

SOUTH AFRICA / JUDGMENT

Leeuw and Another v S (A57/2016)

[2016] ZAFSHC 160 (22 September 2016)

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COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, Mathebula, Mhlambi

CASE / FILE NUMBER

A57/2016

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A57/2016

In the appeal between:

TEBOHO LEEUW

.....First Appellant

MOROLE MOHLAPING

.....Second Appellant

and

THE STATE

Respondent

CORAM: REINDERS, J et MATHEBULA, AJ et MHLAMBI, AJ

JUDGEMENT:

REINDERS, J

HEARD ON: 29 AUGUST 2016

DELIVERED ON: 22 SEPTEMBER 2016

- [1] On the 25th March 2015 the appellants, who were legally represented, appeared before the district court at Phuthaditjaba on a charge of theft out of a motor vehicle, it being alleged that on or about 9th March 2014 they stole a wallet containing cards, alternatively that on the date in question they entered or climbed upon such vehicle. They pleaded not guilty but were convicted on 14 May 2015 of theft out of a motor vehicle and sentenced to 18 months imprisonment. Leave to appeal against both the conviction and sentence was sought and granted by the trial court. Bail pending the appeal was also granted by the learned magistrate.
- [2] It is common cause that a purse containing cards belonging to Ms Thembesile Radebe was stolen out of her vehicle on 9 March 2014 and that one of these cards, a Mr Price card, was found in possession of the appellants on 10 March 2014.
- [3] The evidence upon which the learned magistrate convicted the appellants can be gleaned from the record. Ms Radebe testified that she left her vehicle unlocked in front of BB Cash store on 9 March
2014. Only after arriving home did she realize that her wallet went missing from her handbag that was left on the front seat of the vehicle. When in Mr Price store to discontinue her card, the cashier indicated that the said card was with the appellants who had just enquired about the balance on the card. The manager then called upon security to close the doors when the appellants were about to do a purchase. Whilst the appellants were in possession of the cards, someone else was standing outside the shop with the wallet. Second appellant made a call to one Senapi to bring the wallet, but she refused to take it. During cross examination Ms Radebe conceded that she did not indicate in her sworn statement taken on 10 March 2014 (Exhibit A) that appellants had clothes with them and were about to make a purchase. She failed to give an answer as to the reason for the omission of this fact.
- [4] Mr Joseph Ntombela was employed as a store assistant with Mr Price on 10 March 2014. The appellants requested him to check the balance on two store cards. They then proceeded to put clothes into a shopping basket and were in the queue to pay when he informed security to close the doors of the shop. During cross examination he testified that the appellants dropped the basket on the floor and ran towards the door when it was discovered that the cards did not belong to them. They were caught at the door, arrested and sent to the storeroom. When confronted with his sworn statement made on 11 March 2014, he could not explain why he omitted to mention in the statement that the appellants were taken to a store room, had clothes in their possession or tried to flee. He admitted however that it was indicated to him by appellants that they were sent by one Senapi to enquire about the balances on the cards.
- [5] The appellants testified that on 9 March 2014 they were on their way to Tsetseng to obtain certain documentation from the municipal offices relating to school admission. On their way at Ghlatuto School they met with one Senapi who requested them to check the balance on Mr Price store cards on his behalf as he was in a hurry. After the second appellant, who

was in possession of the two store cards, enquired about the balances, the doors of the store were closed. They were arrested and taken to the store room. The second appellant made a call to Senapi, requesting him to come and give an explanation on the cards. Whilst waiting for his arrival a child arrived handing the wallet of Ms Radebe to her.

- [6] The learned magistrate appreciated that the state case relied on circumstantial evidence and that there were no evidence regarding the identity of the appellants as thieves. On returning the guilty verdict the trial court rejected as not reasonably possibly true the appellants' version to the effect that they were given the cards by Senapi. The court a quo did not make a finding on the credibility of the state witnesses.
- [7] In argument on the papers and before us it is contended for the appellant that the trial court erred in rejecting the appellants' versions and accepting that of the complainant as true regard being had to, inter alia, contradictions and shortcomings in the state case. Mr Reyneke submitted that the appellants could also not be found guilty of the competent verdict of being in possession of the stolen goods as they tendered a reasonable explanation that Senapi handed it to them. Neither Ms Radebe nor Mr Ntombela could dispute this.
- [8] It is trite that the inference that a person found in possession of recently stolen property is a thief, can only be drawn as the only reasonable inference where the nature of the goods stolen and the time lapse between the theft and the discovery of goods in that person's possession, lend themselves to such a finding. The onus of proof remains on the prosecution.

See: *S v Parrow* 1973 (1) SA 603 (A)

- [9] Mr Mtetwa on behalf of the stay conceded that there was no basis for a conviction by the trial court. It was submitted that the learned magistrate erred by failing to have proper regard to the said contradictions, the explanation by the appellants for being in possession of the cards and the fact that one of the other items that was stolen from the complainant's vehicle, namely the wallet, was indeed found in the possession of a third party.
- [10] In the circumstances, although I have my grave concerns about the appellants' versions, it is reasonably possibly true that they were not involved in the breaking into the vehicle and the removal of the cards, and in view of the state's concessions the conviction of both accused as well as the sentences stand to be set aside.

ORDER

- [11] In the result the appeal succeeds.
- [12] The conviction and sentence are set aside and replaced with the following:

"Both accused are acquitted."

C. REINDERS, J

I concur.

M.A. MATHEBULA, AJ

J. MHLAMBI, AJ

On behalf of the appellant: Mr. J.D. Reyneke

Instructed by:

Justice Centre

BLOEMFONTEIN

On behalf of the respondent: Adv.S.Mtetwa

Director: Public Prosecutions

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