



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not reportable

CASE NO. CA&R 148/2024

In the matter between:

THAMSANQA CETYIWE

Appellant

and

THE STATE

Respondent

JUDGMENT

LAING J

[1] This is an appeal against the conviction of the appellant on 12 July 2024 in the Regional Court, sitting in East London, for various offences. The following charges were brought against him: house-breaking with the intent to steal (count 1); theft (count 2); tampering with, damaging, or destroying essential infrastructure (count 3), alternatively colluding with or assisting another person to tamper with, damage, or destroy essential infrastructure; and contravening the provisions of section 82 of the General Law Third Amendment Act 129 of 1993 (count 4).¹ The appellant pleaded not guilty but tendered no

¹ Section 82 provides that '[a]ny person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit housebreaking... and who is unable to give a satisfactory account of such possession, shall be guilty of an offence...'

plea explanation. Pursuant to his conviction on all the charges, the appellant petitioned the High Court and was granted leave to appeal.

Background

[2] The state presented the statement of Mr Marius Botha, employed by On-Time Telecoms. He alleged that he had been contacted on 6 February 2023 by a security company regarding the theft of a lithium battery from a Telkom cellular telecommunication tower. It had subsequently been recovered, and Mr Botha identified it as having come from the tower located at Cove Ridge Estate, outside East London. He explained that Telkom relied on batteries as a form of back-up power supply to ensure the provision of uninterrupted communication services to the public. The towers were regarded as critical infrastructure. The theft of batteries resulted in the disruption of such services, which had a negative impact on the daily operations, economic activities, and wellbeing of the public. Mr Botha's statement was admitted as evidence.

[3] Subsequently, the state called a private security officer, Mr Manele Tobela. He testified that his team had been on patrol on 6 February 2023 when night-shift colleagues informed him that there had been a break-in at the Cove Ridge Estate tower; there was no indication, however, that anything had been stolen. The team proceeded to the tower later that day where they encountered a VW Polo parked approximately 100 metres away. The vehicle sped off, causing the team to give chase. It came to a halt at the entrance to the East London airport. The driver (being the appellant in the present matter) fled. The security officers apprehended him and instructed him to open the boot to the VW Polo, in which they found, *inter alia*, the lithium battery, an angle-grinder, an extension lead, a ten-pound hammer, a shifting-spanner, and a military camouflage jacket. The appellant explained that he had run away because he had loaded the battery into the boot. He had been hired as a driver by a group of Zimbabwean nationals, who were hiding at that stage in the bushes adjacent to the tower. They spoke to Mr Tobela on the appellant's cellphone and requested his release in exchange for payment. Mr Tobela refused. The police arrived

later, and Mr Tobela accompanied them to the tower where they found that an angle-grinder had been used to gain access; one of the four batteries was missing.

[4] The state called another private security officer, Mr Athenkosi Ngamlana. He corroborated Mr Tobela's testimony, but added that the appellant had said that he was simply hired to drive the VW Polo; he knew nothing about what was found inside the vehicle.

[5] The appellant testified in his own defence and stated that he was a registered taxi operator. On the day in question, three men from his village came to his house and asked him to drive them to Qonce, where they would meet with a *sangoma*. He agreed. Along the way, he stopped to allow them to visit a shack situated close to the East London airport. The appellant left them there to buy himself some food. Upon his return, the men requested him to open the boot of the VW Polo so that they could load a battery that had been lying in the grass. The men suddenly ran off. Bewildered, the appellant left the scene. Another motor vehicle followed him, flashing its headlights; this caused the appellant to become afraid. He drove as far as the airport, where he stopped. He attempted to run away but was apprehended by security officers. They instructed him to open the boot; the battery was inside. At that stage, the men who had hired him had managed to contact him to ask his whereabouts. He explained the situation and handed the cellphone to one of the security officers to continue the conversation. The appellant was subsequently taken into custody.

Findings of the court *a quo*, and grounds of appeal

[6] The court *a quo* rejected the appellant's version of events. It held, based on the evidence, that it was not reasonably possibly true that the appellant was lured into a crime without his knowledge. It found him guilty as charged and sentenced him, effectively, to 15 years' imprisonment.

[7] The grounds of the appellant's appeal were, *inter alia*, that the court *a quo* erred in not finding that the main offence was committed on the night before, i.e. 5 February 2023, as reported by Mr Tobela's night-shift colleagues. There was no evidence that the appellant had committed any offence. It was a further ground of appeal that the court *a quo* erred in not accepting that the appellant's version was reasonably possibly true.

Legal framework

[8] The relevant principles in matters of this nature are trite. As a starting point, the correct approach regarding an appeal against findings of fact was set out in the oft-quoted case of *R v Dhlumayo and Another*,² where the erstwhile Appellate Division, per Davis AJA, held that:

'...the trial Judge has advantages— which the appellate court cannot have— in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.

...Consequently the appellate court is very reluctant to upset the findings of the trial Judge.

...Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.

...In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.'³

[9] The above approach has been followed consistently by our courts. The Supreme Court of Appeal emphasized, in *S v Hadebe and Others*,⁴ that in the absence of

² 1948 (2) SA 677 (A).

³ At 705–6.

⁴ 1997 (2) SACR 641.

demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct. These will only be disregarded if the recorded evidence shows them to be clearly wrong.⁵ The principle was reiterated by the Supreme Court of Appeal, too, in *S v Monyane and Others*.⁶ A court's powers to interfere on appeal with findings of fact are limited.⁷

[10] In the present matter, the appellant contends that the court *a quo*'s findings of fact led to inferences that were incorrect. He relies on the decision in *R v Blom*,⁸ where Watermeyer JA set out the 'two cardinal rules of logic' that cannot be ignored in relation to inferential reasoning:

- '(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'⁹

[11] Academic writers have criticized the test contained in *Blom*, arguing in favour of a more realistic approach that adopts 'cable' as opposed to 'chain', reasoning.¹⁰ In other words, the more facts relied upon, the less likely that each or any primary fact is important enough to be decisive of an issue by itself. Guilt may be proved beyond a reasonable doubt even though a primary fact is shown merely to be probable.¹¹

⁵ At 645e.

⁶ 2008 (1) SACR 543.

⁷ At paragraph [15].

⁸ 1939 AD 188.

⁹ At 202–3.

¹⁰ The metaphor is derived from the Australian decision in *Shepherd v R* (1990) 170 CLR 573. The High Court distinguished between a situation where intermediate facts were 'indispensable links in a chain of reasoning toward an inference of guilt', requiring proof beyond reasonable doubt, and a situation where the facts could more accurately be described as 'strands in a cable rather than links in a chain', not requiring the same standard of proof (at 579).

¹¹ See the discussion in Du Toit (*et al*), *Du Toit: Commentary on the Criminal Procedure Act* (Jutastat e-publications, RS 59, 2017), at ch22–pp 31–2.

[12] Despite such criticism, the test remains the starting point for assessing the correctness of inferential reasoning based on proved facts. The Supreme Court of Appeal has not, in any way, discarded the test. In *S v Gcaza*,¹² the court endorsed the erstwhile Appellate Division's reliance on *Blom* in the matter of *S v Reddy and others*,¹³ and went on to hold as follows:

'The sentiments expressed by this court in *S v Ntsele* 1998 (2) SACR 178 (SCA) are relevant, where it held that the onus rests upon the State in a criminal case to prove the guilt of the accused beyond reasonable doubt— not beyond all shadow of doubt. The court held further that when dealing with circumstantial evidence, as in the present matter, the court was not required to consider every fragment of evidence individually. It was the cumulative impression, which all the pieces of evidence made collectively, that had to be considered to determine whether the accused's guilt had been established beyond a reasonable doubt. Courts are warned to guard against the tendency to focus too intensely on separate and individual components of evidence and viewing each component in isolation. In the light of the evidence presented to the trial court, I am satisfied that on the conspectus of the evidence, the inference was correctly drawn that the appellant was guilty of the crimes with which he was charged.'¹⁴

[13] The above principles form the basic framework within which the present matter must be decided. This will be done in the paragraphs below.

Discussion

[14] It was common cause that the appellant had been hired by Zimbabwean nationals to be the driver of a VW Polo. It was common cause, too, that the security officers who testified had followed him; that the appellant had stopped his vehicle at the entrance to the East London airport and attempted to run away; and that the officers had found a

¹² 2017 JDR 0995 (SCA).

¹³ 1996 (2) SACR 1 (A), at 8C–D.

¹⁴ *Gcaza*, at paragraph [25].

battery and other items inside the boot. It was also common cause that the battery had been removed from the Cove Ridge Estate tower. The immediate question is whether the court *a quo* was correct in drawing an inference of guilt in relation to the charges brought against the appellant.

[15] The appellant's reaction to the arrival of the security officers and their pursuit of him is, possibly, the most damning aspect of the case. In that regard, he testified as follows:

'Whilst waiting for them in order for them to get into the vehicle they ran past the vehicle. I was shocked, because I did not know why they were running and I then drove off and I took the route that is coming to town. While I was still driving I saw a vehicle that flicked [its] lights behind me. I drove and then I stopped the vehicle at the airport and I took the key out of the ignition and I was afraid because those people ran away. I was scared. When I went out of the vehicle I tried to run. The reason therefor was that I was scared because I did not know why this other vehicle was following me. While I was running one security officer went out of the vehicle and chased after me. I then stopped and I told him that there was nothing that I was going to do so he must not be aggressive.'¹⁵

[16] The appellant did not say why he had not followed the other suspects to find out what was going on or why he had not simply waited in the VW Polo for their return. He also failed to explain why he had not confronted the security officers to establish why they had pursued him. If he had nothing to hide, then why did he do his utmost to escape?

[17] The following exchange took place during cross-examination:

'PROSECUTOR: So why did you run away?

ACCUSED: I was not running away. I just drove off simply because I was going home, because those people that I went there with had just run over me so I thought that I must just go home.

¹⁵ Sic.

- COURT: My understanding was... was the question not aimed at why did you run away after you had been stopped?
- PROSECUTOR: That is correct, Your Worship.
- COURT: So sir, we now know that you drove off, away from the tower, and near the airport you stopped, the vehicle came to a standstill, and the evidence is that then you got out and ran for a short distance before you were apprehended. So why did you run after the vehicle came to a standstill?
- ACCUSED: It is because I was startled at the time when I went to stop at the airport.
- COURT: Because?
- ACCUSED: I was startled...¹⁶

[18] The appellant's explanation was entirely unconvincing. It raised more questions than answers. How he responded to the intervention of the security officers during the events on the day in question was the key weakness in his defence.

[19] One of the grounds of the appellant's appeal is that the court erred in not accepting that his version was reasonably possibly true. The relevant principle was discussed in *S v Van der Meyden*,¹⁷ where Nugent J (as he was then) observed that:

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent

¹⁶ Sic.

¹⁷ 1999 (1) SACR 447 (W).

explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.’¹⁸

[20] If the appellant not been involved in any of the offences, then there was no reason for him to have deserted his passengers, taken the VW Polo (which belonged to them, on his version), abandoned the vehicle when a puncture brought it to a halt at the entrance to the airport, and attempted to flee from the officers. It cannot be said that his version was reasonably possibly true. To the contrary, the court *a quo* was correct in having drawn the inference, based on the proved facts, that the appellant had been implicated in one or more of the offences. Whether it erred in finding the appellant guilty on all the charges must be explored further.

Correctness of convictions

[21] Regarding count 1, Mr Tobela admitted under cross-examination that he did not know who had broken into the tower on the night before. Mr Ngamlana could take the matter no further. It was indeed possible that the other suspects had been involved in the break-in, but had been unable to complete the theft, causing them to return on the following day. It was also possible that a different third party altogether had been involved. Quite simply, there was no evidence to have linked the appellant to the break-in. Based on the proved facts, such as there were, the cumulative impression is that the implication of the appellant in the offence was not the only inference that could have been drawn.

¹⁸ At 448F–H.

[22] The determination of count 2 is subject to the application of the principles previously discussed. For the reasons mentioned already, the appellant's version of how he came to be found in possession of the battery could not have been reasonably possibly true. Importantly, he admitted that he had seen the battery lying in the grass and loaded into the VW Polo. His reaction to the sudden departure of the other suspects, as well as his reaction to the arrival of and pursuit by the security officers, ultimately betrayed him. It was utterly implausible that the appellant had merely shrugged his shoulders, so to speak, before deciding to set off for home in a vehicle that did not belong to him, carrying an item that did not belong to him, when the others fled the scene. It was also utterly implausible that he had been so startled by the officers that he chose to speed away, eventually abandoning the VW Polo outside the airport before attempting to escape on foot. In the absence of any evidence that the officers intended to cause him harm, it made no sense why the appellant did not confront them to ask why they were so eager to apprehend him. The only reasonable inference to have been drawn from his conduct was that he was directly involved in the removal of the battery from the tower and that he had the necessary intention at the time for the court *a quo* to have convicted him of theft.

[23] In relation to count 3, the elements of the offence require closer examination. From the preamble to the Criminal Matters Amendment Act 18 of 2015, it is apparent that the legislation was enacted, *inter alia*, to create a new offence relating to essential infrastructure. The provisions of section 3 stipulate as follows:

3. Offence relating to essential infrastructure

(1) Any person who unlawfully and intentionally—

(a) tampers with, damages or destroys essential infrastructure; or

(b) colludes with or assists another person in the commission, performance or carrying out of an activity referred to in paragraph (a),

and who knows or ought reasonably to have known or suspected that it is essential infrastructure, is guilty of an offence and liable on conviction to a period of imprisonment not exceeding 30 years or, in the case of a corporate body as contemplated in section 332(2) of the Criminal Procedure Act, 1977, a fine not exceeding R 100 million.

(2) For the purposes of subsection (1), a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both—

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.’

[24] The provision of communication services via a cellular telecommunications tower, such as in the present matter, appears to fall within the definitions of ‘basic service’ and ‘essential infrastructure’, as set out in section 1. To ‘tamper’ includes to ‘alter, cut, disturb, interfere with, interrupt, manipulate, obstruct, remove or uproot by any means, method or device’. There was no dispute in the court *a quo* that the charge was contained within section 3(1), read with the definitions. The difficulty on appeal, however, is that there is no evidence to indicate that the appellant knew or ought reasonably to have known or suspected that the tower constituted essential infrastructure. No attempt was made during the trial to satisfy the test set out in section 3(2). The appellant’s general knowledge, skill, training, and experience were simply never established. Consequently, it cannot be said that he was guilty of the offence in question.

[25] Turning to count 4, the appellant testified that the first time that he saw the items in the boot of the VW Polo was when he was apprehended by the security officers. He had no prior knowledge thereof. In that regard, there was no evidence that he was the

owner of the vehicle; it belonged either to his brother or to one of the other suspects. The appellant explained that his role was to drive the VW Polo because none of the others had a driving licence. It was, in the circumstances, reasonably possible that he had been involved in the theft of the battery merely as the driver of the getaway vehicle. It was also reasonably possible that he had no knowledge of the items in the boot; it was not his vehicle. Consequently, it cannot be said that he was unable to give a satisfactory account of the items in question.¹⁹

Conclusion

[26] I am of the view that the court *a quo* was correct in finding that the appellant was implicated in one of more of the offences. For the reasons set out above, however, I am of the view that it was wrong in finding: (a) that he was involved in the break-in on the night before; (b) that he had the necessary general knowledge, skill, training and experience to have known or that he ought reasonably to have known that the tower constituted essential infrastructure; and (c) that he was unable to give a satisfactory account of the various items found in the VW Polo. The recorded evidence demonstrates that the court *a quo* misdirected itself in that regard, warranting interference on appeal.

[27] In the end, I am persuaded that the appellant ought to have been convicted only on count 2 for the offence of theft, regarding which he was sentenced to seven years' imprisonment. He was not granted leave to appeal against sentence. In the circumstances, I would order that:

(a) the appeal is upheld in relation to counts 1, 3, and 4, and the convictions and sentences in that regard are set aside; and

(b) the appeal is dismissed in relation to count 2.

¹⁹ See section 82 of the General Law Third Amendment Act 129 of 1993 (n 1, above).

JGA LAING

JUDGE OF THE HIGH COURT

I agree.

JM ROBERSON

JUDGE OF THE HIGH COURT

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