

SOUTH AFRICA / JUDGMENT

Marema v S (A317/2019) [2023] ZAGPPHC 1175 (13 September 2023)

[2023] ZAGPPHC 1175

COURT

North Gauteng High Court, Pretoria

BEFORE

de Vos, D Makhoba

CASE / FILE NUMBER

A317/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: A317/2019

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date:

13 September 2023

In

the matter between: MADIMETSA
 JOSEPH MAREMA
 Appellant
 and
 THE
 STATE
 Respondent

JUDGMENT

DE VOS AJ

- [1] The appellant is appealing against his conviction by the Pretoria Regional Court for housebreaking with intent to steal and theft of a motor vehicle. Mr Marema was sentenced, on 7 August 2019, to
- (7) seven years' imprisonment plus a further (5) five years' imprisonment wholly suspended for (5) five years.
- [2] The finalisation of the matter has been delayed by the record being incomplete. The matter was postponed for the reconstruction of the record on 23 June 2020, 1 February 2021, 21 April 2022, and 8 August
2022. When the matter came before us, the parties agreed the record was in a state sufficiently complete for the Court to hear the matter. We accepted this position.
- [3] The conviction centres on Mr Marema having been found in possession of a stolen red Lexus. The police had no other evidence linking him to the crime. No further evidence would materialise either. Even at the trial, no witnesses linked Mr Marema to the crime, and no objective evidence would be brought. The sole evidence against Mr Marema is that he was found in possession of the Lexus.
- [4] Mr Marema has stated, all along, that he was keeping the Lexus for his friend, Mr Lusana. In convicting Mr Marema, the trial court rejected this version. Counsel for Mr Marema submits, before this Court, that the trial court improperly rejected Mr Marema's explanation of how the Lexus came into his possession, did not account for all the evidence and erred in its approach to circumstantial evidence.
- [5] We consider these grounds of appeal against the evidence led at the trial. The State led the evidence of the claimants, Mr and Mrs Pienaar as well as the arresting officers, Cst Mabusela and Cst Mawana. Their evidence is summarised below.
- [6] The complainants are the Pienaars. They testified that a silver Honda and a red Lexus were stolen from their home on 22 November

2017. Their evidence was limited to waking up to the discover that the cars had been stolen in the night. They could provide no evidence of the actual theft. It appeared that the thieves had climbed through a window, snatched the keys and made away with the cars. Neither of the Pienaars saw any of this, as the theft occurred whilst they were asleep.
- [7] Mr Pienaar opened a case of theft for both vehicles and provided the police with the car registration numbers. The following day, 23 November 2017, the police informed Mr Pienaar that his car had been recovered, and on 24 November, Mr Pienaar identified the car as his SAP Pound Unit. The Honda was never recovered.
- [8] The State also proffered the evidence of the arresting officers, Cst Zolake Mabusela and Cst Mawana. The Court only has the spelling of the officers as they appear on the transcript. Their names are, however, spelt inconsistently and inaccurately. The Court has no way of verifying the correct spelling of their names and will reflect them as they appear in the transcript.
- [9] The officers patrolled the Olievenhoutbosch area in a marked police vehicle on 23 November
2017. Their evidence was that whilst patrolling, they noticed a red Lexus that appeared to fit the description of one of the cars reported stolen the day before. They stopped and confirmed on the police radio control that this car was reported stolen. The red Lexus was parked next to Mr Marema's house. From this point onwards, the evidence of the two police officers diverge. Both agree that Mr Marema informed them the car belonged to Mr Lusana and that they set off to his house but found no one there. At Mr Lusana's house, the officers found the identity document of Mr Lusana's wife.
- [10] Much of the evidence of these officers contradict each other. The contradictions will be dealt with in more detail below.
- [11] Mr Marema's version was, in the main, that his friend, Mr Lusana arrived at his house at about 6 pm on 22 November 2017, driving the red Lexus. Mr Lusana suggested they drive to Mooiplaas to pick up their girlfriends. There was a baby seat in the car which Mr Lusana removed, and they left it in Mr Marema's home. They went to Mooiplaas, picked up their girlfriends and came back to Olievenhoutbosh. Mr Lusana told Mr Marema that he would leave the red Lexus with Mr Marema and fetch it later. Mr Lusana left the red Lexus at Mr Marema's house as there was no space at Lusana's house. Mr Marema did not think it odd that Mr Lusana had a different car, as he had many cars and often had different cars. Nor did he think it was odd to remove the baby seat, as Mr Lusana had children. Mr Marema said he did not know that the Lexus was stolen.
- [12] The following day, Mr Marema, awoke to two police officers outside his home. The police officers were drawn to his home because a red Lexus parked in his yard had been reported stolen. The police informed Mr Marema that the vehicle's registration, description, and make matched a car that had been reported stolen. Mr Marema explained to the officers that the car was not his but belonged to his friend, a Mr Lusana. Throughout the record, no

accurate or fuller name is provided for Lusana, nor is his surname provided. We will refer to him as Mr Lusana in the judgment. Mr Lusana had asked Mr Marema to leave the car there as Mr Lusana did not have a parking space for the car. Mr Marema provided the police with Mr Lusana's number and took them to his house. Mr Lusana was, and remains, nowhere to be found.

- [13] The trial court accurately identified that the State was relying on circumstantial evidence as no direct evidence had been led. The trial court weighed the dissonance in the two police officers' versions but ultimately held that they were consistent on material points and differed only in relation to immaterial issues. The trial court concluded the very feature of dissonance in their versions indicates that they had not rehearsed their testimony or colluded in creating a narrative. The trial court identified contradictions in Mr Marema's evidence. On this basis, presumably, the trial court found Mr Marema not to be credible. The trial court rejected Mr Marema's version as not reasonably possibly true.
- [14] The trial court considered this evidence and convicted Mr Marema. The trial court convicted Mr Marema as he was found in possession of the Lexus. The Lexus was one of two cars stolen the night before. The second car was a Silver Honda. Mr Marema was found guilty with housebreaking and theft of (count one) a Red Lexus with registration number F[...] and (count two) a Honda Silver Grey Reg No C[...].
- [15] We have been asked to reconsider the trial court's approach. Central to Mr Marema's appeal is his submission that his version was reasonably possible true. Mr Marema submits that the trial court erred in accepting the versions of the police officers in the face of a multitude of contradictions. Mr Marema contends that the trial court erred in ignoring the fact that he took the officers to Mr Lusana's home and failed to attach any weight to this fact. Lastly, Mr Marema submits that the trial court erred in its application of the doctrine of recent possession by applying it to the charge of housebreaking. We consider these submissions in light of the evidence led and the applicable case law.
- [16] The Court must be convinced that Mr Marema is guilty beyond a reasonable doubt. The Court cannot reject Mr Marema's version solely on the basis that it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false.[1] The corollary is that if Mr Marema's version is reasonably possibly true, he is entitled to an acquittal. Equally trite is that Mr Marema's conviction can only be sustained if, after consideration of all the evidence, his version of events is found to be false.
- [17] In *S v Shackell*[2] it was held with regard to improbabilities in the accused's version that a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the Court must decide the matter on the acceptance of that version. The accused's version cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

[18] The test is not whether Mr Marema's version matched how people probably would behave. The test is whether his explanation, that Mr Lusana left a stolen car at Mr Marema's house, cannot possibly be true. Evidence has to be led to show it is not possibly true, or some other basis, on which Mr Marema's version can be rejected as so improbable that it cannot reasonably be true.

[19] The trial court found the circumstances "suspicious" and "leaving much to be desired". The trial court weighed that Mr Marema had "never seen this friend of his driving the car previously", the car is of significant value, and Mr Marema assumed that the car belonged to Marema without making any enquiries about the ownership of the vehicle. As they were close friends, Mr Marema "ought to have enquired from Mr Lusana as to the ownership of the car before he accepted and even drove the car to park it on his yard that night. This can be seen from the judgment of the trial court –

"Common sense dictates that if one sees your friend in a motor vehicle for the first time, one would be expected to make enquiries about the car before accepting it and even driving it and keeping it at his/her own place".[3]

[20] For these reasons, the trial court rejected Mr Marema's version as improbable.

[21] It is true that Mr Marema's version presents him as suspicious, lacking in common sense, possibly overly complacent, inactive, uncurious and strange. Mr Marema did not ask questions that many people would about the new car. Mr Marema's failure to ask questions only renders his behaviour suspicious. In fact, that is how the trial court typified his behaviour: "suspicious". A suspicious explanation is not the equivalent of a false explanation, and Mr Marema's explanation cannot be rejected for being suspicious – only if it is found to be false. Mr Marema's explanation is not so implausible that it cannot be true. The trial court provided no basis on which it concluded that Mr Marema's version could not be true – only that his conduct rose to be suspicious.

[22] The trial court held that Mr Marema's explanation "left much to be desired". However, Mr Marema need not have convinced the Court of his version; to the contrary, the Court had to find a basis to find his version to be false – not just improbable. Our courts have held –

"It is trite law that there is no obligation upon the accused person, where the state bears the onus, 'to convince the court'. If his version is reasonably true he is entitled to his acquittal even though his version is improbable. A court is not entitled to convict unless is satisfied not only that the explanation is improbable but beyond a reasonable doubt it is false. It is permissible to look at the improbabilities of the case to determine whether the accused's version is reasonably possibly, but whether one believes him is not the test. As pointed out in many judgements, the test is whether there is a reasonable possibility that the accused version may be true. Accordingly, it is a misdirection by the trial court to regard an accused's failure 'to convince it' as a guarantee of the veracity of the evidence tendered by the State." [4]

- [23] The approach of the trial court was incorrect, in that the test is not whether the evidence fully explained or even convinced the trial court, but rather whether it is not reasonably possibly true.
- [24] In considering whether Mr Marema's version is reasonably possibly true, we weigh the fact that Mr Marema's explanation accords with the first version of events presented by both officers on the stand. It also weighs with us that Mr Marema is supported by the steps taken after the police's arrival at his house. Mr Marema provided the police with the phone number of Mr Lusana and even took them to his house. Mr Marema's version that he took them to Mr Lusana's house is then bolstered by objective evidence as they find the identity document of Mr Lusana's wife at the property.
- [25] In rejecting the version of Mr Marema, the Court provided no basis for excluding these two pieces of evidence. The first piece of evidence was that Mr Marema provided the officers with Mr Lusana's number: we know this number was correct as one of the officers spoke to Mr Lusana. The second piece of evidence was that Mr Marema took the officers to Mr Lusana's home, and we know the house was the correct home as the officers found Mr Lusana's wife's identity document at the house. These two pieces of evidence, in a sea of contradictions, stand out as being not disputed. The evidence of both police officers as well as Mr Marema is, on this score, identical.
- [26] The trial court does not account for these pieces of undisputed evidence. Ironically, these events are the only aspects where the evidence of Mr Marema and the two officers dovetail. Yet, the trial court disregarded these pieces of evidence entirely, despite them lending support to Mr Marema's version that the car belonged to Mr Lusana.
- [27] The trial court erred in this regard. It failed to account for this evidence and rejected Mr Marema's version on the basis that it was suspicious and left much to be desired.
- [28] The trial court identified four contradictions between the evidence of the two police officers. The first contradiction, identified by the trial court, is whether Mr Marema knew of the Honda. Second, whether Mr Marema provided the name of his friend, Lusana, when confronted by the police. Third, whether Mr Marema voluntarily pointed out the keys and the car sets or whether these were found during a search of the premises. Fourth, whether Mr Marema mentioned Lusana's name early or only after he was placed in the police van.
- [29] The trial court found that the officers corroborated each other in all other material respects, and when the evidence is weighed in its totality, the contradictions are not material. The trial court considered that months had passed since the events, that officers were overworked and that the differences showed the absence of collusion by the officers.
- [30] On a close study of the record, it is revealed that the contradictions extend beyond the four identified by the trial court. The officers' evidence not only contradicted each other, but they also, on material issues, contradicted themselves. The clearest example relates to whether Mr Marema told the officers the car belonged to his friend and when he did so.

- [31] Cst Mabusela's evidence is that he spotted the Lexus and called in to check the description and registration number. Having satisfied himself that the Lexus matched the description of the stolen car, he asked Mr Marema about the car parked in his yard. Cst Mabusela's evidence of what happened next is central –

“Then he told me that his friend came with the car and asked him to – and ask him if he can park that car there at his yard.”[5]

- [32] On Cst Mabusela's first version, Mr Marema immediately explained that the car belonged to his friend. In this first version, Mr Marema explained the car belonged to his friend prior to being confronted with an allegation that the car was stolen - before an arrest was on the cards.
- [33] Cst Mabusela then presented a second version of his statement made at the time of the arrest. The second version from Cst Mabusela is that Mr Marema did not explain the car belonged to his friend. This second version of Cst Mabusela contradicts his oral testimony to the Court. There is thus an internal contradiction in Cst Mabusela's evidence.
- [34] Cst Mabusela is then confronted with the contradiction between his evidence in Court and the statement at the time of the arrest. Cst Mabusela explains that it was only at the stage of arrest that Mr Marema explained how the Lexus had arrived in his yard. This third version is at odds with the evidence given to the Court.
- [35] At this stage, Cst Mabusela had given three contradictory accounts as to Mr Marema's explanation of how the Lexus came into his possession. First, Mr Marema told Cst Mabusela, upon arrival, that the car belonged to a friend. Second, Mr Marema had not presented an explanation at all. Third, Mr Marema told Cst Mabusela, only when being arrested, that the car belongs to a friend.
- [36] Whilst the trial court accepted the contradictions between the officers' narration of the events, the Court did not consider or weigh that Cst Mabusela failed to provide the Court with one congruent version.
- [37] Matters get worse when Cst Mabusela's evidence is then considered together with Cst Mawana's evidence. Cst Mawana's evidence was that the officers saw the Lexus, called in to confirm it was the car they were looking for and when they confronted Mr Marema, Mr Marema immediately said his friend had left the car there.
- [38] Cst Mawana's account changed frequently during his testimony. Cst Mawana's evidence traversed the entire spectrum. Cst Mawana's evidence vacillated from Mr Marema immediately told the officers the car belonged to his friend, and even gave the friend's name, all the way to the other extreme: that Mr Marema was silent and told them nothing. At one stage, Cst Mawana tries to then give the middle ground of these two extreme versions and says Mr Marema was silent until he was asked and then explained the car belonged to his friend.

[39] There are many more contradictions between the evidence of the two officers, relating to whether Mr Marema informed them that there was a Honda at Mr Lusana's house, whether Mr Marema provided the officers with Mr Lusana's number, whether Mr Marema called Mr Lusana, whether the neighbours came to the house and whether they joined the officers at the police station, whether Mr Marema provided them with the name of his friend and whether Cst Mabusela had a conversation with Mr Lusana on the day of the arrest. The trial court failed to deal with these contradictions.

[40] In *S v Mkohle*[6] the Appellate Division said the following:

'Contradictions per se do not lead to the rejection of a witness' evidence. . . . (T)hey may simply be indicative of an error. . . . (N)ot every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such

matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'

[41] The contradictions were plentiful. We have highlighted some of them and set out the extent of one of the contradictions. The officers' testimony was internally contradictory; they contradicted their own oral evidence as well as their written statements at the time of the arrest. They also contradicted each other. The contradictions were so many that they cast doubt on the reliability of this evidence.

[42] The contradictions are material. The nature of the contradictions considered above relates to Mr Marema's explanation of how the car came into his possession. It is the basis on which Mr Marema contends he could not have been found guilty. It is not only important but, in fact, central to the determination of this case. The officers' evidence in relation to the material issue – the reasonableness of Mr Marema's explanation – is contradictory.

[43] The Court cannot conclude that the contradictions are immaterial. The contradictions cast doubt on whether Mr Marema's guilt and the State's case against him. The Court cannot conclude that the State has made out a case, beyond a reasonable doubt, when that case consists of a multitude of contradictory statements on material

issues.

[44] We are not persuaded that Mr Marema is guilty beyond a reasonable doubt. The basis for this belief is that Mr Marema's version, although suspicious, is reasonably possibly true. In addition, the evidence of the officers gave against it was so contradictory that the Court could not rely on their evidence.

[45] There is one last aspect which the Court must address. The trial court relied on the doctrine of recent possession for the finding of guilt. The doctrine can only possibly apply to theft – not to housebreaking. The trial court, however, convicted Mr Marema of housebreaking when the doctrine would not permit such a conviction.

Order

[46] As a result, the following order is granted:

- a) The appeal is upheld.
- b) The conviction is set aside.
- c) The sentence is set aside.

I de Vos

Acting Judge of the High Court

D Makhoba

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the Appellant, ADV KGAGARA Instructed by: Pretoria Justice Centre Counsel for the Respondent: ADV JACOBS Instructed by: Legal Aid South Africa Date of the hearing: 25 July 2023 Date of judgment: 13 September 2023

[1] S v V 2000

(1) SACR 453 (SCA) at 455.

[2] 2001

(2) SACR 185 (SCA) para 14.

[3] Judgment, p 18 l 15 - 20

[4] S v V 2000 (1) SACR 453 – 454 (SCA)

[5] Transcript p 35 line 22

[6] 1990

(1) SACR 95 (A).

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