

SOUTH AFRICA / JUDGMENT

Brown v S (CA&R245/2016)

[2017] ZAECGHC 89 (28 July 2017)

[2017] ZAECGHC 89**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas, N Molony

CASE / FILE NUMBER

CA&R245/2016

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION – GRAHAMSTOWN****Case****No.: CA&R245/2016****In**

the matter between:

ALINCIA
MEGAN BROWN
Appellant
and
THE
STATE
Respondent**JUDGMENT****REVELAS J:**

- [1] The appellant was charged with, and pleaded not guilty to common law theft (shoplifting) in the Grahamstown Magistrates' Court but was found guilty as charged on 15 June 2016. She was sentenced to pay a fine of R1,000.00 or serve a prison sentence of four months, wholly suspended for three years on the usual conditions. This appeal is only against the appellant's conviction.

- [2] The relevant facts giving rise to the charge, the conviction and the present appeal, were common cause and are briefly the following:
- [3] The appellant and a female friend visited Pick ‘n Pay Liquor, a liquor store in Grahamstown on Saturday, 21 February 2016. After she entered the store, the appellant walked amongst the shelves and removed two bottles of liquor from the shelves and concealed them in her overalls. She then proceeded to the exit of the store, passing the till points where payments for purchases were made, without paying for the two items. At the exit door of the store, the appellant was prevented from leaving the store by a security guard posted at its exit. The security guard, Mr Makhi Mnqanana (spelt “Maki Nyanana” in the transcript of the record), was an employee of Hi-Tec Security in Grahamstown (“Hi-Tec”), the security firm engaged by Pick ‘n Pay for security purposes. He pointed out to her that she had an item belonging to the store on her person and demanded a till slip from her, as proof that she had paid for the item in question. She told him that her friend, who was at that stage still inside the store, had the relevant slip. Mnqanana made it clear that she could not leave the store without a payment slip and that she should fetch it. She returned to the shelves and removed the bottle of Russian Bear vodka from her overalls and replaced it on a shelf. Then she proceeded to the exit of the store, again passing the till points. At the exit door, Mnqanana once again prevented the appellant from leaving. This time he wanted to see the till slip for the bottle of Southern Comfort liquor still concealed in her overalls and which she had not removed and replaced along with the bottle of vodka. She had no till slip as proof of payment for the bottle of Southern Comfort either. A heated argument between the two of them followed. Mnqanana testified the appellant then wanted to leave the store “by force”. Mnqanana had also removed the bottle of Southern Comfort from her person. He said that the appellant appeared to be inebriated. Security personnel of Hi-Tec followed the appellant when she tried to leave the store, after her altercation with Mnqanana. They prevented her from getting into her vehicle and accompanied her back into the store. Mnqanana went to the back of the store to look at the video footage captured by the close circuit television camera installed inside the store. There he verified, with a colleague, that the appellant had indeed removed the two bottles of liquor and tried to leave the store without paying for them.
- [4] At the trial, Detective Warrant Officer Daniël Britz presented the evidence of the video footage of the incident as described above. He was not cross-examined at all. The appellant also did not testify at the trial. Thus the State’s version of events remained unchallenged.
- [5] In her unsuccessful application in terms of section 74 of the Criminal Procedure Act (“the Act”),[1] during argument at the end of the trial, and in the appeal before us, the appellant relied on the following two grounds in support of her contention that the State had not proved all the elements of theft:
- (a) The charge sheet and the charge leveled against her was defective in that the owner(s) of the alleged stolen items, or the complainant,

referred to in the charge sheet, did not testify, and the State accordingly failed to prove (i) that the witness Makhi Mnqanana (the security guard), was an agent of the complainant, Pick 'n Pay Liquor, (ii) that he was in direct control of the items alleged to have been stolen, and (iii) that he was therefore in lawful possession of those items;

(b) The appellant did not complete the theft because the complainant or “rightful owner”, alternatively “the lawful possessor” of the alleged stolen items never lost control over those items.

[6] In her notice of appeal the appellant also added a further ground, namely that the trial magistrate failed to consider whether or not the appellant was guilty of attempted theft.

The Alleged Defective Charge Sheet

[7] The charge sheet reads that the alleged stolen items were the “property of/ or in the lawful possession of Malutti(sic) Mnqanana and/or Pick 'n Pay”. The appellant argues that since only Britz and Mnqanana were called as the only State witnesses by the prosecution, the State failed to prove that either of these two witnesses were the owner of, or in lawful possession of the two bottles of liquor.

[8] The State, in support of its case relied on section 95(8) of the Act which provides that: “[i]f it is uncertain to which of two or more persons property in connection with which an offence has been committed belonged at the time when the offence was committed, the relevant charge may describe the property as the property of one or other of those persons, naming each of them but without specifying which of them, and it shall suffice at the trial to prove that at the time when the offence was committed the property belonged to one or other of those persons without proving which of them.”

[9] Mnqanana specifically testified that Hi-Tec employed him as a security officer and that he was also employed by Pick 'n Pay. He testified that he was posted at the liquor store of the latter on the day in question and also, that another security guard employed by Hi-Tec was present in the back of the store where the close circuit television camera footage was to be viewed. This evidence can mean nothing else, but that beyond reasonable doubt, Pick 'n Pay engaged the services of Hi-Tec for security purposes at its store and that Mnqanana, as an employee and security officer of Hi-Tec, was deployed to perform security duties in the store in question. Since he was posted at the exit door of the store to check whether items leaving the store had been paid for, the only inference that can be drawn was that he was posted there to combat theft from the store. The store and its contents unquestionably belong to Pick 'n Pay. Accordingly, Mnqanana was indeed an agent of Pick 'n Pay, tasked with preventing theft of its stock in the liquor store in question. As such he was in lawful possession thereof. Since this aspect was also not challenged in cross-examination of the security guard, one has to accept his evidence in this regard.

[10] The fact that the spelling of the complainant's first name ("Malutti") in the charge sheet, differs from the first name ("Makhi") of the person who testified as the complainant is of no great moment. Obviously a spelling error had occurred with regard to Mnqanana's

first name in the charge sheet. In any event, Mr van der Veen, who represented the appellant at her trial, expressly abandoned an earlier point taken by him, namely that State failed to prove that the security guard who testified at the trial was the same person as on the video footage presented in evidence. It can therefore be accepted that the person who gave evidence about the theft of the items in question, and whose evidence was corroborated by a visual recording of the events, was an employee of the security company (Hi-Tec), which was engaged by the owner of the items (Pick 'n Pay) to prevent store theft. As the State advocate pointed out, such a defect is cured by section 88 of the Act, which provides that "where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall,

unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred".

The Alleged Incomplete Appropriation

[11] The appellant's argument amounts to this: If the alleged thief is caught red handed, so to speak, the theft has not been completed.

The appellant relied mainly on three judgments in support of her argument. These were *S v Mekula*,^[2] *S v Tau*^[3] and *S v Mqabuzana*^[4].

[12] In *Mekula*, a case similar to the present matter in some respects, the appellant removed a bottle from a crate with the obvious intention of stealing it. Noticing that he was being observed by security personnel, he decided to replace the bottle. He thus abandoned his intention to steal the item in question prior to the act of appropriation being completed. In the process of replacing it in the crate, he dropped the bottle and it broke. These circumstances weighed heavily with the court in *Mekula*^[5], and in this regard the following was stated:

"It was precisely because he recognised that the owner, through the security guard, continued to exercise effective control over the bottle, that he resolved to retrace his steps and to replace the bottle in the position from which he had taken it. He made no attempt to remove the bottle from the building, clearly because he realised that he could not do so without surrendering the bottle to control of the security guard. In these circumstances I consider that the accused ought to have been convicted of attempted theft."

[13] The facts in *Mekula* differ from the present matter in that, unlike the accused in *Mekula* the appellant never abandoned her intention to steal. She had already passed the pay points where she had to pay for the items taken by her and wanted to leave without paying. Upon detection, she replaced only one of the items that she had stolen and held on to the other item in respect of which the theft had already been completed. The items were retrieved only after they had been stolen, and only through the intervention of their legitimate

possessor, i.e. the security guard, and not because the appellant had abandoned her intention to steal the items. The appellant, in fact, far from recognizing that the security guard had noticed what she was doing, and abandoning her intended course of action, forcefully sought to leave a second time, this time with a single bottle of alcohol hidden in her clothing.

[14] In Tau the appellant was convicted in a regional court of theft of a piece of raw gold (1,73kg). The appellant, employed by a goldmine, was removing stones and raw gold from the smelting pot in the mine's smelting house on the day in question. The rule was that if a piece of raw gold was removed from the smelting pot it was to be handed to the chief smelter, or his assistant. The appellant was observed removing a piece of raw gold from the wheelbarrow where he had placed it earlier and then kicking the gold under a pan from under which a portion thereof protruded. He was immediately confronted, arrested and charged. On appeal his conviction was set aside as the court held that the gold piece was still under the effective control of the owners thereof, despite the actions of the appellant. It was further held that his actions had not amounted to executory conduct, but merely preparatory in nature. It was further held that his actions could only constitute attempted theft if he had removed the gold from under the pan, and had then taken steps to remove it from the very tightly secured building.

[15] The facts in Tau differ from the appeal before us in several respects, the most important being that in Tau, the appellant never had the gold on his person. In the present matter, the appellant secreted the stolen items in her clothing.

In other words, she had indeed taken steps to remove the items from the store. Her further act of passing the till points without paying, amounted to executory conduct which constituted contrectatio.

[16] In Mqabuzana it was held that in a self-service store sufficient contrectatio (appropriation) to constitute theft, takes place when articles are taken past the place of payment animo furandi, without payment. This is exactly what happened in the present matter.

[17] In S v Nxumalo[6] the court pronounced that "it is proper to convict a person for theft if, in a self-service shop, the person concealed articles of clothing with the intention to steal and was apprehended before reaching the till point". The learned author CR Snyman, in his work Criminal Law,[7] endorsed the aforesaid view by stating that once "X concealed the article in his clothing, it ceases to be visible to the shop owner and that exactly for this reason the shop owner, from that moment, ceases to exercise control over the article".

[18] The unchallenged evidence confirms that the witness Mnqanana was the person in lawful possession of the alleged stolen items, that he established that the appellant had secreted items belonging to Pick 'n Pay in her clothing and thus lost control over the items. The appellant clearly had no intention of paying for the items, therefore they were concealed animo furandi. There can be no finding of attempted theft in such circumstances.

Conclusion

[19] Given the facts of the matter and the authorities referred to, the appellant's arguments are unconvincing. Accordingly, the appeal must fail.

Order

[20] The appeal against the appellant's conviction is dismissed.

E REVELAS

Judge of the High Court

MOLONY AJ:

I agree.

N MOLONY

Judge of the High Court (Acting)

Appearances:

For the appellant: Adv J R Koekemoer instructed by Wheeldon, Rushmere & Cole Inc.,
Grahamstown

For the respondent: Adv Z Mdolomba of the National Director of Public Prosecutions,
Grahamstown

Date heard: 28 June 2017

Date delivered: 28 July 2017

[1] The Criminal Procedure Act , No 51 of 1977, as amended

[2] 2012 (2) SACR 521 (ECG)

[3] 1996 (2) SACR 97 (T)

[4] 1976 (1) SA 212 (E)

[5] Supra at para 8.

[6] (2/2014 [2014] ZANWHC 11 (2 May 2014)

[7] 6th edition, at page 490

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