



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

**NOT REPORTABLE
DATE: 10 SEPTEMBER 2009**

**MAGISTRATE SERIAL NO.19/09
CASE NO: 614/08
HIGH COURT REF: 674**

In the matter between:

**BOMGANI NGWENYA
THABANG NTHOKE MAGAHLELA
DAVID SHOKA APHANE
and
THE STATE**

**1ST ACCUSED
2ND ACCUSED
3RD ACCUSED**

RESPONDENT

REVIEW JUDGMENT

MAVUNDLA. J.,

[1] Accused 1 Bongani Ngwenya, a male aged 24 years old, accused 2 Thabang Nthoke Magahlela a male aged 23 and accused 3 David Shoka Aphane a male aged 26 all appeared on 24 February 2009 before the Magistrate at White River on a count of theft of clothes valued at R1000 the property of or in the unlawful possession of Mr. Price or City of Couriers and Mr.

Fredirick Hermanus Geldenhuys, on or about 25 November 2008.

[2] They were unrepresented. Their right to legal representation had been explained to them and they chose to conduct their own defence. They all pleaded not guilty but were however eventually found guilty on theft and sentenced on 5 May 2009 as follows:

- 2.1 Accused 1 and 3 sentenced to a fine of R2000 or 200 days imprisonment.
- 2.2 Accused 2 sentenced to a fine of R3000.00 or 300 days imprisonment.
- 2.3 All three accused were further sentenced to a further 8 months imprisonment suspended for 5 years on condition that each accused is not found guilty of theft, fraud committed during the period of suspension.

[3] The matter came before me by way of review on 25 May 2009. I forwarded the following queries to the magistrate per letter dated 26 May 2009:

- 1. Accused 2 and 3 indicated that they speak Northern Sotho.
- 2. From the record it is not clear whether the interpreter was conversant in Northern Sotho
- 3. What language was employed to interpret to accused 2 and 3?

- 4 Can it be said that accused 2 and 3 had a fair trial if the proceedings were not explained to them in their language⁹
5. On what basis was the version of accused 1 and 2 rejected?
- 6 Was there evidence that the three accused committed theft?
- 7 On what evidence can it be said that the State had proven the guilt of the three accused beyond reasonable doubt?
8. Accused 2 is the one who was found carrying the bag
9. Should he not have been found guilty of being in possession of stolen goods?
10. Were accused 1 and 3 not supposed to have been acquitted, if not, why not?"

[4] The relevant magistrate was on leave as from 8 May 2009 to 8 June 2009 and as a result there was a delay in responding to the aforesaid queries. He has since responded to these queries and his response has been forwarded to the office of the Director of Public Prosecutions. The Senior State advocate H.S. Ngobeni has kindly furnished his opinion, with which S Lakhi-Hatia, Deputy Director of Public Prosecutions agrees, for which I am thankful and to which I shall later refer.

[5] I do not intend to deal with the query relating to the interpretation, since I am of the view that nothing much turns around this point. I say so because the magistrate in his reply

has stated that the proceedings were interpreted, *inter alia*, in Northern Sotho because the interpreter is conversant with IsiSwazi. Northern Sotho, S Sotho. Zulu, English and Afrikaans.

[6] Accused 1, in disclosing his defence in terms of s115¹ explained that on the day in question they went to Bushbuckridge to deliver some goods, and then his co-accused told him that he had picked up a bag. They then put the bag inside the truck and continued with their duties. They went back with the bag of his co-accused but did not, after logging off, report at work that his co-accused had picked up the bag. The supervisor took them to the bus terminal and left them about 50 meters therefrom, and they then proceeded on foot. A security guard came, stopped them and searched the bag that was with his co-accused and found some clothes therein. When a receipt was demanded, his co-accused said that he did not have one, and they were all three arrested.

[7] Accused 2 stated that he pleaded not guilty because he did not know anything. Accused 3 stated that they went to deliver at Bushbuckridge. He was inside the truck when his friend accused 2 came inside having a bag. It was already 22: 00 when they arrived at their work place next to Nelspruit. They asked their supervisor to take them to their residential places or

¹ Criminal Procedure Act No 51 of 1977.

to the bus stop. Their supervisor dropped them at White River where they then walked on foot. After walking a short distance a security guard came while accused 2 was holding the bag. They found clothes inside the bag. When asked where they had found the clothes, accused 3 responded by saying that he did not know. They were all taken to the police station where they were locked up.

- [8] The magistrate then requested the accused to confirm whether they understood the language spoken. Accused 1 indicated that he speaks isi-Swazi but can understand a little English. Accused 2 indicated that he can hear IsiSwazi but cannot speak it. Accused 3 indicated that he speaks Northern Sotho and understands a little English.
- [9] The first State witness called was Mr. Frederik Hermanus Geldenhuys who indicated that he had no problem in the use of either Afrikaans or English. He testified that he is a security officer with Maxis Security. He was patrolling when he came across the three accused on 25 November 2008 at about 20 00. One of them, Accused 2, was holding a sports bag. He searched the bag and found new clothes with labels still inside the plastics and having price tags. He inquired from the accused as to where the clothes were from, whereupon all three said that the clothes had been bought from somebody. Upon inquiring about the slip, the one who was carrying the bag responded that the clothes had been bought from someone. He said that the

accused were not assaulted.

- [10] Mr. Ngwenya. in cross examination, denied that the witness had asked him where he had got the bag from adding that only the one who was carrying the bag had been asked. The witness maintained that all three of them had given the same answer. He did not have further questions to this witness
- [11] Accused 2 disputed that this witness had asked them about where they had got the clothes from. The witness maintained that he had asked them and that they all had responded that one person at the mall had sold the clothes to them. Accused 2 further disputed the time they came across the witness, adding that the time was approximately 22: 00 or 23: 00. The witness maintained that it was 20: 00. The witness further testified that the accused had requested them to let them go offering to give them the goods and to pay them. Accused 2 denied these last mentioned allegations. Accused 3 did not have any questions to the witness.
- [12] The second state witness called was Mr. Christo Swart who testified that he is in the employ of City Couriers in Rock Street. He said that he knew all three accused as he had employed them He further testified that on 25 November 2008 the three accused had gone to do some deliveries. On 26 November 2008 he was called to the police station where he identified some clothes still covered in their plastics, with their tags still on

as those of Mr. Price. He further said that he usually communicated with the accused through a supervisor in IsiSwazi or Shangaan.

- [13] Accused 1 did not have any questions to Mr Swart. Accused 2 put it to Mr Swart that if something is missing they do not notice that immediately until after a day or two. Mr Swart agreed with this suggestion. Accused 3 did not have any question to this witness.
- [14] The court asked Mr Swart what his reaction would be if he was walking in the street and picked up a bag which was easily accessible Mr Swart gave his possible reaction. I deem it not necessary to record his response or possible reaction because his possible reaction is of no consequence in the determination of the guilt of the accused. After this witness the State closed its case
- [15] Accused 1 testified in his own defence. He testified that he confirmed what he had said at the beginning of the trial. Under cross examination accused 1 stated that accused 2 had come with the bag and told them that he had picked it up from the bush outside Mr. Price shop. He testified further that he had seen the clothes when they were taken out from the bag by the security guard that had arrested them. He further said that he had asked accused 2 what their explanation would be when

asked where the clothes had been from. He further testified that his co-accused had hidden the bag just before they arrived at their place of employment when they returned from doing the deliveries. Accused 3 had been the driver of the truck. He further testified that it had been accused 2's idea that the bag be hidden because he said he had picked up the clothes. The first State witness spoke to accused 2 who was having the bag.

[16] To the court's question whether he had seen the contents of the bag when they were on their way to their company, accused 1 answered that he had seen the bag, opened it but that he had not searched it. He further said that he knew that accused 2 had not gone inside Mr Price shop because he was walking outside while he, accused 1, was inside Mr. Price collecting IBT. He further said that when they went inside to deliver accused 3 was standing near the truck and he himself was collecting the IPD. While exiting from the shop he saw accused 2 coming around a corner of Mr. Price shop. Accused 2 and accused 3 did not have any questions to ask accused 1.

[17] The proceedings were then remanded to 6 March 2009 and the bail of all three accused was extended. On resumption on 6 March 2009 accused 2 testified in his defence. He testified that they were returning from Bushbuckridge on the day in question. There was a bag which he had left at White River. They went to knock off at their work place. They asked their supervisor to take them to White River. They then went to take the bag where

they had left it. They were stopped by the security guard at gun point and asked where the items in the bag were from. He told them that he had picked them up but the security guard arrested them after telling them that they had failed to produce the receipt for the items.

[18] Accused 1 asked accused 2 to tell the court where he had picked the bag up in Bushbuck Ridge. Accused 2 answered that he had picked it up from a dustbin when he had gone to pass water. Accused 3 did not have any question.

[19] On being cross examined by the State prosecutor, accused 2 said that he had opened the bag and found some t-shirts therein. He said that there was no shop nearby where he found the bag in the dustbin which he described as a big rubbish dustbin. He did not take the bag to his company because there were no lost t-shirts there. He conceded that the items he had found had belonged to Mr. Price. He also conceded that the items were still inside their plastic bags. Accused 1 and 3 did not have any questions to him. The proceedings were then adjourned to 23 March 2009 for the witness of accused 2.

[20] On resumption of the proceedings on 23 March 2009, accused 2 informed the court that he was closing his case. Accused 3 also did not testify and proceeded to close his case.

[21] The magistrate evaluated the evidence of both the State

witnesses and that of the accused. The magistrate accepted the evidence of the State witnesses adding that the three accused had not so much challenged the evidence of the first State witness. The magistrate concluded that the three accused had been in possession of the bag and that they were all aware of its contents before they reached their place of employment. The magistrate further concluded that the three accused had a duty to reveal the contents of the bag to their supervisor or to the firm as they had ample time to do so. The magistrate proceeded to reject the version of all three accused and found them guilty as charged.

[22] All three accused addressed the court in mitigation. The personal circumstances of accused 1 are that he is [.....]. He is single and unemployed and has two children aged [.....] year and [.....] and [.....] year and [.....] months both with different mothers. He is staying with the mother of one of these children, who is receiving child grant. He is not certain whether the mother of his other child is receiving child grant. He has a tuck shop from which he gives an amount of R200 to the mother of his child he does not stay with. He said further that he makes about R1100 per week.

[23] Accused 2 is [.....] years old. He is single and has three children two of whom are twins who are [.....] years old. The other child is [.....] months old. He does temporary work as a brick layer and gets R40 per day. His highest qualification is grade [.....]. He

was employed for 8 months at [.....]. His expenses per week are R500 for groceries. R300 for the children and R200 for general things and his income was R500 per week. He further does not have parents.

- [24] Accused 3 is [.....] years old. He had just started working as a taxi driver, driving from Germiston to Pietersburg and was going to earn R500 per week. He had not yet received his salary on his arrest He is staying with his parents. His uncle maintained him His brother is doing grade [.....].
- [25] The proceedings were then adjourned for sentence to 5 May 2009. The accused were sentenced as indicated in paragraph [2] above.
- [26] It was correctly submitted by Mr. Ngobeni, that according to the evidence, the items involved had allegedly belonged to Mr Price or were to be delivered to them and had not yet been recorded in their stock. Mr Swart from City Couriers did not tell the court that the items were missing from their depot. The accused were only found in possession of the property.
- [27] For the offence of theft, the identification of the owner or person entitled to the property or in possession thereof is one of the important prerequisites for a successful prosecution. The State failed to adduce any evidence proving who the owner or lawful possessor of the articles

[28] Accused 2 testified that he had picked up the bag containing the clothes from a dustbin and brought it to the truck. Accused 3 did not testify. He had indicated in his plea explanation that he had seen the clothes in the truck. The magistrate stated in his judgment that it is clear that all three accused were in possession of the bag and that they were aware of its contents. In my view, the fact of the matter is that the evidence of the State is that accused 2 alone was in possession of the bag². The fact that accused 1 and 3 were aware of the contents of the bag, does not help the State in proving theft nor possession of the bag containing the clothes against in particular accused 1 and 3.

[29] I am of the view that the magistrate misdirected himself in finding all three accused guilty of theft. Accused 2, in my view, failed to give a reasonable explanation for his possession of the clothes. His explanation that he had found the bag and the clothes in a dustbin, was in my view correctly rejected by the magistrate. Geldenhuis testified that the explanation given to him was that the goods had been bought from someone. The magistrate found no reason to reject the evidence of this witness. In my view, he correctly rejected that of the accused. He should,

² Pages 8 line 25 -9 line 1 of the record F H Geldenhuy's evidence "Are you able to tell the court who of the three had it with him? Who was carrying it? -The one that is sitting in the middle "

however, have found accused 2 guilty of contravening s36 of Act 62 of 1955 - possession of suspected stolen property.

[30] For a conviction on possession of suspected stolen property, the Deputy Director of Public Prosecutions S Lakhi-Hatia and a Senior State Advocate. H S Ngobeni, and. correctly so, opined that a sentence of R1000.00 or 8 months imprisonment would be in order. Such a sentence, in my view, having regard to the circumstances of the case and the personal circumstances of the accused stated above, indeed, is appropriate.

[31] The conviction of all three accused on the count of theft, in my view, is not in accordance with justice and should, therefore be set aside and substituted.

ORDER

1. The conviction of all three accused on theft and accused 2's sentence are set aside and substituted as follows:
2. "1. Accused 1 and 3 are found not guilty and discharged.
2. Accused 2 is found guilty of contravening s36 of Act 62 of 1955 - possession of suspected stolen property.
3. Accused 2 is sentenced to a fine of R1000.00 or 8 months imprisonment."

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

I AGREE

M.W MSIMEKI
JUDGE OF THE HIGH COURT