

04/3/13

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IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER A 208/12

BEFORE THE HONOURABLE JUDGES: MAKGOBA J, THULARE AJ

In the matter between

SWATE WILLIAM MALESELA

AND

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES ☒ NO

(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO

(3) REVISED.

APPELLANT

RESPONDENT

4/3/13

DATE

SIGNATURE

JUDGMENT

THULARE AJ

[1] Appellant, a 35 year old male was convicted of housebreaking with intent to steal and theft and sentenced to 5 years imprisonment in the Regional Division of Gauteng held in Pretoria on 10 June 2011. He was legally represented at the court *a quo*.

[2] Appellant was granted leave to appeal against his conviction only.

[3] Appellant pleaded not guilty to the charge, elected not to disclose the basis of his defence, exercising his right to remain silent. The State called two witnesses, and appellant was the only witness for the defence.

[4] Peter Matage Damons (hereinafter referred to as Damons for ease of reference) testified that he knows appellant. They used to seek employment together within the areas of Waterkloof and Groenkloof and also used to share their food a long time ago.

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[5] Damons was at work on 7 October 2010 at house number 124 Main Street Waterkloof. He worked and slept there. He took a bath at house number 126 as the electricity at 124 was switched off. On that day he woke up at about 05H00 from 124 and went to 126. He locked the house and the gate of 124. At that time there was nobody inside yard 124.

[6] After his shower, when he went back into 124, he found appellant inside the yard. It was after 20 to 25 minutes. Appellant is also known as Mpieriewierie and he called him by that name and asked him what does he want in that yard as he (Damons) worked there, and also asked him how he got entry into the yard as he (Damons) had locked the gate.

[7] Appellant's answer was that he slept there, meaning at 124. Damons further testified that when he approached appellant, he noticed that appellant was standing next to the inside gate and there were items on the ground next to him, to wit, the inside of a geyser that is made out of copper and lamp shades that hang from the ceiling. Appellant then showed him, on a flower bed, a place where appellant said he slept. Damons saw some sheets and other materials there on the ground next to where he saw appellant.

[8] Damons testified that he asked appellant where the items came from and before appellant could answer he then called other males that he worked with who slept at 126. When they came, appellant ran away down Queen Wilhemina into Lange street and when he went into Lange street Damons went back to Main street, but after about five minutes appellant came back. When appellant came back to him, he told Damons that he is not the one who took the items from the house and that he knew those who did, one of them being Long. Appellant was saying he was chasing those people when he ran out.

[9] Damons' testimony is that he knows the person named Long, but that he did not see this person on that day in or near the yard and that he saw appellant alone in the yard. He saw nobody running away from the house. The inside of the geyser was removed from the geyser and the lamp shades were removed where they were hung from the ceiling. The items belonged to his employer, Gerhard.

[10] House number 124 had a board that it was for sale. There was some renovations done and if a person went passed the person would believe that nobody stayed there, according to Damons.

[11] After appellant came back where Damons was with other males, Damons called the owner who came 10 to 15 minutes thereafter. He then explained to the owner what he saw and what appellant said to him and then police were later called to the scene. Damons said he had a good relationship with the appellant before the incident.

[13] Gerhardt Janse van Rensburg testified that he got a call from Damons, a temporary worker they had engaged to assist in demolishing houses from which they intended to do a development, Damons told him he (Damons) had arrested somebody who was stealing from a house yet to be demolished. Upon his arrival on the scene he found Damons and the appellant sitting on the ground on the pavement and Damons showed him some items that he claimed appellant was found with. It was a copper water tank that came out of an old geyser that was in the receiving space room and four brass light fittings which were taken from the same house. The fittings were consistent of intricate brass bowls and globe inside it. Because they were second hand, they would cost about R1000-00 to R1500-00. He then called the police who then arrested appellant. When asked what appellant said to him if anything, his answer is that appellant said it is not true. The damage that he saw was where the copper tank was taken from the geyser which was inside the ceiling. The ceiling was broken up when the geyser was taken. The light fittings were also no more hanging from the ceiling. He is not sure whether the window was broken before or during the break-in. The geyser is an old one, because of the copper, the damage there can be about R1500-00.

[14] Appellant testified that he is self-employed and does paving and building. He and Damons know each other. On 7 October 2010 he travelled from home and did not have enough money to travel back home and he had to get a place to sleep. Whilst walking, at the corner of Queen Wilhelmina and Main Streets he saw a house and realized nobody was staying there. This is because the house was dark, there were no curtains and the wall was broken. He went in and got to the trees and flower bedding. He slept there. At around 05H30 he heard footsteps of people walking inside the yard. He lit his torch and saw people running away. He recognized them as Long and Bob. He went to inspect where they were coming

from and he found the copper geyser and the lights at the gate. It was at that time that Damons came and saw him. Appellant denies that he ran away. He told the owner when asked what he was doing there, that he was just sleeping. He denies having broken therein or stolen any items. He was not tied or held and could have fled but he did not, even when waiting for the owner or later for the police. He was during that period doing paving for Waterkloof Primary and was employed by the community. Although he knew Damons, he did not know that Damons lived at that house until that morning. Although he knows people doing the same job as him, they are not used to borrowing money to each other.

[15] At the close of the defence case, the court *a quo* postponed the case to the 9th June 2011 because the Regional Magistrate wanted to ask Damons some question(s). On the day the question(s) was to be asked, this was not done and the parties proceeded to address that court on the merits whereafter the matter was rolled to the next day for judgment and sentence.

[16] In my view, the Magistrate was correct in her finding that appellant's version that he slept at the flower beds of house 124 on the night of 6 October 2010 is reasonably possibly true.

[17] At least from Damons' testimony we know that a tree had fallen onto the wall and that the wall was broken, through which one could jump into the yard. What we also know, is that the window was broken, the burglar proof was broken, the ceiling was damaged and that the geyser was damaged. From the evidence of appellant and Damons, the impression is that at least the wall was damaged sometime before the 6th October 2010. Damons testimony is that he closed the window himself on the evening of 6 October 2010 and that everything was intact. His version is further that the lights had not been working for some time before that day.

[18] Janse van Rensburg informed the court that Damons told him that he (Damons) ran after the appellant and caught him. I have reason to believe that this is the report that Damons gave to Janse van Rensburg. In court, Damons said the appellant ran away and came back out of own accord after five minutes. If appellant wanted to escape and did run away, it is improbable that he would after such escape out of his own accord return to the same place and the same people

from whom he ran off, especially where he stood accused of such serious allegations.

Moreover, even in court, Damons changed his version from that the items were in appellant's hands to that they were on the ground as and when it suited him, depending on the question. Furthermore, the impression Damons created to Janse van Rensburg was that it was his industry, of running and catching appellant, that led to the recovery of the stolen items which appellant fled with. In court, his version is that when appellant ran away, he did not take the items with, as they were lying on the ground. These contradictions in the account of Damons, collectively in my view, have a negative impact on his credibility.

[19] It is against this background that one approaches the question as to when the windows, the burglar proof, the ceiling and the geyser was damaged. Damons say he closed the window the previous evening and that everything was intact. Janse van Rensburg says he saw the broken window but he cannot say whether that was broken before or whether it was broken at the time of the break-in.

[20] There is no direct evidence that implicates the appellant with the commission of the crime of housebreaking with intent to steal and theft. For all intents and purposes, the State relies on the evidence of a single witness, to wit, Damons. Janse van Rensburg's testimony in the main was to formally prove ownership only.

[21] The approach to be adopted, in my view, is set out in *S v Shackell* 2001(2) SACR 185 (SCA) by Brand AJA as he then was at paragraph 30 when he said:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step."

See also *S v V* 2000 (1) SACR 453 (SCA) at 455 paragraph 3 (i).

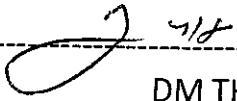
[22] I am inclined to pronounce myself in terms similar to how Moosa J did in *S v Janse van Rensburg* 2009 (1) SACR 216 at 223 paragraph 20 when he said:

"The complainant is a single witness and in the light of all the omissions and contradictions, I do not agree with the findings of the trial court that the evidence of the complainant was satisfactory in every material respect. The version of the appellants, although highly suspect, cannot, on the totality of the evidence and the probabilities, be said to be not reasonably possibly true or false beyond reasonable doubt."

[23] In my view, notwithstanding some probabilities in the version of appellant, there remains a reasonable possibility that the substance of his version is true. It is not for me to speculate as to what it is that concerned the Magistrate such that she deemed it meet to recall Damons. Whatever it is, in the totality of the circumstances, in my view, the appellant ought to have been given the benefit of the doubt.

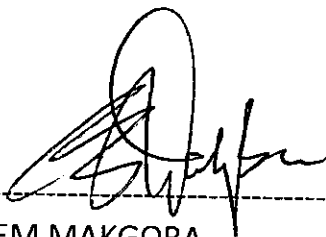
I would make the following order

1. The appeal against conviction is upheld.
2. The conviction and sentence are set aside.



 DM THULARE
 ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.



 EM MAKGOBA
 JUDGE OF THE HIGH COURT