

SOUTH AFRICA / JUDGMENT

Makhalima v S (CA&R30/2017) [2018] ZAECHGC 27; 2018 (1) SACR 625 (ECG) (29 March 2018) [2018] ZAECHGC 27

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, B R Tokota

CASE / FILE NUMBER

CA&R30/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE NO CA&R30/2017

DATE HEARD: 28/03/2018

DATE DELIVERED:

29/03/2018

In

the matter between

AKHONA

MAKHALIMA

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT

ROBERSON J:-

- [1] The appellant was convicted in the Magistrate's Court, East London, of theft, and sentenced to pay a fine of R500.00 or to undergo 50 days' imprisonment. This appeal lies against conviction only, leave having been granted on petition to this court.
- [2] It was not in dispute that the appellant, accompanied by his young child, purchased and paid for some items at a shop known as Spargs in Beacon Bay, East London. However he did not pay for a bottle of energy supplement which was found in his possession after he left the shop. The appellant's defence was that he did not have the intention to steal and that he forgot to pay for the supplement.
- [3] Mr Ntsikelelo Mazwana testified that on 22 August 2016 he was operating the CCTV system at Spargs. He observed the appellant

carrying a green bag and pushing a trolley in which there was a child. The trolley was constructed to look like a vehicle, with the child, as Mazwana described it, underneath the trolley in a separate compartment and "driving" the trolley as though it was a vehicle. The child was not able to reach into the portion of the trolley where purchases are placed. The appellant took a supplement from a shelf, put it in the trolley, and continued shopping. The supplement was in a bottle and Mazwana thought it weighed 300 grams. Mazwana could not say that the child did not observe the appellant taking the supplement.

- [4] Mazwana continued to watch the appellant but lost sight of him at a certain point. When he saw the appellant again he noticed that the supplement was no longer in the trolley. The green bag was in the place where the supplement had been. Mazwana watched the appellant pay at the pay point for the other items he had selected. At this time the green bag was in his hand. He put the items which he had paid for in the trolley and proceeded to the exit and was thereafter brought to the control room by a security officer whom Mazwana had alerted. Mazwana asked the appellant where the supplement was. The appellant opened the green bag and said that he had forgotten to pay for it. The green bag contained only the supplement. The police were then called.
- [5] After re-examination of Mazwana by the prosecutor the magistrate asked Mazwana some questions. The appellant's attorney

sought to ask questions arising from the court's questions, and asked Mazwana if the appellant had received a telephone call while he was paying for his purchases. The magistrate said that this was new evidence and the prosecutor objected to the question. The magistrate did not allow the question. I shall deal with this aspect later in the judgment.

- [6] Mr Patrick Mathe was the security officer who was alerted by Mazwana. He testified that Mazwana told him that the appellant had taken the supplement and had not paid for it, and that it was in a bag. After the appellant went out of the shop, Mathe told him that he had been informed that the appellant had taken a supplement but had not paid for it. The appellant told Mathe that he had forgotten to pay for the supplement and that it was in his bag. This was a small bag inside the trolley. Mathe took the appellant to the control room where the bag was opened. The appellant was asked why he had not paid for the supplement and he said he had forgotten to pay for it.
- [7] The appellant testified that his child was familiar with supplements and always wanted to taste them at home. When the child saw the appellant selecting the supplement from the shelf he became excited and wanted to hold it. The child asked if it was “the gym thing” and repeatedly asked him if he could taste the supplement. In order to keep the child calm the appellant put the supplement in the bag and carried on shopping. The appellant did not give a precise description of the bag but said he used it for his work keys, his lunch, and some paperwork, and on the day in question it contained his car keys and his wallet. He took the bag into the shop because his car keys and wallet were in it. He said that he unzipped the bag before putting in the supplement and after he did so he did not zip the bag closed. He bought chips for the child in order to distract him from the supplement.
- [8] When he got to the till point the mother of his child telephoned him as he was about to pay. He took all the items from the trolley, as well as the bag, and put them down at the till point. He told the child’s mother that he would call her back and then paid for the items. He did not remember if he took his wallet from the bag or if the wallet was in his hands. He had earlier taken the wallet out of the bag to check if there was money in it. He could not remember if he put it back in the bag or in his pocket. He put the items for which he had paid in the trolley and put the bag on top. As he was about to leave the shop the security officer (this must have been Mathe) stopped him. He told Mathe that there was an item for which he had not paid and that he forgot to pay. He asked if he could pay for the supplement but Mathe refused and took him to the control room. There he repeated that he had forgotten to pay and asked to pay for the supplement.
- [9] The magistrate found that the State had proved that the appellant had the intention to steal. She was of the view that the appellant’s explanation for putting the supplement in the bag did not make sense because the child was sitting underneath the trolley and would not have seen the supplement. This conclusion ignores the appellant’s evidence that the child saw him selecting the supplement and repeatedly asked to taste it. There was no evidence from the State to the effect that this did not happen. Mazwana lost sight of the appellant for a while after the appellant had selected the supplement.
- [10] The magistrate also reasoned that the appellant’s evidence that he was not sure if he took the wallet from the bag or from his pocket when he paid did not make sense because the reason he took the bag into the shop was because it contained his wallet. This reasoning is not clear but seems somewhat circular. The appellant said that he had taken the wallet out of the bag

to check for money but could not remember if he put it back in the bag or in his pocket. The State led no evidence about how the appellant paid, namely whether he took the wallet from the bag or from his pocket, or had it in his hand.

- [11] The magistrate also seemed to question how the appellant could have forgotten about the supplement when the bag was in front of him at the pay point. She said that the telephone call had terminated when he paid and did not accept that he was disturbed by the telephone call. I think this reasoning is speculative and overlooks the possibility that during the whole process of unpacking goods from a trolley and getting ready to pay, a telephone call can divert a person's attention from the matter in hand. The fact that the appellant apparently openly put the bag down at the pay point with his other purchases in my view supports to an extent the appellant's version that he had forgotten about the supplement.
- [12] The magistrate was further of the view that if the appellant knew that the child became excited when he saw a supplement, he should have initially taken other steps to distract the child and that it was not necessary to hide the supplement. I think that this is somewhat artificial reasoning which imposes an ideal form of conduct on a person without taking into account varying responses to particular circumstances.
- [13] Lastly the magistrate reasoned that because the appellant was holding the bag he should have felt the weight of the supplement in the bag. Again I think that this is speculative reasoning. The weight of the supplement was not firmly established. Furthermore one does not know what the weight of the bag was.
- [14] In my view there were insufficient grounds for rejecting the appellant's version and effectively finding that it was not reasonably possibly true. It is not improbable that a parent will be distracted by a child and will forget to pay for an item. There was no evidence on behalf of the State of the manner in which the appellant put the supplement in the bag or what the child was doing when he did so. His version was supported by the evidence of the State that when confronted outside the shop he immediately told Mathe that the supplement was in the bag and that he had forgotten to pay for it. This is a case where there was a reasonable doubt about the guilt of the person accused and the appellant should have had the benefit of that doubt.
- [15] I need to deal with two aspects of the trial which are cause for concern. The magistrate questioned the appellant at some length (three pages of the transcript) in a manner which was nothing short of badgering and strongly suggested that the magistrate had already decided that the appellant was guilty. I quote an example:

"(Indistinct) ... fail to understand the way you reacted to ... (inaudible) child, I just fail to understand it. Anything could have distracted your child immediately after you have taken this item from the shelf and after you have put it on the trolley he's not seeing it anymore ... (inaudible). It's on top of him, he's ... (indistinct) a child. You – according to you he knows the supplement, you know what's going to happen, he could have still easily be distracted initially give him the chips, give a toy or something, he'll forget about it that its still there. After all the bag is here with you, you can feel it it has a weight. Why

should you forget about this thing that is in the bag that you were carrying? --- A phone call, Your Worship, distracted me a bit.

Until when? Up until what stage? Because when you were paying you had to stop the person that you were speaking to, you had to pay. The bag is here in front of you why would you forget about it? It's not that you were on the phone call up until you finished paying then you were leaving the store then the phone call stopped. You stopped the phone call before you paid and the bag is in front of your eyes. Why would you forget about it? You had to pick it up again and

put it in the trolley, you still have – feel the weight that there must be something here. Any question arising from the Court's question?"

[16] It will be noted that the appellant did not even have an opportunity to answer the last barrage of questions.

[17] The second aspect occurred during cross-examination of the appellant by the prosecutor. I have already mentioned that the magistrate did not allow the question relating to the telephone call and that the prosecutor had objected to the question (see paragraph [5] above). The prosecutor questioned the appellant in relation to this telephone call as follows:

"And also this new evidence that at the trolley - at the till point you were phoned by the mother of the child. That's new evidence and that was never stated to the State witnesses. What is your comment on that that you got a phone call during – when you were paying at the tills? --- Do you want me to answer that part?"

It's new evidence. If you were telling the truth now why didn't you say it from the beginning? --- No. I am telling the truth.

Now, why didn't you say it – why didn't you give the State witnesses an opportunity to answer you on that? Why only is coming out now? Can you answer me on that or are you going to remain silent? --- I'm just trying to think as to what happened when I was giving the statement.

Are you trying to think of a lie? --- No I'm not lying.

Now, just tell me the truth. --- No, I'm not lying.

Now, don't think, tell me. --- I'm telling the truth, I'm not lying."

[18] This was grossly unfair and offensive cross-examination, especially in the light of the fact that the prosecutor had objected to the question about the telephone call and the magistrate had disallowed the question. It is unfortunate that the magistrate did not restrain the prosecutor and unfortunate that the appellant's attorney did not object.

[19] The following order will issue:

The appeal succeeds and the conviction and sentence are set aside.

J. M. ROBERSON

JUDGE OF THE HIGH COURT

TOKOTA J:-

I agree

B. R. TOKOTA

Appearances:-

For the Appellant: Adv. D. Geldenhuys, Grahamstown Justice Centre

For the Respondent: Adv. H. Obermeyer, Director of Public Prosecutions, Grahamstown

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