

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

Appeal number: A237/2015

In the matter between:

TAHLO KATADI

Applicant

and

THE STATE

Respondent

CORAM: RAMPAL, J *et* REINDERS, AJ

HEARD ON: 7 DECEMBER 2015

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 10 DECEMBER 2015

[1] This is an appeal. The appellant was found guilty in the district court and sentenced to an effective sentence of 18 months imprisonment. He was aggrieved particularly by his conviction. The respondent does not support the conviction.

[2] An incident took place at Theunissen on 22 April 2015. The actual scene of the incident was apparently at shaft number 4 of Beatrix Gold Mine.

- [3] The appellant was arrested soon after the incident was reported. Subsequent to his arrest he was criminally charged. The first charge was that he unlawfully and intentionally stole 14kg of copper cables worth R920.36 the property or in the lawful possession of Sibanye Gold Mine or Mxolisi Menxe or Khayaalethu Cenyane at Theunissen on 22 April 2015. The prosecution also alleged in the charge sheet that he unlawfully and intentionally damaged a booster motor valued at R13 514 the property of or in the lawful possession of Menxe at the same place and date. That was the second charge preferred against him.
- [4] He first appeared on 23 April 2015. All along he has been in custody. The appellant was tried in the Theunissen District Court. His trial commenced on 20 July 2015. Mr Morolong appeared for the defence and Ms Eksteen for the prosecution. He pleaded not guilty to the charges. He explained that he was employed as a shepherd; that he was on duty as such on the day of the incident; that he was herding his employer's livestock on his employer's farm that morning; that he was arrested on that farm close to Steeldale Farm; that from there he was taken to the mine where he was accused of damaging mine property and stealing copper. The accusations were false, he said.
- [5] Notwithstanding his plea, the appellant was found guilty as charged on 19 August 2015. On the same day he was sentenced to 6 months and 12 months imprisonment in connection with the first and the second charges respectively. The sentences have to run consecutively. He was aggrieved.

[6] The appellant unsuccessfully applied for leave to appeal in the district court. He pursued the matter further by way of a petition. On 18 November 2015 this court, per Molemela, JP et Mohale, AJ granted him leave to appeal against his conviction.

[7] The version of the state was narrated by two witnesses, namely:

Mr Mxolisi Menxe, a security guard and Mr Richard Ngema, an electrician.

[8] The version of the defence was also narrated by two witnesses, namely:

Mr Tahlo Katadi, the appellant or accused and Mr Thadi Barnard Thoabala, the constable attached to the community service centre at Theunissen. In common parlance such a centre is called a police station.

[9] There were 13 grounds of appeal listed in the notice of appeal dated 2 September 2015. Among others, the appellant contended:

9.1 That the district magistrate erred in accepting the testimony of one eye witness and in rejecting the version of the appellant;

9.2 That the court *a quo* erred in finding that the appellant damaged the booster motor of the water pump and that he

was found in possession of copper cables stolen from such motor;

9.3 That the court *a quo* erred in failing to consider the probabilities and improbabilities in the case as a whole;

9.4 That the court *a quo* erred in concluding that the version of the appellant was not reasonably true and

9.5 That the court *a quo* also erred in finding that the state had proved the charges against the appellant beyond reasonable doubt.

[10] The primary issue in the court *a quo* concerned the identity of the perpetrator. The residual question relative to that issue that arose on appeal was whether the trial magistrate adopted the correct approach in evaluating the merits and demerits of the prosecution's case as against the merits and demerits of the defence case.

[11] In **S v Radebe** 1991(2) SACR 166(T) at 182 Swart J remarked:

“Die staatsaak moet, met inagneming van die sterkhede en swakhede daarvan, saam met die verdediging se saak, en dié se sterkhede en swakhede, in die weegskaal gegooi moet word.”

I am in respectful agreement with that sound approach.

- [12] In **S v Chabalala** 2003(1) SACR 134 (SCA) another significant dimension was added. The aforesaid approach was developed further. At para [15] Heher AJA, as he then was said:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking into account inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”

- [13] Where the balancing act favours the state, then and only then, can a conviction follow. Conversely, where the balancing act favours the defence, the accused is entitled to his acquittal. Where the scale appears to be evenly balanced, the same principle applies. The accused must be acquitted.

- [14] The correct approach requires that evidence should be evaluated to ascertain whether it is reliable or unreliable. In **S v Trainor** 2003(1) SACR 35 (SCA) at para [9].

“A conspectus of all the evidence is required. Evidence that was reliable should be weight up alongside such evidence as may be found to be false. **Independently verifiable evidence**, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated **against the onus on any particular issue** or in respect of the case in its entirety.”

- [15] The headnote of the decision in **S v Jochems** 1991(1) SACR 208(A) reads as follows:

“In considering whether the state has discharged the onus of proof resting on it, the trial court is obliged to consider the evidence as a whole and such defects as there might be in the evidence of the accused do not materially assist the state in discharging the onus if the evidence of the state is open to serious criticism.”

I share those sentiments but I underlined the preposition “and”. Once it is replaced with the preposition “but” the headnote reads a whole lot better. I think that my preferred preposition accords well with the good intentions of Milne JA.

- [16] Now I turn to the version of the state. The first state witness was Mr Menxe. His evidence may be condensed as follows: He was designated as a priority crime investigator. In common parlance the witness was a security guard deployed on the mine. He was in the employ of Sibanye Protection Services. He followed up a report he received from one Mr Julius Heinz. He and a colleague of his then proceeded to the galley box number 2. At the corner of that galley box he saw an unknown man carrying a green handbag. They drove towards him. The man dropped the bag and instantly took to flight when he saw them coming. They pursued him, arrested him and took him back to the bag he had dropped. Inside the bag they found copper cables. From there they took the fugitive to the security officers. I suppose the witness meant security offices. An electrician was then called.

He inspected the copper cables. He ascertained that they were copper windings and that they matched those of the booster motor. They weighed the copper and established that its mass was 14kg and its value R920.36. The suspect was present during that process. He identified the suspect as the appellant. The electrician was a certain Mr Richard Ngema.

[17] At the heart of the dispute or issue was the identity of the culprit. It is trite that the evidence of identity is approached and treated by the courts with caution. Similarly the evidence of a single witness is also treated with caution. Where, as in this case, a single witness testified about the identity of the alleged culprit, which identity was in dispute, a trial court has to be doubly cautious.

[18] The question of identity was disputed from the outset of the trial. In his plea-explanation the appellant pertinently averred that he was not the culprit; that he was wrongly accused; and that he was not on the mine where the booster motor was damaged and its copper windings stolen. On the contrary he averred, through the explanation of his plea, that he was on the farm where he was herding his employer's animals at the time of his surreptitious arrest.

[19] It was clear from Mr Menxe's testimony that he was not alone when the appellant was arrested. Although he never named his colleague, there was reason to believe that one Khayaletu Cenyane was his companion. The gentlemen's name featured in the charge sheet in respect of the first charge. He must have witnessed the events prior to the appellant's arrest because he

was part of the live action, just as Mr Menxe was. Yet the state failed to call him in order to have Mr Menxe corroborated. Mr Cenyane could easily have done so. I have to qualify this last comment. He could easily have done if Mr Menxe's testimony was true. There was absolutely no explanation given as to why such an important eye witness was not called. Moreover, the prosecution did not avail the witness to the defence after the close of the state case. Those were curious aspects of the prosecutor's conduct.

[20] In those circumstances it had to be assumed that Mr Cenyane was available to testify. Therefore, an inference adverse to the state case must be drawn for the prosecution's failure to call him. Failure to call a witness has adverse consequences (See **S v Teixeira** 1980 (3) SA 755 (AD) at 763 G – 764 B.

[21] During the course of delivering judgment, the district magistrate said the following about Mr Menxe:

“And he is not a single witness, because the accused admit (sic) a lot of the evidence of the state witnesses.” See page 68:12-13 of the record.

The magistrate went a step further to say:

“So the state did not really call a single witness. There is a lot of aspects was (sic) confirmed.” See page 68: 20-22 record.

[22] The a foregoing quotations clearly demonstrated that the district magistrate did not evaluate Mr Menxe as a single witness as he was required to do. The law required that the evidence of that particular witness be treated with caution. The district magistrate obviously misapplied the cautionary rule as it applies to a single witness. In my view the district magistrate materially erred in that regard.

[23] The trial magistrate implicitly acknowledged that there were serious shortcomings in the evidence of the single witness. That much was apparent from the aforesaid two quotations. He appreciated that some corroborative evidence was necessary. However, he reasoned that the shortcomings in the evidence of the single witness were effectively remedied by a lot of aspects admitted or confirmed by the appellant. No such redeeming admissions on material aspects were spelt out. On my own, I could find none. There was a dispute as to precisely where the appellant was arrested. According to him he was confronted on the farm and not on the mine. The dispute raised the question whether or not there was a physical boundary, for instance a fence, between the mine and the farm. According to him he was not carrying any bag but a stick. According to him he did not run away at any stage immediately prior to his arrest. Those were all material considerations. They were at the heart of the identity dispute. The appellant did not admit those material aspects. The onus was on the state to prove them by means of credible and reliable evidence of identifying witnesses.

- [24] Whatever defects there might have been in the appellant's evidence or that of his witness could not materially have assisted the state in discharging the onus – **S v Jockerns**, *supra*. Whatever merits there might have been in the state case were materially weakened by its failure to call Mr Cenyane. It must be born in mind that Mr Menxe admitted during cross examination that the appellant was arrested in an open field on the farm.
- [25] However hard I tried, I could find no admission by the appellant that so materially supported the version of Mr Menxe as to render the calling of Mr Cenyane unnecessary. The version of the single witness and that of the appellant were poles apart. They were diametrically opposed. Because they were, corroborative evidence was required to support the disputed version of the state. In my view the district magistrate materially erred in finding that the evidence of the appellant supported that of the single prosecution witness in respect of a lot of aspects. The failure to call that witness was, therefore, one of the weaknesses in the prosecution case. However, it was not the only weakness. There were others. I proceed to deal with them below. The witness' evidence was open to serious criticism. **S v Jochems**, *supra*.
- [26] In the first place, no one, not even Mr Menxe, saw the appellant damaging the booster motor of the water-pump. It appeared that a certain Mr Heinz saw the damage first. In what circumstances he discovered the damage, we were not told and we shall never know. He too was not called to testify. By the look of things, he saw non-one in the vicinity of the galley box where the water pump was. Shortly after his discovery Mr Menxe burst on the

scene and immediately saw the appellant carrying a suspicious plastic bag.

[27] Why Mr Heinz did not earlier see what Mr Menxe shortly saw, we do not know. I guess he did not see the appellant in the vicinity of the galley box. Perhaps that explains why he was not called. The appellant was never taken to the maliciously damaged water-pump. On the strength of Mr Ngema's evidence that the copper windings in the bag matched the copper windings in the booster motor, the court inferentially reasoned that the appellant was, beyond reasonable doubt, proven to have maliciously damaged the property of the mine. There was no clear evidence that the electrician actually examined the copper windings of the booster motor. Moreover, the element of malice, in other words malicious intent, was hardly averred in the charge sheet.

[28] In the second place, during cross examination Mr Menxe admitted that the booster motor could not have been stripped by bare hands and that tools must have been used to strip it and to remove its copper windings. It was undisputed that no tools whatsoever were found in the bag or in the appellant's possession at the time of his arrest. That evidence was a material consideration. On the one hand it tended to weaken the prosecution case, based on circumstantial evidence, that he was beyond reasonable doubt responsible for the malicious damage. On the other hand it tended to fortify the appellant's defence that he was not involved in the alleged malicious actions. It *prima facie* tended to be indicative of his innocence **S v Chabalala**, *supra*.

[29] In the third place, the charge sheet was not a model of good draftsmanship. The proforma form was not properly completed. The appellant was not sufficiently informed about the second charge. It was alleged that Mr Menxe was the owner or lawful possessor of the booster motor allegedly damaged by the appellant at Theunissen on 22 April 2015. See page 78 of the record.

However, without applying to the court to have the charge sheet amended, the prosecutor casually amplified the charge sheet in respect of the second charge she said:

“... malicious injury (sic) to property, the accused is guilty of malicious injury (sic) to property in that upon or about the 22nd of April 2015 and at or near Theunissen in the district, division of Theunissen the accused did unlawfully and intentionally damage a booster pump to the value of R30,540.00, the property or in the lawful possession of Mr Menxe and also Sibanyi Gold Mine with the intention to injure (sic) the said property.”

[30] As can be seen, Sibanye Gold Mine was then added as one of the possible owners or lawful possessors of the booster motor. However, there was no evidence about such an enterprise. I have reservation as to whether there existed a mine called Sibanye Gold Mine. Perhaps it did, I am not entirely certain. The trial magistrate found that Mr Menxe gave evidence that he worked at shaft number 4 of Beatrix. The finding was not supported by evidence. Although I am uncertain about the existence of Sibanye Gold Mine, I am certain that Mr Menxe

evidence was that he worked for a business enterprise called Sibanye Protection Services. It may well be that Beatrix Gold Mine is one and the same entity as Sibanye Gold Mine or Sibanye Protection Services. I do not know. The question is how are we, sitting on appeal, to know if there was no evidence led on those aspects. I have earlier remarked that the specific intent of malice was not alleged.

- [31] In the fourth place, the 14kg mass of the copper windings was also a material consideration. It appeared to me that the significance of the evidence was not appreciated. No mention of the mass was made in the judgment. An object of that mass is quite heavy for an average man to carry. In my experience as a shopper I found it to be physically demanding to carry a 5kg bag of sugar over a very short distance from a shelf to a till in a supermarket by hand. I would imagine, therefore, that a man of average physical strength would find it very difficult to carry, by hand a 10kg let alone 14kg object over any distance of significant length. The evidence concerning the mass of the copper somehow tended to favour the version of the appellant. It seemed to me that he would not have been able to carry such a massively heavy load by a single or even by both hands. The mass of the copper windings was an independently verifiable evidence that should have been considered in order to see if it fortified the evidence tendered by the prosecution or the defence. **S v Trainor**, *supra*. It was lamentable to realize that such objectively reliable evidence was not considered. It would, therefore, appear that evidence which appeared to strengthen the merits of the appellants case and necessarily weakened the state

case, was not taken into account. The approach adopted was contrary to the decision in **S v Radebe**, *supra*.

- [32] In the fifth place, Mr Menxe's evidence was that the appellant must have stripped the booster motor at night. If that was indeed the case, then the appellant would probably had done all he could to remove his ill-gotten loot at night still. It was improbable that he would foolishly have waited to do so during daytime when the risk of been spotted and caught was so much greater than during night-time. In my view it was highly improbable that a man who chose to operate under cover of darkness, in order to reduce the risk, would defeat that very purpose by taking the tools away but leaving the loot behind on the scene of the crime in order to remove it during daytime.
- [33] To the extent that the district magistrate did not take into account these probabilities and improbabilities on both sides he committed a misdirection on a question of law. **S v Chabalala**, *supra*. That being the case, it would not have been decided with conviction, that all the elements that pointed either to the guilt or innocence of the appellant as an accused were evenly weighed up. Seeing that some important considerations favourable to the appellant were left out of the equation, it could not have been correctly decided that the balancing scale so heavily tilted in favour of the state as to exclude any reasonable doubt about the guilt of the appellant. Therefore, doubt must have existed as to whether the appellant had maliciously damaged the motor and unlawfully stolen its copper windings.

- [34] In the six place, I want to deal with the appellant's attire. It was put to Mr Menxe, by the appellant's attorney, that at the time of his arrest, the appellant was wearing a blanket; that he was carrying a stick and that he had a shepherd's watch dog with him. The response of the witness was that he saw none of those. I guess he would probably have given the same answer had he been asked if he had seen the sheep. Since the witness did not really deny the substance of what was put to him, the appellant's version on those points had to prevail. If it is accepted, and I think it should, that there was a watchdog and that there were sheep in the open veld where the appellant was arrested, then the evidence of the state witness becomes suspect. His evidence that he did not see the dog, the blanket and the stick indicated that his powers of observation were questionable. These were unfavourable features of his evidence. The evidence of identifying witness must be shown to have been reliable **S v Mthetwa** 1972 (3) SA 766 (A) at 768 A – D. The witness failed the test. His version was open to serious doubts.
- [35] The defence witness, Constable Thoabala, though not a good witness, corroborated the version of the appellant. Not only did he corroborate the appellant version but he added a material aspect to it. He added that the appellant was wearing gumboots. Therefore, the appellant was dressed in a typically cultural way of a Mosotho shepherd from Lesotho.
- [36] I find it difficult to imagine a shepherd wearing gumboots and a blanket trying to run away in order to escape arrest. That is one thing. The other is this: Stealth has always been a feature of

stealing. A man on a criminal mission to steal is unlikely to have a watch dog on his side. This is the other thing. These considerations tend to favour the appellant's version that he was on a farm, herding sheep and not on the mine stealing property.

[37] The version of the appellant was that he was employed as a shepherd; that his employer owned a farm adjacent to the mine; that he was herding a flock of sheep on the day in question; that two security guards from the mine approached him on the farm; that he refused to get into their vehicle; that they forcefully took him away from the farm to the mine; that there he was accused of stealing copper cables and that no such stolen property or damage was shown to him. It later became known that the farm in question was known as Van Glen Ross.

[38] The district magistrate rejected the aforesaid evidence of the appellant. He found that it was not reasonably true. Among other grounds of the rejection, the district magistrate believed that Mr Menxe's evidence was true because the witness previously appeared in that court several times. Such an approach was incorrect, with respect. The district magistrate was required to consider the evidence of that witness within the context of the peculiar factual matrix of this particular case in isolation from the previous good impressions the witness had previously created in unrelated cases.

[39] Witnesses do frequently appear before the same judicial officers. In those circumstances, judicial officers may form good or bad impressions about such witnesses at times. It is natural to take

such previous impressions into account. But it must be borne in mind that it is subjective judgment and the result of a number of factors whose varying weight depends on the peculiar circumstances of a particular case. It is an unsafe game to routinely play – Credibility of Witness (1985) 102 SALJ 32. It was clear and obvious, therefore, that the version of the appellant was not rejected on the grounds of its inherent demerits but rather on the grounds, among others, that the appellant came up against a witness very well known to the court and about whom the trial magistrate had formed favourable previous impressions. The perception was created that it was the trial magistrate previous knowledge of the witness, and related favourable impressions that made him believe the witness and disbelieve the appellant. See **R v L** 1955 (1) SA 575 (T) for a contrary viewpoint.

What was required of the state was to establish, that the version of the appellant was not reasonably true. That, the state failed to do, in my view.

[40] During the course of the judgment the district magistrate said the following about the appellant:

“You did not even try to explain to the court why you say it could not be you.”

By so saying the district magistrate erroneously shifted from the state to the accused the onus which rested on the state.

“It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one believes him is not the test. As pointed out in many judgments, the test is whether there is a reasonable possibility that the accused's evidence may be true.”

S v V 2000 (1) SACR 453 (SCA) at 455 a-c.

The appellant was not obliged by law to call his employer as a witness. His decision not to call his employer could not be correctly held against him as it was. The onus remained on the state throughout the entire duration of the trial to prove the guilt of the appellant beyond reasonable doubt. **S v Ntsele** 1998 (2) SACR (SCA) (AD) at 182 B-D and **S v V**, *supra*.

[41] It follows, therefore, that the district magistrate erred in a number of respects on matters of fact and on questions of law. I would, therefore, uphold the appeal on the grounds as set out in paragraph 9, *supra*.

[42] Accordingly I make the following order

42.1 The appeal is upheld;

42.2 The conviction in respect of each of the two charges is set aside and it is substituted with the order as set out below;

42.3 The accused is found not guilty in respect of both charges.

M.H. RAMPAL, J

I concur

C. REINDERS, AJ

On behalf of the appellant: Adv. J.S. Makhene
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the defendant: Adv. S. Chalale
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