

SOUTH AFRICA / JUDGMENT

Marwanqana v S (A216/2010) [2010] ZAWCHC 476 (17 September 2010)

[2010] ZAWCHC 476

COURT

Western Cape High Court, Cape Town

BEFORE

Blignault, Wragge

CASE / FILE NUMBER

A216/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH
COURT, CAPE TOWN)

CASE

NUMBER:A216/2010

DATE:17

SEPTEMBER 2010

In the matter between:

MLUNGISELELI

MARWANQANA

.....Appellant

and

THE

STATE

.....Respondent

In the matter between:

MLUNGISELELI

MARWANQANA

.....Appellant

and

THE

STATE

.....Respondent

JUDGMENT

BLIGNAULT. J: Appellant, Mr Patrick Mlungiseleli Marwanqana was convicted on 17 July 2009 in the Vredendal Magistrate's Court on a charge of theft, namely that on 17 October 2007 at Jet Stores, Vredendal, he stole three DVD's, the value of which was R340.00. He was sentenced on 9 September 2009 to 24 months imprisonment, of which a period of 12 months imprisonment was suspended for five years. The magistrate refused his application for leave to appeal against his conviction and sentence. He then applied to this Court for leave to appeal against his conviction and sentence. He was granted leave to appeal against his conviction, but not against his sentence.

JUDGMENT

BLIGNAULT. J:

Appellant, Mr Patrick Mlungiseleli Marwanqana was convicted on 17 July 2009 in the Vredendal Magistrate's Court on a charge of theft, namely that on 17 October 2007 at Jet Stores, Vredendal, he stole three DVD's, the value of which was R340.00. He was sentenced on 9 September 2009 to 24 months imprisonment, of which a period of 12 months imprisonment was suspended for five years. The magistrate refused his application for leave to appeal against his conviction and sentence. He then applied to this Court for leave to appeal against his conviction and sentence. He was granted leave to appeal against his conviction, but not against his sentence.

Mr Gert Orian was the only State witness. On Wednesday 17 October 2007 he was employed by Jet Stores as a security guard. Between 12 o'clock and one o'clock he was on duty. He was standing on ladder. He saw appellant taking three DVD's from a shelf and putting them in the front part of his trousers. He saw appellant, but appellant could not see him as he was partly hidden behind rails of the shop. Appellant was wearing an orange T-shirt with a jacket and three-quarter blue pants. Appellant then moved towards an outside door and he also moved towards that door. He waited just outside the door and then asked appellant to come with him. Appellant walked with him towards the tills, but halfway through the shop, he started to wrestle and he took out the DVD's and threw them at his friends. Then appellant kicked off his shoes and ran away through the door to the outside. He followed appellant, but he could not catch him. He saw appellant later near the taxi rank and he reported the matter to the police. He and his manager worked out that the three DVD's were worth about R340.00. Appellant testified that he was part of a group of three men that entered Jet Stores that day. They wanted to look at clothes. He left his two companions at the clothes section and walked to the department where the shop sold DVD's. He was wearing a jacket with a large pocket on the inside. He placed the DVD's in the pocket. He moved to the clothes department and then placed the DVD's in the pocket of his jacket. He said that he did this, because he wanted to use both hands to remove a pair of trousers from a shelf which was quite high. Whilst looking at the trousers, the security guard arrived and hit him on the shoulder with his hand. The security guard told him to come with him, but he would not tell him where they were going. Then a fight broke out. They were pushing each other he said. The pair of trousers that he was looking at fell out of his hands. The DVD's fell out of his pocket and landed between

the clothes where they were pushing each other. His two friends were present when this incident happened. He said that it was his intention to purchase the DVD's and that he had money available to pay for them. After the fight, he left the shop in order to fetch something like a piece of wood to hit Orian with. When he returned, the police were there. Mr Booï testified that he was in the company of appellant and a friend named Bell in Jet Stores when the incident happened. They first went to the clothes department. Appellant told them that he was going to the DVD department where he wanted to purchase DVD's. When appellant returned, he had the DVD's with him and he put them in his jacket. The security guard then arrived whilst appellant had a pair of trousers in his hands. Appellant and the security guard started quarrelling. The security guard asked him to go with him and the two of them left. He said that appellant had not been arrested outside the shop. He also said that appellant did not put the DVD's inside his trousers, but in his jacket. When they entered the shop, they saw the security guard standing on the steps. In his judgment the magistrate summarised the evidence in the matter. He then commented on the witnesses. Mr Orian's conduct, he found, was normal. He acted reasonably and the Court cannot say that he did anything wrong that day. In regard to appellant, he said the following: "Nou kyk ons na die beskuldigde se optrede daardie dag. Indien die beskuldigde nie die goed wou steel nie, waarom het die beskuldigde soos 'n dief aangegaan? Beskuldigde stoei daar met die persoon. Die getuienis van die Staat is dat hy die gesteelde goed daar neergooi het. Hy skop sy skoene uit en hy gooi goed voor die getuie in om nou 'n sekere jaagtog van die agtervolger te rem." Appellant, he said, did not show the DVD's to Orian when he was confronted by him. His conduct shows that he had the intention to steal the DVD's. His version could not reasonably possibly be true. The magistrate rejected it and convicted him as charged. Appellant is not appealing against his sentence and it is, therefore, not necessary to consider the sentencing procedures. Counsel for appellant on appeal advanced a number of submissions. He submitted that Orian's evidence deviated in a material respect from the statement that he made to the police. The important point of difference is that Orian said in his statement that he arrested appellant inside the shop, whereas in evidence he said that it was outside. The magistrate considered this point in his judgment and said that Orian, according to his evidence, had explained to the policeman that he had confronted appellant outside the shop, but that he did not write it down. The magistrate found that this explanation was acceptable. I have no reason to question the magistrate's judgment in this regard. Counsel also submitted that the magistrate erred in finding that there was no reason for Orian to lie and then to use this factor to reject the version of appellant and his witness, Booï. In my view this was but one of many factors taken into account by the magistrate and he did not, on the face of it, attach much weight to it. Counsel for appellant also submitted that the magistrate erred in not attaching more weight to the evidence of appellant's witness, Booï. In my view the magistrate did not ignore this evidence, but he was obviously aware that Booï was not an independent witness. It seems to me that the magistrate found, on appellant's own evidence, that there were important reasons for rejecting his version. The appellant was unable to explain why, if he was innocent, he did not show the DVD's to Orian and explain to him that he was going to pay for them. Appellant could also not explain why he started to wrestle with Orian. In my view the magistrate did not err in this regard. It is trite law that a Court of Appeal will not likely interfere with the factual findings of the trial court. See *S v Francis* 1991(1) SACR

198 (A) at 204D-E. I have considered the magistrate's judgment and I am not persuaded that he misdirected himself or erred in any material respect. I would accordingly dismiss appellant's appeal against his conviction.

Mr Gert Orian was the only State witness. On Wednesday 17 October 2007 he was employed by Jet Stores as a security guard. Between 12 o'clock and one o'clock he was on duty. He was standing on ladder. He saw appellant taking three DVD's from a shelf and putting them in the front part of his trousers. He saw appellant, but appellant could not see him as he was partly hidden behind rails of the shop. Appellant was wearing an orange T-shirt with a jacket and three-quarter blue pants. Appellant then moved towards an outside door and he also moved towards that door.

He waited just outside the door and then asked appellant to come with him. Appellant walked with him towards the tills, but halfway through the shop, he started to wrestle and he took out the DVD's and threw them at his friends. Then appellant kicked off his shoes and ran away through the door to the outside. He followed appellant, but he could not catch him. He saw appellant later near the taxi rank and he reported the matter to the police. He and his manager worked out that the three DVD's were worth about R340.00.

Appellant testified that he was part of a group of three men that entered Jet Stores that day. They wanted to look at clothes. He left his two companions at the clothes section and walked to the department where the shop sold DVD's. He was wearing a jacket with a large pocket on the inside. He placed the DVD's in the pocket. He moved to the clothes department and then placed the DVD's in the pocket of his jacket. He said that he did this, because he wanted to use both hands to remove a pair of trousers from a shelf which was quite high. Whilst looking at the trousers, the security guard arrived and hit him on the shoulder with his hand. The security guard told him to come with him, but he would not tell him where they were going.

Then a fight broke out. They were pushing each other he said. The pair of trousers that he was looking at fell out of his hands. The DVD's fell out of his pocket and landed between the clothes where they were pushing each other. His two friends were present when this incident happened. He said that it was his intention to purchase the DVD's and that he had money available to pay for them. After the fight, he left the shop in order to fetch something like a piece of wood to hit Orian with. When he returned, the police were there.

Mr Booie testified that he was in the company of appellant and a friend named Bell in Jet Stores when the incident happened. They first went to the clothes department. Appellant told them that he was going to the DVD department where he wanted to purchase DVD's. When appellant returned, he had the DVD's with him and he put them in his jacket. The security guard then arrived whilst appellant had a pair of trousers in his hands. Appellant and the security guard started quarrelling. The security guard asked him to go with him and the two of them left. He said that appellant had not been arrested outside the shop. He also said that appellant did not put the DVD's inside his trousers, but in his jacket. When they entered the shop, they saw the security guard standing on the steps.

In his judgment the magistrate summarised the evidence in the matter. He then commented on the witnesses. Mr Orian's conduct, he found, was normal. He acted reasonably and the Court cannot say that he did anything wrong that day. In regard to appellant, he said the following:

"Nou kyk ons na die beskuldigde se optrede daardie dag. Indien die beskuldigde nie die goed wou steel nie, waarom het die beskuldigde soos 'n dief aangegaan? Beskuldigde stoei daar met die persoon. Die getuienis van die Staat is dat hy die gesteelde goed daar neergooi het. Hy skop sy skoene uit en hy gooi goed voor die getuie in om nou 'n sekere jaagtog van die agtervolger te rem."

Appellant, he said, did not show the DVD's to Orian when he was confronted by him. His conduct shows that he had the intention to steal the DVD's. His version could not reasonably possibly be true. The magistrate rejected it and convicted him as charged.

Appellant is not appealing against his sentence and it is, therefore, not necessary to consider the sentencing procedures. Counsel for appellant on appeal advanced a number of submissions. He submitted that Orian's evidence deviated in a material respect from the statement that he made to the police. The important point of difference is that Orian said in his statement that he arrested appellant inside the shop, whereas in evidence he said that it was outside.

The magistrate considered this point in his judgment and said that Orian, according to his evidence, had explained to the policeman that he had confronted appellant outside the shop, but that he did not write it down. The magistrate found that this explanation was acceptable. I have no reason to question the magistrate's judgment in this regard. Counsel also submitted that the magistrate erred in finding that there was no reason for Orian to lie and then to use this factor to reject the version of appellant and his witness, Booi.

In my view this was but one of many factors taken into account by the magistrate and he did not, on the face of it, attach much weight to it. Counsel for appellant also submitted that the magistrate erred in not attaching more weight to the evidence of appellant's witness, Booi. In my view the magistrate did not ignore this evidence, but he was obviously aware that Booi was not an independent witness. It seems to me that the magistrate found, on appellant's own evidence, that there were important reasons for rejecting his version. The appellant was unable to explain why, if he was innocent, he did not show the DVD's to Orian and explain to him that he was going to pay for them. Appellant could also not explain why he started to wrestle with Orian. In my view the magistrate did not err in this regard.

It is trite law that a Court of Appeal will not likely interfere with the factual findings of the trial court. See *S v Francis* 1991(1) SACR 198 (A) at 204D-E. I have considered the magistrate's judgment and I am not persuaded that he misdirected himself or erred in any material respect. I would accordingly dismiss appellant's appeal against his conviction.

BLIGNAULT. J: It is then so ordered.

BLIGNAULT, J

WRAGGE. J: I agree.

WRAGGE, J

/bw

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