

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

REPORTABLE

REVIEW CASE NO: 5032/2003

In the matter between:

THE STATE

And

LINDA METU

ACCUSED

REVIEW JUDGMENT DELIVERED 25 NOVEMBER 2003

DLODLO, A.J

1. The matter came before me by way of an automatic review in terms of section 302 of Act 51 of 1977 as amended.
2. The two (2) accused persons, according to the Charge Sheet, were charged with attempted housebreaking with the intent to steal. In the alternative the Accused were charged of malicious injury to property. Both the main charge as well as the alternative are alleged to have happened on 9 July 2003 at Konstitusie Street, Number 9, Cape Town.
3. Both Accused were not legally represented. They elected to handle their defence on their own when their rights to legal representation were explained to them by the magistrate.
4. On 14 October 2003 when the Accused were called upon to plead they pleaded Not Guilty. In terms of Section 115 Act 51 of 1977

they respectively disclosed the basis of their defence as follows:

Accused 1: "We had a quarrel with accused 2. She picked up a piece of wood and threw it at me, which missed me and hit the window pane."

Accused 2: "I had a quarrel with accused 1, got angry and hurled a plank at him. He dived it and it hit the window."

After explanation of plea in terms of Section 115 of Act 51 of 1977 the proceedings became mechanically recorded.

What appears on the very first page of the typed record is this:

"Aanklaer stel eerste Aanklag aan beide beskuldigdes:

Aanklag: Poging tot diefstal.

Court: How do you plead accused 1?"

Both accused once more pleaded not guilty and Accused 2 tendered explanation thus:

"Your Worship we went to that flat to go and fetch water. Your Worship as we are the people who are washing cars Your Worship" and thereafter he repeated his earlier explanation. Similar explanation was put forth by Accused 1.

5. The State led evidence of three (3) witnesses. I do not propose to deal with the testimony of these witnesses. It suffices to mention that their evidence did not advance the State's case any further. It was not proved that any of the accused committed any of the offences mentioned in this matter. I hasten to add that it is not clear what charges were preferred against the accused. The record mentions attempted housebreaking with malicious injury to property as an alternative. The record further mentions the charge to have been "Poging tot diefstal". It is a confused scenery to say the least.
6. At the close of the State's case the magistrate *mero moto* discharged accused 1 in terms of section 174 Act 51 of 1977. Accused 2 testified in his defence, in my view wrongly as he could simply have closed his case.

7. The evidence by the State did not in my view prove any guilt on the part of Accused 2. The magistrate clearly wrongly found the Accused 2 guilty. It is once more not clear from the record which offence is Accused 2 guilty of. Accused 2's version was not shown not to have been reasonably possibly true. Even if the magistrate did not believe the version of the Accused 2, he was not in law entitled to reject it and pronounce him guilty.

In **S v Jaffer** 1988 (2) SA 84 (C) Tebbutt J (Thring J concurred) reiterated the test laid down in **R v Difford** 1937 AD 370 at 373, namely, that even if an accused' explanation be improbable, the Court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

In **S v Kubheka** 1982 (1) SA 534 (W) at 537 F - H, Slomowitz AJ said the following in regard to an accused' story:

"Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State."

Van der Spuy AJ (as he then was) in **S v Munyai** 1986 (4) SA 712 (V) at 715G explaining further that what the onus on the state entailed stated thus:

"In other words, even if the State case stood as a completely acceptable and unshaken edifice, a Court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false."

In other words despite the years that have gone by the test still remain the same as set out in **R v M** 1946 AD where Davis AJA (as he then was) stated:

".....the Court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true."

8. As no formal Judgment was delivered by the magistrate it remains a mystery why he convicted Accused 2. It is a further mystery what the crime is that she was convicted of. At any rate regardless of what the magistrate had in mind, the evidence tendered for the State does not succeed to prove Accused 2 guilty of any of the offences mentioned in this case.

In my view the evidence viewed as a whole brings about doubt. It is trite law that where there is doubt in a criminal matter, the benefit thereof must ordinarily be given to the accused person. In the circumstances of this case, I am of the view that Accused 2 was wrongly convicted.

The conviction and sentence are therefore set aside.

DLODLO, A.J

I agree and it is so ordered.

HLOPHE, JP