



REPUBLIC OF SOUTH AFRICA

Case No 385/97

Bib

48/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of:

SESINYANA SHAKANE

Appellant

and

THE STATE

Respondent

CORAM : *VAN HEERDEN, HEFER et SCOTT JJA*

HEARD : *21 MAY 1998*

DELIVERED : *27 MAY 1998*

JUDGMENT

SCOTT JA/...

SCOTT JA:

The appellant was convicted in the Giyani Magistrates Court, together with two other adult women, on one count of theft and one count of contravening s 36 of Act 62 of 1955. The count of theft related to clothing and a handbag allegedly stolen from a shopping centre at Giyani. The statutory offence related to a relatively large quantity of clothing as well as two video machines and two compact disc players found in a motor car which was being used by the three women. All three were in their mid-twenties and described themselves as students. The appellant (who was accused No 1 at the trial and to whom I shall refer as such) was sentenced to 12 months imprisonment on each count. The other accused, who, unlike accused No 1, were first offenders were sentenced to a fine on each count. All three accused appealed unsuccessfully to the Transvaal Provincial Division. The present appeal by accused No 1 is directed at both the

conviction and the sentence and is with the leave of the Court *a quo*.

Both counts related to events which occurred on Saturday 19 December 1992. It was not in dispute that at about 1 pm on that day the three accused entered the shopping centre (referred to in evidence as the 'Smart Centre'.) From the evidence it would appear that the Smart Centre is a departmental store carrying a wide variety of stock. Much of what followed is in dispute. Indeed, the version of the accused differed sharply from that of the State even in relation to events which would otherwise appear to be of little consequence. In broad terms the evidence adduced by the State with regard to the count of theft was to the following effect.

Miss Anna Mokoena, a saleslady employed at the shop, testified that while sorting dockets at a desk near the entrance to the shop she observed the three accused first at the ladies section and then in the children's department. What

drew her attention to them was the manner in which they were communicating with each other and looking about the shop. At some stage she observed accused No 3 hand to accused No 1 a handbag which she recognised as one which was identical to those on sale in the shop. The latter placed a lipstick and certain other small articles in the bag and the trio headed for the exit. She also overheard accused No 3 saying 'let's get out' to her companions. Miss Mokoena summoned a security officer, referred to in the evidence as 'Margaret', and the three accused were apprehended outside the shop. According to Miss Mokoena the accused refused to come back into the shop and Margaret was obliged to go and call the manager, one 'Solly'. In the meantime, accused No 1 handed a set of keys to accused No 3 who a short while later returned in a BMW motor car. Accused No 1 climbed in but by this time Solly had arrived and he pulled the keys out of the ignition. The three accused were then taken back into the shop and accused No

1 into the kitchen where, according to Miss Mokoena, she was searched by Margaret and Miss Matimela, a credit controller who by then had also become involved. Miss Mokoena testified that on the way back to the shop she observed that accused No 1's gait was affected seemingly by something concealed on her person under her clothes. Following the search Margaret and Miss Matimela emerged from the kitchen carrying the items which, she said, had been found concealed under accused No 1's clothing. They were two 3-piece suits for infants and two 2-piece trouser-suits. These items and the handbag were the subject matter of the count of theft.

Miss Miriam Matimela also gave evidence. She confirmed having seen Miss Mokoena attempting to persuade the three accused to come back into the shop and Solly going outside in the company of Margaret. She said, however, that she had not assisted in searching accused No 1. But she did see Margaret

walking from the storeroom (which is adjacent to the kitchen) carrying the clothes which she said had been found on accused No 1. The security officer, Margaret, did not give evidence.

The version of the three accused as to what had happened was totally different. They said that they had gone into the shop merely to look for accused No 3's cousin. After observing that she was not there, they left. They said that the handbag belonged to accused No 3 and that she had purchased it a few weeks previously from someone in Mkhuthlu where she lived. They said that on the day in question it was being used by accused No 1. They denied that accused No 3 had handed the bag to accused No 1 as alleged by Miss Mokoena. They also denied that accused No 3 had gone to fetch the BMW motor car. They said that not only had accused No 1 been searched but also accused No 2 and that this had taken place in the storeroom where there were clothes packed on shelves and not

in the kitchen. Accused No 1 and accused No 2 denied that any clothes belonging to the shop had been found concealed on their person. In short, the defence was that the entire State case was a fabrication.

Turning to the count of contravening s 36 of Act 62 of 1955, Sergeant Rodney Ngobeni testified that shortly after arriving at the Smart Centre he spoke to the three accused and in their presence searched a BMW motor car which had been pointed out to him by accused No 3 who was in possession of the keys. In the boot he found two video recorders, two compact disc players and a large quantity of clothing including female underwear and trousers. All the items appeared to him to be new. The initial response of the accused to his inquiry regarding the items was that they belonged to another gentleman who was 'outside'. Sergeant Ngobeni saw no sign of this person and suspected that the goods were stolen. He brought the three accused to the police station where he

again asked them for an explanation for the goods found in the motor car. This time they said that they had purchased the clothing at a factory or factories in Durban and the electronic equipment at an auction in that city. According to Sergeant Ngobeni they were unable to produce a receipt for their purchases or furnish the name of the factory or the auctioneer in question. In these circumstances he continued to suspect that the goods had been stolen.

The accused in evidence did not deny that they were in possession of the goods found in their presence by Sergeant Ngobeni in the boot of the car. They said they had driven down to Durban where they had spent two weeks on holiday and where they had purchased the goods in question with the object of reselling them at a profit. The clothing, they said, had been purchased at a factory, or factory shops - the evidence is not entirely clear - and the electronic equipment they had purchased at an auction sale. They testified that they had not been taken

directly from the Smart Centre to the police station but that en route the police had turned off into the bush where they had been assaulted. They said that they had been asked to give an explanation for the goods found in the car while they were in the bush and not at the police station. They referred the police to receipts in the cubbyhole of the car and these were removed by the police. The allegations regarding the trip to the bush and the furnishing of the police with receipts were not put to Sergeant Ngobeni in cross-examination. As in the case of the theft charge, the defence on the statutory charge was similarly that their alleged failure to furnish receipts for their purchases was a total fabrication.

It is convenient to deal first with the theft charge. As far as the theft of the clothing is concerned it was the State's case that the clothing in question was found concealed on accused No 1's person when she was searched. Miss Mokoena testified that the search was conducted by Margaret and Miss Matimela

in the kitchen. The latter, however, denied that she had participated in the search and said that Margaret alone had searched accused No 1. This, she said, had taken place not in the kitchen but in the storeroom. The only person (apart from the accused) who could give direct evidence as to the search and what was found on accused No 1 was therefore Margaret. But she was not called as a witness, nor was any explanation offered as to why she did not give evidence. Accused No 1 and accused No 2 both testified that they had been searched. They said this took place in the storeroom where clothes were packed on the shelves. They both denied that any clothing had been found on their person. In the absence of Margaret, the only evidence on which the State could rely was that of Miss Mokoena as to accused No 1's gait and the evidence of Miss Mokoena and Miss Matimela to the effect that Margaret had emerged from either the kitchen or the storeroom carrying the clothing which later formed the subject matter of the

charge. As to accused No.1's gait, Miss Mokoena's observation and conclusion

by the very nature of things involved a high degree of subjectivity and were far

from conclusive. It is significant that Miss Mokoena's evidence on this aspect

was not confirmed by Miss Matimela. The evidence that Margaret emerged either

from the kitchen or the storeroom carrying the clothing in question does not justify

the inference that she necessarily found it concealed on the person of accused No

1 or accused No 2. This is particularly so in the light of the denial by the accused

and the failure on the part of the State to explain why Margaret was not called as

a witness. It follows that in my view the State failed to prove the theft of the

clothing.

As far as the handbag is concerned, the critical question in issue was

whether or not it was the property of the shop. The evidence adduced by the State

was far from satisfactory. According to Miss Mokoena the shop's label was still

attached to the bag found in the possession of the accused and it still contained the packing kept in the bag to retain its shape. The bag produced in Court clearly had no label attached to it and contained no packing. No attempt was made by the State to explain this. Miss Matimela conceded in cross-examination that on the day in question she had expressed some doubt as to whether the bag was new or not. She would hardly have done so had it been filled with packing and had a Smart Centre label been attached to it. No evidence was adduced by the State as to whether the Smart Centre was the sole retailer of bags of that kind, nor for that matter was any other evidence produced which would have resolved the issue. In my view the State failed to discharge the burden upon it and the accused were entitled to an acquittal on the theft charge.

I turn to the count of contravening s 36 of Act 62 of 1955. The magistrate rejected the evidence of the accused to the effect that on the way to the

police station they had been taken by Sergeant Ngobeni and other policemen into the bush where they had been assaulted and where the police had removed from their vehicle the receipts which they had been given when purchasing the goods in question. I can see no reason for interfering with this finding. Indeed, this far-reaching allegation was not put to Sergeant Ngobeni in cross-examination by the attorney representing the accused, nor, as pointed out by the magistrate, would there seem to be any reason for the police to have fabricated a false charge against the accused after discovering receipts relating to the goods found in the boot of the vehicle. The question remaining is whether in any event the State discharged the burden of proof imposed on it in terms of the section.

In this Court counsel for accused No 1 submitted that the accused had not been 'found in possession' as required by the section and referred to various cases in which a distinction had been drawn between 'found in possession' as

opposed to being 'in possession'. On the facts of the present case it is unnecessary to consider the distinction, if indeed there is one. (Cf *S v Wilson* 1962 (2) SA 619 (A).) The vehicle was searched and the goods discovered in the presence of all three accused. It was common cause at the trial that the vehicle was being used by the accused and that the goods in question were in their possession. Indeed, the accused contended that they had jointly purchased the goods in Durban. There is accordingly no substance in the point.

Next, it was submitted that the magistrate had erred in finding that Sergeant Ngobeni's suspicion that the goods were stolen was one which was reasonably entertained. I cannot agree. The quantity of clothing was clearly more than one would ordinarily expect three people to purchase for their own use. The electronic equipment was obviously expensive. Sergeant Ngobeni observed that the goods appeared to be new and many of the items still had the manufacturer's

label attached to them. He first suspected they were stolen when the accused said they belonged to a person outside and he could find no such person. This suspicion was confirmed when a short while later at the police station the accused in effect gave a new explanation, viz that they had bought the electronic equipment at an auction in Durban and the clothing at a factory or factory shops in the same city. The new explanation was not such as to allay his suspicion. The accused could name neither the auctioneer nor the factories. They could also produce no receipts. On this basis the suspicion, considered objectively, was one which, in my view, was reasonable. Once this is accepted, it is, I think, of no consequence that Sergeant Ngobeni might have included in the factors he took into consideration some additional ground which was unjustifiable, eg that the accused were suspected of stealing other goods from the shop.

Finally, it was submitted that the explanation offered by the

appellants at the trial was satisfactory and that the magistrate erred in rejecting it as false. In his judgment the magistrate in a somewhat ambiguous passage appears to have drawn an adverse inference against the accused for declining to make a statement indicating the basis of their defence at the commencement of the trial in terms of s 115 of the Criminal Procedure Act 51 of 1977. This was clearly a misdirection. Nonetheless, I am satisfied that the rejection of the explanation offered by the accused in their evidence was fully justified.

I have previously dealt with the rejection of their evidence regarding their inability to produce any form of receipt for their purchases. Apart from this, their explanation was riddled with improbabilities. Accused No 1 testified that she and her co-accused had spent two weeks in Durban when purchasing the clothing and equipment. This was shortly before their arrest. While in Durban they had stayed, she said, at a beachfront hotel. However, in cross-examination she was

unable to state the name of the hotel. She could also not recall at which factories the clothing had been purchased, nor could she say where in Durban the auction had been held. She also had no idea what their accommodation had cost them, nor could she remember the route they had taken on returning from Durban.

The other accused fared little better. Accused No 2, after a lengthy postponement of the trial, not surprisingly gave the name of a beachfront hotel at which they had allegedly stayed. But she, in turn, had no idea what they had paid for the clothing and equipment, and yet the purchases were said to have been made with a view to reselling the goods at a profit. Accused No 3 said they had spent some nights in a township while in Durban but was unable to give the name of the township.

It follows that in my view the accused were correctly convicted on the count of contravening s 36 of Act 62 of 1955. (The constitutionality of the

section is not in issue in this appeal as the convictions predated 27 April 1994.

See Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (cc).)

There remains the appeal against the sentence of 12 months imprisonment imposed on accused No 1 (the only appellant) in respect of this count.

When confronted with a list of previous convictions on the customary form SAP 69 the appellant was prepared to admit only two. The prosecutor elected not to attempt to prove another two which were denied and the case was disposed of on that basis. The first of those which were admitted related to a minor assault and is of little relevance. The second, dated 24 April 1990, was one of fraud involving R10 000 and for which the appellant was sentenced to a fine of R500 plus 3 years imprisonment which was conditionally suspended for 5 years.

In the light of this conviction I can see no basis for interfering with the sentence imposed by the magistrate. It was not suggested that it was vitiated by any misdirection on his part. The appeal against sentence on this count must therefore fail.

The appeal against the conviction on the count of theft is upheld and the conviction and sentence on that count is accordingly set aside. The appeal against the conviction and sentence in respect of the count of contravening s 36 of Act 62 of 1955 is dismissed.

D.G. SCOTT

VAN HEERDEN JA

- Concur

HEFER JA