

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A176/2008

In the appeal between:-

BRAKIE SAMUEL MOLOI

Appellant

and

THE STATE

Respondent

CORAM: EBRAHIM, J *et* LEKALE, AJ

HEARD ON: 7 FEBRUARY 2011

JUDGMENT BY: LEKALE, AJ

DELIVERED ON: 24 FEBRUARY 2011

INTRODUCTION:

[1] The appellant was convicted of theft by false pretences and sentenced to a fine of R2 000,00 or 4 (four) months imprisonment by the Magistrate's Court at Harrismith on the 15th May 2008.

[2] He now approaches this Court by way of an appeal against the

conviction with the leave of the court below.

BACKGROUND:

[3] The appellant was arraigned after the complainant had laid a charge against him about one month after the incident.

[4] The complainant testified before the trial court, as the sole witness for the State, to the effect that on the relevant Saturday she met the appellant at a supermarket some 100 metres from the latter's workplace. The appellant requested her to go to the post office to deliver a card and to return with his cellphone. He offered her R20,00 to run that errand. The appellant took her to a bottle store which he informed her was his workplace. The appellant, furthermore, invited her to pledge something as security that she would return with his cellphone. She, thereupon, gave him, as security, R210,00 in cash together with the R20,00 which he had advanced to her for her services. When she later returned to the bottle store, the appellant had changed into another T-shirt and denied that he had sent her to the post office. She returned on three occasions but the

appellant persisted in his denial.

- [5] The appellant's case was simply that he only left his workstation when he went to the toilet and was at his workplace from 09h00 to 17h00 on the day in question. He denied that he had sent the complainant to the post office or met her before she confronted him and relied, in this regard, on an attendance register as his alibi.

GROUND OF APPEAL:

- [6] In the Notice of Appeal and the Heads of Argument submitted on behalf of the appellant it is, effectively, contended that the Court *a quo* erred in finding that the State had proved its case beyond reasonable doubt because it committed a misdirection when, in its assessment of the probabilities, it preferred the complainant's version to that of the appellant.

APPELLANT'S SUBMISSIONS:

- [7] Advocate Pretorius submitted, *inter alia*, that:

- 7.1 the appellant's version that he was on duty on the day in question and did not leave the bottle store is reasonably possibly true; and
- 7.2 the appellant was a credible witness and it was not strange that the complainant had identified him after a month because she saw him on, at least, three occasions at the bottle store, prior to making the identification.

THE STATE'S CONTENTIONS:

- [8] Advocate Liebenberg, for the State, conceded that there were a few disconcerting features about the complainant's version but nevertheless supported the conviction on the basis that the magistrate had correctly rejected the appellant's version on the ground that the attendance register did not prove that the appellant did not leave the bottle store at any stage on the relevant day.
- [9] In addition she submitted that the complainant had had an opportunity to see, talk to and hear the appellant and, as such, her identification of him as the culprit was reliable. She argued

that the conviction was, on this ground, also sound.

ISSUE TO BE DECIDED:

[10] The question to be decided in this appeal is whether or not there exists a reasonable possibility that the appellant's version might be reasonably possibly true.

APPLICABLE LAW:

[11] The test is whether there is a reasonable possibility that the appellant's evidence may be true. The court does not have to believe the appellant's story in all its details. For a verdict of not guilty to be returned, it suffices for the court to find that there is a reasonable possibility that the appellant's evidence may be substantially true. (Compare **S v JAFFER** 1988 (2) SA 84 (C) and **S v SAULS AND OTHERS** 1981 (3) SA 172 (A).)

[12] In order to resolve a conflict of fact between the evidence of the State witnesses and that of an accused person, the court applies its mind not only to the merits and demerits of both the State and the defence witnesses, but also has regard to the

probabilities of the case.

See: **S v VAN DER MEYDEN** 1999 (2) SA 79 (W);

S v VAN ASWEGEN 2001 (2) SACR 97 (SCA).

FINDINGS:

[13] The Court *a quo* considered the appellant's alibi in isolation and lost sight of the fact that in law, there is no onus on the accused person to establish or prove his innocence. What the Court *a quo* failed to keep in mind is that if the appellant's alibi might reasonably possibly be true, in the light of the totality of the evidence, he was entitled to an acquittal.

(See **R v HLONGWANE** 1959 (3) SA 337 (A) at 340 – 341.)

[14] Applying this legal test, we are satisfied that the learned magistrate erred in his assessment of the probabilities. We find that it is improbable that the appellant would have deprived the complainant of her money under false pretences in circumstances such as the present and, at the same time, tell

her where he could be found so that she could have him arrested and criminally charged.

[15] The magistrate also ignored the fact that the complainant did not go to the police station to report the matter at the earliest reasonable opportunity, but only reported the matter a month later. This factor, alone, raises doubt about the complainant's credibility in the context of her explanation that she was told she could not go to the police station on the day of the theft because the police station closed at 13h00.

ORDER:

[16] The appeal accordingly succeeds.

[17] The conviction and sentence are set aside.

L.J. LEKALE, AJ

I concur.

S. EBRAHIM, J

On behalf of appellant: Mr. P.L. van der Merwe
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On behalf of respondent: Adv. E. Liebenberg
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/sp