

IN THE HIGH COURT, BLOEMFONTEIN
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A195/2013

In the appeal between:

MOEKETSI LUCKY PAKELA

Appellant

and

THE STATE

Respondent

CORAM:

MUSI, J *et* MBHELE, AJ

JUDGEMENT:

MBHELE, AJ

HEARD ON:

5 MAY 2014

DELIVERED ON:

29 MAY 2014

- [1] This is an appeal against conviction and sentence. The appellant, who is a police officer, was convicted of theft out of a motor vehicle and sentenced to six months imprisonment in terms of Section 276(1)(b) of the Criminal Procedure Act 51 of 1977.
- [2] The appellant applied for leave to appeal and it was refused by the trial court. This court granted leave to appeal.
- [3] In convicting the appellant the trial court relied on the evidence of three state witnesses. The evidence was to the effect that the accused broke into a vehicle that was parked in

an enclosure or yard where confiscated cars were parked (SAP13 section).

- [4] The appellant and all 3 state witnesses are Police Officers stationed at Theunissen Police station. It was alleged that the appellant was caught in the act, removing amplifiers from a vehicle kept for safety at the Police Station. It was further alleged that a torch, hand gloves and a screw driver were found in his possession. One amplifier was detached from the vehicle while the other one was almost detached with only three of four screws left to keep it in its place.
- [5] The first state witness Constable Ntorela went to inspect the SAP13 section, after he became suspicious when he saw the police vehicle which was driven by Warrant Officer Lesibe, parked far from the police station, at an unusual spot. While inspecting vehicles in the SAP13 section he saw a wooden object placed on the boot of a Honda Ballade. Upon removal of the said wooden object the boot went open and the appellant came out of the boot.
- [6] The second witness Constable Kale said he took a decision to inspect the SAP13 section after he had noticed that the gate leading to the SAP13 section had been left open and the pad lock was missing. The appellant jumped out of the boot in the presence of Constables, Ntorela and other two female police officers, constables Tsotsane and Morwe.

- [7] The following is common cause: Warrant Officer Lesibe was called to the scene, the tools that were alleged to have been used in the commission of crime were not seized and never recorded into the SAP13 register. The incident was not recorded in the pocket books/diaries of all the police officers who handled the crime scene nor was it recorded in the occurrence book kept at the police station.
- [8] The appellant denied any involvement in the theft. The appellant's version was that on the night of the incident he was confronted by Ntorela and Kale while walking from the lecture hall, where he was writing a statement to the charge office. They accused him of having stolen amplifiers out of a vehicle that was kept at the SAP13 section of the police station.
- [9] The basis of the appellant's appeal is that the court erred in rejecting his version and also that the state witnesses had reason to implicate him falsely, because he advised a female friend to lay a charge of rape against another police officer who is a friend of the state witnesses.
- [10] It is trite that the state has to prove its case beyond reasonable doubt. The appellant's version must be reasonably possibly true. If the court finds that it is reasonably possible that the accused's version is true, then he is entitled to acquittal.

[11] The court *a quo* found that the state proved its case beyond reasonable doubt. The court *a quo* found that the state witnesses were truthful and reliable, more particularly Warrant Officer Lesibe who has testified before and it for the past 14 years and could not find fault with him or his testimony. The court condemned the appellant for not recording the incidents of that night in his pocket book but found no fault with the state witnesses for committing the same omission. More weight was put on the appellant's failure to produce the docket for which his statement was needed.

[12] Upon cross-examination it emerged that the two female police officers who were working at the charge office on the night of the incident would, if called, have contradicted the state's version. The state did not call those two female officers who would have shed light on the movements of the appellant as he alleged that he was at the charge office where he took a notepad for writing his statement before proceeding to the lecture hall. The conduct of the state witnesses, on the night of the incident leaves many questions unanswered.

[13] The police pocketbook is a "bible" of any police officer and I find it strange that they all chose not to record this incident in their pocketbooks. The incident was not even recorded in the occurrence book at the charge office as is normally the practice.

[14] What is even more strange is that they failed to confiscate and record the tools that were used and found on the scene of the crime in the SAP13 register.

[15] It is unfathomable how a person acting alone, could get into a boot of a car and manage to put a wooden block on its lid to keep it closed.

[16] I have asked myself the question whether the state's case was so strong and convincing that it justified total rejection of the appellant's version. The answer is no. The court *a quo* in its analysis of the evidence expected the appellant to prove his innocence and disregarded the material defects that were so glaring in the state's case.

[17] In the magistrate's view the appellant was expected to give reasons why the state's witnesses implicated him falsely. This approach is wrong as it puts a burden on the appellant to speculate and find reasons why the state witnesses implicated him falsely. See **S v Ipeleng** 1993 (2) SACR 185 (T).

[18] I am of the view that the state has not succeeded in proving the guilt of the appellant beyond reasonable doubt.

[19] I therefore make the following order:

19.1 The appeal against conviction and sentence succeeds.

19.2 The conviction and sentence are set aside.

N. M. MBELE, AJ

I concur.

C. J. MUSI, J

On behalf of the appellant: Adv. T. Langenhoven
Instructed by:
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of the respondent: Adv. E. Liebenberg
Instructed by:
Director: Public Prosecutions
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