



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: CA&R 101/13

Heard on: 19-03-2014

Delivered on: 28-03-2014

In the matter:

**TEBOGO MOFANA
TEBOGO MOSATA**

**FIRST APPELLANT
SECOND APPELLANT**

And

THE STATE

RESPONDENT

Coram: Lacock J et Phatshoane J

JUDGMENT ON APPEAL

PHATSHOANE J:

1. Mr Tebogo Mofana and Mr Tebogo Mosata, the first and second appellants, were arraigned before Ms Prinsloo at the Magistrates' Court for the district of Kimberley on a charge of theft of a bag with the contents out of a motor vehicle. They were each sentenced to three years imprisonment. With leave of this Court they are before us on appeal against both convictions and sentences.
2. At the trial the state called two witnesses, Constable Nonfo Modisamongwe and Mr Bernadus William Roche Matjan, the complainant. Const Modisamongwe says that in the early hours of the morning of 22 September 2012 he and W/O Lucas Johannes Jacobs noticed the appellants standing next to a turquoise Toyota Yaris motor vehicle with registration numbers: Layla NC.

When the appellants noticed them they ran away. He and W/O Jacobs chased after them in their police vehicle. In the course of the chase the first appellant tossed away a bag. They were caught up with and arrested behind Changes Night Club in Dunell Street, Kimberley. The two police officers returned to the vehicle where they had earlier spotted the appellants standing. They found that the front left passenger window of this vehicle was broken. In an effort to trace the owner of the vehicle, the police officers shouted out the name on the vehicle registration plate "Layla" at the nearby flats where the vehicle was parked. Two gentlemen approached them. Mr Matjan identified himself as the owner of the vehicle. He explained that when he parked his vehicle its windows were intact and closed and its doors were locked.

3. Const Modisamongwe intimates that there was a pair of tekkies, a wallet with a drivers' license and a cellphone charger in the bag. The complainant testified that there was also a perfume bottle in the bag while inside the wallet there were cards and R350.00 cash. Nevertheless, the police could not find any cash in the wallet.
4. The appellants' version is that they had been socializing at Changes Night Club with two ladies, Mpho and Refilwe. They left the club accompanied by Refilwe while Mpho remained behind chatting to someone. Outside the night club they requested Refilwe to return to the club to look for Mpho. While they were waiting, two policemen in a police van accosted them and falsely accused them of having broken the window of a motor vehicle. They were searched and arrested.
5. During the cross-examination of the first appellant the prosecutor enquired from him whether he intended to call Refilwe. He responded positively. At the end of his testimony he closed his case without calling Refilwe. The second appellant took the stand. After his cross-examination the Magistrate enquired from him if Mpho and Refilwe were present in Court. His response was in the negative. This is what appears further on record:

"Do you intend to call them?---If the Court want them here, yes
 It's not the Court who wants anyone, and you?---I can bring them here to testify.
 Accused No 1 yesterday said he can call anyone of them easily by calling them with a phone call. You say you can call them, that is why the Court ask whether anyone of you bring them along today? --- Your worship I was not informed whether they would be needed today.

You will not be informed because it is up to you whether you want to call witnesses for yourself. But let's go back to the event..."

6. At the end of the second appellant's testimony on 04 December 2012 their legal representative requested a postponement so that he could call W/O Jacobs, the state witness who was made available to the defence at the end of the state's case. W/O Jacobs was not readily available due to ill-health. The trial Magistrate granted the defence a postponement to 10 December 2012 on which day W/O Jacobs took the stand and, on the contrary, corroborated the state's case. At the end of W/O Jacobs' testimony the defence requested a further postponement to call Refilwe and Mpho. Counsel for the defence intimated that his instruction was that the first appellant visited Mpho's home to secure her as a witness but was told that she went to Upington for the school holidays and would return on 09 January 2013. At Refilwe's home he was told that she was in Barkly West.
7. The Magistrate was of the view that on 04 December 2012 when the appellants testified they had indicated that they were to call Refilwe and Mpho and on their own account it was easy for them to get hold of these witnesses. She stated that when the appellants requested a postponement on 04 December 2012 their intention was to call W/O Jacobs to testify and not the two ladies. She accused them of only enquiring after the availability of these witnesses on the Thursday before the resumption of the trial and ascribed it to delaying tactics. For these reasons the Magistrate refused the appellants' application for a further postponement. Faced with no option the defence closed the case for the second appellant.
8. In her Judgment the Magistrate reasoned that, in respect of the first appellant, she did not refuse him leave to call his witnesses because he closed his case after he had testified. She states that her decision not to allow a further postponement was because the testimony of the two defence witnesses would have come to naught because the appellants contradicted each other and had called W/O Jacobs as a witness who completely corroborated the state's case.
9. The conviction of the appellants is attacked on various grounds. One such ground is that the Magistrate denied them the right to a fair trial by not affording them an opportunity to call material witnesses to support their alibi defence. It

was contended that the Magistrate knew that the trial was conducted during the festive season when one of these witnesses was on vacation.

10. It is a principle of elementary justice that an accused person be afforded a full opportunity of giving evidence in his own defence and of calling such other witnesses as he or she may desire. See *District Commandant, South African Police, and Another v Murray* 1924 AD 13 at 17. In terms of s 35(3)(j) of the Constitution, the accused has a right to a fair trial which includes the right to adduce and challenge evidence. In *S v Younas* 1996 (2) SACR 272 (C) at 274 the Court made the following pronouncement on the Magistrate's failure to allow an accused the right to call a witness:

"I do not think that respondent's request can fairly be described as a delaying tactic. To me it represented a genuine and understandable concern on the part of respondent to adduce the evidence of others to support his own denials of much of what applicant had said.

The fact that applicant made a good impression on the court could hardly justify a refusal to give respondent the opportunity to adduce countervailing evidence. On the contrary it would seem to me that in the interests of justice there should have been all the more reason to allow the fullest ventilation of respondent's case.

The fact that the Act envisages a less rigid and formal procedure than is normally the case cannot be used as justification for a denial to a respondent (ie an accused) of his fundamental right to a fair hearing.

In my view the magistrate's refusal to allow respondent to call a witness or witnesses resulted in just such a denial; it constitutes a gross irregularity in the conduct of the proceedings. Nor can it be said (cf s 309(3) of the Criminal Procedure Act 51 of 1977) that, despite the irregularity, there was not a failure of justice. In my view, there was. One does not know what the witness or witnesses would have said; the further evidence could have given the lie to applicant and altogether destroyed her credibility. It is idle to speculate; respondent should have been given the chance to call witnesses; the denial to respondent of the opportunity to call witnesses was gravely prejudicial to his case. Justice has clearly miscarried and the correct course open to this Court is to set aside the conviction and sentence and refer the matter back to the magistrate's court.

Ordinarily in these circumstances the matter would be remitted to the magistrate who has previously heard it; however he is aware that respondent has a previous conviction for a crime of violence, viz robbery, and one cannot exclude the reasonable possibility that he may be influenced by this knowledge. An order will therefore be made for retrial de novo before a different magistrate."

See *S v Selemana* 1975 (4) SA 908 (T) at 909A-D and authorities cited therein; *S v Nkambule* 1995 (2) SACR 444 (T); and *District Commandant, South African Police, and Another v Murray* (supra).

11. The Magistrate stance that the appellants should have made a firm decision earlier on during their trial that they intended to call the two witnesses cannot

be reasonable. It was within the province of the defence to determine which evidence they wished to put before the Court and at what stage. For as long as they do not cause undue delays or disrupts the proper functioning of the Court and the criminal justice system the door to properly prosecute their defence must not be closed on them. It matters not that the first appellant had already closed his case. What matters is that the second appellant had still not closed his case.

12. It remains the obligation of the trial Court to establish the truth and to evaluate the evidence placed before it or determine its weight or cogency. The evidence of the two witnesses which the appellants intended to call was, in my view, relevant. Evidence which is relevant is admissible. In *S v Trainor* 2003 (1) SACR 35 (SCA) at 41b-c para 9 Navsa JA said the following:

“A conspectus of all evidence is required. Evidence that is reliable should be weighed alongside such 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 the 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.”

13. I am of the view that the denial by the Magistrate to afford the appellants the right to call their witnesses is a misdirection which led to a failure of justice and vitiates the proceedings.
14. This is not a case where the trial Magistrate would be dispassionate enough to deal with the issues as she has assessed the merits, convicted the appellants, and is also now privy to their previous convictions. To my mind, the sensible course to follow is the commencement of the retrial *de novo* before a different Magistrate.

In the result:

Order:

1. The conviction and sentence are set aside.
2. The case is remitted to the Magistrates' Court, Kimberley, for retrial *de novo* before a different Magistrate.

M.V. PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

I concur:

H.J. LACOCK

JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the Appellants	Ms N.M. Mazibukwana
Instructed by	Kimberley Justice Centre
On behalf of the State	Adv T. Kelaotswe
Instructed by	Director of Public Prosecutions