



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: A567/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHER JUDGES: YES /NO	
(3) REVISED	
17/6/15	<i>[Signature]</i>
DATE	SIGNATURE

23/6/2015

In the matter between:

JOSEPH TSEPO RAMOKADI
ABEL MOSEKEMANG ROOIBAADJIE
WEALTHMAN SMOUS NGCOBO
DAVID MASEGO ROOIBAADJIE

First Appellant
Second Appellant
Third Appellant
Fourth Appellant

and

THE STATE

Respondent

Heard: 30 April 2015

Delivered: 23 June 2015

JUDGMENT

A.A.LOUW J

Introduction

[1] On 13 March 2014 the four appellants were convicted on a count of theft of copper to the value of approximately R40 000 in the district of Benoni.

[2] On 14 March 2014 the appellants were each sentenced to three years' imprisonment of which 18 months' imprisonment were suspended for a period of 5 years on certain conditions.

[3] The appellants were granted leave to appeal against the conviction and sentence imposed on them

Conviction

[4] Reed & Mitchell is an industrial company. Cool It is an air-conditioning company which on a regular basis serviced the air-conditioning equipment at the premises of Reed & Mitchell.

[5] The four appellants entered the premises of Reed & Mitchell (the complainant) in two vehicles. There is an exit and entrance control to the premises as well as security cameras inside the building from which the yard could be watched.

[6] What is no longer in dispute is that they were seen taking the copper in various boxes or containers from a building on the complainant's premises

and loaded these into their vehicles. They were stopped before they could exit at the security gate. The vehicles were searched and the copper found.

[7] The copper weighed 461kg and its value was R40 000.

[8] On appeal the only point that was argued is that the court a quo erred in finding them guilty of theft whilst the appellants were not successful in stealing and that the conviction should therefore have been for attempted theft only. This was the simple issue on which the appeal turned.

[9] The magistrate rejected this argument as far-fetched because he stated they had already completed their action or, to put it differently, *contrectatio* was completed.

[10] On behalf of the appellant reliance was placed on the 5th edition of *Criminal Law*¹ as well as *State v Tau* decided in this court².

[11] The eminent writer of this text book opines that the word *contrectatio* no longer plays any useful role in South African law. He defines the act of appropriating ownership of another's goods as follows:

“By diefstal in die vorm van saakonttrekking bestaan die toe-eieningshandeling uit enige handeling ten opsigte van ‘n saak waardeur X

(i) die regmatige eienaar of besitter uitsluit van sy saak en

¹ CR Snyman p499; I am in the possession of the Afrikaans, 6th edition which I shall quote hereunder.

² 1996(2) SACR 79 (T) 102 g-h

(ii) *self die bevoegdheid van 'n eienaar oor die saak uitoefen.*

*X gedra hom dus asof hy die eienaar of reghebbende is terwyl hy dit nie is nie, en oefen in die plek van die reghebbende self die beheer oor die saak uit.*³

[12] He further gives the following examples also with reference to the *Tau* case:

“Dat 'n blote aanmatiging van beheer oor die saak nie voldoende is vir 'n diefstalhandeling nie, maar dat daar verder vereis moet word dat X deur sy optrede Y van sy saak moes uitgesluit het, blyk duidelik uit twee uitsprake, naamlik Tau en Mzandi. In Tau het X beheer uitgeoefen (of minstens hom die beheer aangemagtig) oor 'n stuk ru-goud, maar in die smelthuis van die goudmyn waar die handeling plaasgevind het, was die sekuriteitsmaatreëls so uitstekend dat hy nooit daarin sou geslaag het om die ru-goud uit die smelthuis te verwyder nie. Die hof het tereg beslis dat X nie diefstal van die ru-goud gepleeg het nie, omdat hy nooit daarin geslaag het om Y van sy effektiewe beheer oor sy saak uit te sluit nie. In Mzandi het X by 'n huis ingebreek, artikels soos 'n hoëtrousetel van een plek in die kamer na 'n ander plek onder 'n bed verskuif en dit in 'n sak geplaas. Die artikels is egter nooit deur hom uit die kamer verwyder nie. Vermoedelik was sy bedoeling om dit later te kom

³ At p510

*haal wanneer dit vir hom veiliger was, maar dit het nooit gebeur nie. Die hof het tereg beslis dat X nie diefstal in die huis gepleeg het nie, maar hoogstens poging tot diefstal, omdat die werklike eienaar nooit sy beheer oor sy artikels verloor het nie. Alhoewel daar 'n aanmatiging van beheer oor die artikels was, en alhoewel X hom dus self die bevoegdhede van 'n eienaar aangematig het, was daar nooit 'n effektiewe onttrekking van die artikels uit die werklike eienaar se beheer nie.'*⁴

[13] When this authority is applied to the facts in this case it is clear that the magistrate was not correct in finding that *contractatio* was **the** requirement and that theft had in fact been completed. The appellants had throughout been watched on CCTV and vehicles are routinely searched at the security gate before they exit. This is where the appellants were apprehended. They clearly did not succeed in excluding the owner of its control of the copper.

[14] In my view therefore the appeal must succeed on this basis namely by replacing the conviction for theft with that of attempted theft.

Sentence

[15] I am however not of the view that this have any meaningful effect on sentence. The fact that they were stopped short of the gate and therefore did not complete the theft is no credit for them. I view the sentence imposed by the magistrate as a light one for theft of this magnitude and therefore find that

⁴ At p511

this sentence is suitable, exercising my own discretion, for the crime of attempted theft as well.

[16] On behalf of the appellants it was argued that the magistrate erred in making an example of them by overemphasizing that theft of copper is rife in the area of the court's jurisdiction; that the appellants worked in a group; they were in a position of trust and that they failed to show remorse.

[17] In my view it is established that these four factors exist. The question simply is what weight should be given to these factors taking into account the circumstances mentioned hereunder. As regards the position of trust it is so that this case can be compared to theft from one's employer as the company they worked for regularly performed services at the complainant's premises. They did in fact bite the very hand that was feeding them. In this connection the following was said in *State v Prinsloo*:

*"Theft from an employer must be heavily punished. The employer is entitled to unswerving honesty from the employee in return for the wages he pays and the benefit he gives him... the employer is particularly in a vulnerable position in relations to employees who choose to deal with the employer's assets. I consider the duty of the courts whenever this sort of misdemeanour is detected to send out a message that such conduct will be severely punished"*⁵

⁵ 1998(2) SACR 669 (W) at 672 b-e

[18] On the other hand Legodi J stated that it is important to keep first offenders out of jail, in so far as it might be possible⁶.

[19] The main contention for an argument that they should be kept outside of a prison is that they were all gainfully employed and were family members who supported their respective families and that the copper was retrieved.

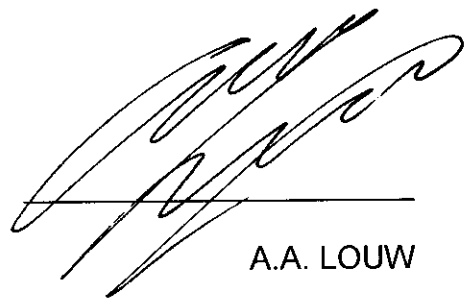
[20] In my view having regard to the nature of the offence, the community interest and their personal circumstances, I am of the view that an appropriate sentence is three years' imprisonment of which 18 months are to be suspended for a period of five years.

Order

I therefore make the following order:

1. The appeal on conviction succeeds. The conviction of the appellants for theft is set aside and replaced with a conviction on attempted theft.
2. The appellants are sentenced to three years' imprisonment half of which is suspended for a period of five years on condition that each appellant is not convicted of theft or attempted theft committed during the period of suspension.

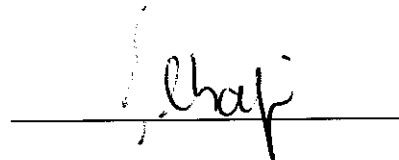
⁶ *State v Chipape* 2010(1) SACR 245 (GNP)



A.A. LOUW

Judge of the High Court

I agree



V.V. TLHAPI

Judge of the High Court

For the Appellant	:	Adv. M van Wyngaard
For the First Respondent	:	Adv. Makanda
Instructed by	:	The DPP