellant and the firearm register. There is no evidence that she handled or examined or tested them.

[9] Counsel for the appellant submitted that there were apparent contradictions in the case of the respondent. He also made heavy weather about the location of the clutter box which was situated outside the house and easily accessible to other

members of the household. He pointed out, given the amendment of the recording of the exhibits and unprocedural manner in dealing with them, the chain of evidence had been broken. The State through Mr Hoffman supported the conviction and argued that the weapons were positively identified in particular by Colonel Sehlabaka. He conceded wisely so, that the chain evidence was broken. However, he submitted that the lapse was not of such magnitude that will vitiate the decision of the learned magistrate. I respectfully differ with this submission and deem his approach to be incorrect. This aspect will be discussed in the following paragraphs.

[10] This appeal turns on the question whether the evidence of Colonel Sehlabaka was correctly accepted by the learned magistrate. The appellant must show on adequate grounds that the trial court was wrong in accepting her evidence. The principles guiding a court of appeal to interfere on appeal with the findings of fact of a trial court were illuminatingly dealt with in **R v Dlumayo and another 1948 (2) SA 677 (A)**.

[11] The learned magistrate was correct in acquitting the appellant on other charges on the basis that the chain evidence had been broken from the moment the exhibits were seized from the residence of the appellant to the final analysis. His reasons are eloquently stated on **page 353 line 13 to 25 and 354 line 1 to 25:-**

“And when I make the evaluation of this contradictions and the criticism taking into account their numbers and importance and their bearing on the other parts of the witnesses evidence I found that indeed these contradictions and criticism are minors, they are not such magnitude that it can be said that the credibility of warrant officer Scott was affected by these contradictions and criticism.

It is vital that the state bear the onus to adduce evidence by each person who handed the exhibit from the moment the exhibit were discovered at the scene until presented in Court especially where such chain is placed in dispute. I have already outlined the criticism in as far as the evidence of Ms van Niekerk and Major Maqala is concern.” It is for this reason that I am not going to repeat the same. Safe to say that indeed the two

state witnesses made mistake in as far as the recording of the exhibit in the register and when the exhibits were taken to Pretoria. When one consider how the state witnesses handled this exhibits I found that indeed there was a broken lineage which create a missing link in as far as chain evidence is concerned. To this end I agree with Mr Kruger that where the defence dispute chain of evidence the onus rest with the prosecution to prove the same. The broken lineage alluded to above create a missing link of such magnitude that I found is detrimental to the case for the prosecution.

The broken linkage refer to above is so overwhelming as to create doubt that warrant officer Magela who works at forensic laboratory Pretoria might have analyses same exhibit related to this case before me. I agree with the defence attorney's contention that the stat's chain of evidence regarding the exhibit was not properly presented before this Court and therefore cannot be found that the chain evidence has been proved by the prosecution in as far as these exhibits are concern. I am not satisfied that the exhibits seized and collected from the scene of crime at [...] G. S. were taken and handled properly from the moment they were discovered or collected until analysis by warrant officer Magela".

This is in line with the decision of the court in **S v Sithole 2013 (1) SACR 298 (GNP)**. In that matter the learned judge dealt with the issues relating to the collection, marking and custody of exhibits before delivery or dispatching of the same to the laboratory. In the court a quo the learned magistrate correctly found that there was no causal nexus and that the respondent has failed to discharge the onus of proof.

[12] The learned magistrate relied on the evidence of Colonel Sehlabaka to return a verdict of guilty on count number 2. The relevant part of the transcribed record on **page 60 lines 1 – 21** reads as follows:-

**“Die warrant officer Scott waarvan u praat is die vorige staatsgetuie? ---
Ja. Hy het aan my gesê dat die vuurwapen wat is geroof vanaf meneer**

J[....] is daar op daardie adres gevind, en ek het hom gevra wie was die eienaar van daardie plek, hy het aan my gesê dat die huis behoort aan meneer J[....]. Ek het in die huis ingestap, hulle was besig om saam met hom te praat maar ek kan nie onthou wat hy was besig om te praat, hulle het my die vuurwapen gewys en my gevra om dit te bevestig, en ek het dit bevestig.

Hoe het u dit bevestig met ander woorde hoe het u dit vergelyk dat u inderdaad ... --- Dit was Z88 R5, daar was ook 'n hand radio, van daar af daar was polisieuniform.

Maar om seker te maak dat hierdie R5 en hierdie Z88 is wat u s'n is hoe het u dit vergelyk? --- Met die registrasienommers want hy het hulle geboek op die pocket boek sowel as die registrasieboek OB nommer firearm register, dit is waar hy het dit geregistreer.

Ek wil u net iets toon hierso, die register waarvan u sê hy het dit geboek ek toon u 'n dokument hierso dit is 5 bladsye, my geleerde vriend ek dink hy het dit, dit is 'n A12 SAPS 110. --- Ja dit is."

[13] Under cross examination she conceded that she was not the author of the document that she relied upon in her evidence in chief. The following is recorded on pages 68 line 11 to 25 and 69 line 1 to 7:-

"You can keep it with you I'm going to ask you questions on it later on. I first want to return to this document that you used in your evidence in chief the occurrence book alright. You are not the author of the inscriptions in this book? -- Ja.

You also do not direct the person who made these inscriptions on how to do them? -- Nee.

And apart from this document you have no personal knowledge of if these inscriptions are correct or not? -- Ek verstaan nie.

You were not the person who filled in this document, you were not the person who authored what is said in this document, so what I'm asking you is you don't know if what stands here what's written here is indeed correct or not that would be subject to the person who did that. --- Ek het nie die dokumentasie geskryf maar ek weet alles wat verskyn hier is die waarheid.

Madam I will put it to you then that the truthfulness of these inscriptions are subject to the credibility and reliability of the person who made the inscriptions which is not you. --- Dis korrek.

And in essence this whole document and all your testimony based on it is hearsay if these persons don't come and back up what you are saying or support corroborate what you're saying"

[14] Further cross examination revealed the manner in which she vacillated and equivocated in her evidence. On **page 72 line 12 to 25 and 73 line 1 to 22** the record reads as follows:-

"And you used this occurrence book as the mechanism to confirm it. --- Dis korrek.

Now you see that is the problem this book is lying at the SAPS, you have no idea why you are needed yet somehow some magically somehow you have the exact occurrence book for the exact date when the robbery of Mr J[....] took place with the exact alleged firearms that you need to confirm at the scene when you were called out without prior knowledge. --- Eintlik wat het gebeur is dat ek het nie die OB boek soontoe gevat nie, wat gebeur het is toe ek arriveer daar ek was gevra deur die vuurwapen en gelukkig ek was saam met mevrou Sibert, en ek het haar gevra vir 'n sekere serial nommer of ken u van die vuurwapen, en sy het dit ook bevestig. En ook toe ek arriveer daar by die polisiestasie wat het gebeur is dat ek het weer bevestig die vuurwapen register sowel as die ander OB boek en ek het gesien dat hulle was dieselfde.

Now ma'am you've now substantially changed your version, you understand that, the story that we are hearing now differs materially from what you testified in evidence in chief. This is the first time that we hear it was Sibert who confirmed not you, and that you did not have the OB with you, the occurrence book with you. --- Die verduideliking wat ek gee nou is dat u sê dat ek het met die OB gevat by die toneel, so wat ek sê is dat toe ek arriveer by die toneel wat het gebeur, dit is wat ek verskaf aan die Hof.

I put it to you that your version is changed because you realised that there is a possibility after the cross-examination, because it is not I who said so it was your evidence in chief, and if I was wrong the prosecutor would have made an objection to my asking you that. --- Die verduideliking wat ek gee nou is dat niemand het my gevra dat ek die OB gevat by die toneel, soos u het gesê dat ek sou nie die OB boek gevat van die polisiestasie af. So wat gebeur is dat ek het daar by die toneel gevat sonder die OB".

[15] In evaluating the evidence, the learned magistrate found that the firearms shown to Colonel Sehlabaka were the same that were booked out by and robbed from the appellant. They belonged to the South African Police Services. He concluded that it was impossible that the appellant could have been robbed by his family members in particular those he was living with. Further that the appellant was confronted with overwhelming evidence and elected to remain silent.

[16] In his analysis the learned magistrate appears to have concentrated on the evidence of Colonel Sehlabaka relating to the identifying of the firearms. He seemed to overlook the inconsistencies in her evidence and the unreliability of the document she was relying on. The state did not lead any evidence that she examined the firearms in order to confirm the serial number(s). There was also no evidence that she tested them that they were in a working condition. In addition there was no evidence led pertaining to her knowledge of the firearms and/or special qualities of the said firearms. The fact that these are well known firearms does not mean that proper evidence must not be led about the identification.

[17] The appellant did not tender any plea explanation but instead denied everything. This compelled the respondent to prove everything including whether the exhibits seized from [...] G. S., B. were indeed firearms. The learned magistrate did not consider the evidence in totality but did so in vacuum. All the charges arose out of the same set of facts. The evidence pertaining to the other charges is inextricably linked to this charge.

[18] The learned magistrate correctly found that the chain evidence has been compromised and contaminated through the conduct of the police. The removal of the exhibits from the original forensic bag into a new forensic bag was conceded and deemed to be unprocedural by Major Maqala. The outcome of the analysis of the forensic laboratory could not be relied upon to sustain any conviction. It is a misdirection to find the chain evidence broken in the circumstances and accept such evidence contaminated as it is, admissible in the very same circumstances only because it is a different charge. He should have found then that a conviction could not be sustained in these circumstances. To this extend the learned magistrate committed a misdirection both on the facts and law.

[19] I deem it unnecessary to deal with the decision of the learned magistrate on the election of the appellant to exercise his right to remain silent. I do so not out of disrespect for the learned magistrate. This matter could have been sufficiently decided on other evidence as illustrated in the preceding paragraphs. Suffice to mention that I have already found that the learned magistrate was wrong to find that there was overwhelming evidence against the appellant. In **S v Masia 1962 (2) SA 541 at 546 E-F** the court held that the failure to testify can only be used as a factor against the accused person if there is evidence that can sustain a conviction. In this matter there is none.

[20] The conviction can thus not stand on the accepted evidence and falls to be set aside.

[21] Accordingly I make the following order:

21.1 The appeal is upheld

21.2 Both conviction and sentence are set aside.

MA MATHEBULA, J

I concur

CHESIWE, AJ

On behalf of appellant: Adv. L Tshabalala

Instructed by: Bloemfontein Justice Centre

Bloemfontein

On behalf of respondent: Adv. R Hoffman

Instructed by: Director of Public Prosecutions

Bloemfontein