

SOUTH AFRICA / JUDGMENT

Mdubane v S (CA & R 97/17) [2018] ZANCHC 58 (18 May 2018)

[2018] ZANCHC 58

COURT

Northern Cape High Court, Kimberley

BEFORE

Pakati, Stanton

CASE / FILE NUMBER

CA & R 97/17

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION, KIMBERLEY)

Case

No: CA & R 97/17

Heard

on: 09/02/2018

Delivered

on: 18/05/2018

In

the matter between

JABU

MDUBANE

Appellant

V

THE

STATE

Respondent

Coram:

Pakati ADJP et Stanton AJ

JUDGMENT

ON APPEAL

PAKATIADJP

[1] The appellant, Mr Jabu Mdubane, was arraigned in the Regional Court, Port Nolloth, for theft of 1.8 copper cable with a mass of 521kg valued at R31 260-00, the property in the lawful possession of Telkom alternatively being found in possession of property suspected to be stolen in contravention of s 36 of the General Law Amendment Act, 62 of 1995 ("the Act"). He pleaded not guilty and denied knowledge of the offence but was nevertheless convicted of contravention of s 36 of the Act on 24 January

2014. On 13 March 2014 he was sentenced to seven years imprisonment of which three years were suspended for a period of five years on certain conditions.

[2] On 09 December 2014 the appellant's application for leave to appeal against conviction and sentence was refused by Regional Magistrate Huisamen but was granted leave to appeal against conviction and sentence by this Court on 03 November 2016, hence this appeal.

THE GROUNDS OF APPEAL AND THE PRINCIPLE ON APPEAL

[3] In his petition dated 10 December 2014 and filed on 12 December 2014 he recorded the following reasons as his grounds of appeal:

"8.1 AD SKULDIGBEVINDING

8.1.1 Die Agbare Landdros het nie die bewyslas wat op die staat rus behoorlik in ag

geneem nie en gevolglik die beskuldigde skuldig bevind in omstandighede waar die Staat nie daarin geslaag het om hom van sy bewyslas te kwyt nie.

8.1.2 Die Agbare Landdros het bevind dat die staat bo redelike twyfel bewys het dat die applikant op 12 Desember 2012 in besit gevind was van verrnoedelik gesteelde goedere, naamlik koperkabels, waarvoor die applikant nie 'n redelik verduideliking kon gee nie.

8.1.3 Die Agbare Hofhetfouteer deur nie die volgendefeite in ag te neem nie en/of nie die waarskynlikhede en onwaarskynlikhede op te weeg teen die beweer feite nie:

8.1.3.1 Te bevind dat die applikant se weergawe van die gebeure en hoe die goedere agter op sy voertuig gekom het, nie redelik moontlik waar

is nie;

8.1.3.2 Te bevind dat dit onwaarskynlik is dat die applikant so ver na 'n vreemde plek sal ry om klere te gaan haal nadat die persone

aan wie hy 'n geleentheid gegee het, genome het dat Springbok nie baie ver is nie;

8.1.3.3 Te bevind dat dit vreemde is vir die applikant om te Port Nolloth sy voertuig aan die persone te gee met die vertroue dat hul sou terugkeer na hom, en dat hy die persone vertrou het;

8.1.3.4 Te bevind dat dit onwaarskynlik en vreemd is dat die applikant tesame met die persone daardie tyd van die nag sou terug ry, sander

om te rus of oor te slap;

8.1.3.5 Te bevind dat dit nit toevallig was dat die applikant se voertuig aan die spesifikasies voldoen vir die optel en vervoer van hierdie hoeveelheid koper kabel nie

8.1.3.6 Te bevind dat dit die applikant geweet het waarheen hul ry, en so ook die rede waarvoor hul na Port Nolloth is, en dat dit beplan was;

8.1.3.7 Die applikant se weergawe te verwerp en dit as onwaarskynlik en vals te beskou en te aanvaar;

8.1.3.8 The bevind dat die applikant se weergawe en verduideliking nie redelik moontlik waar kan wees nie.

8.1.4 Dat daar redelike vooruitsigte op sukses is dat n Ander Hof tot n ander bevinding kan kom en die applikant onskuldig kan bevind, indien die aansoek om verlof tot appel toegestaan word.

8.2 AD VONNIS

8.2.1 Dat die vonnis van 7 jaar gevangenisstraf-waarvan 3 jaar gevangenisstraf opgeskort word vir n termyn van 5 jaar op voorwaardes, deur die Agbare Hof opgele, onnodig swaar en onvanpas in die omstandighede is.

8.2.2 Dat die Agbare Hof fouteer het deur nie die Persoonlike Omstandighede van die applikant, soos volledig voor die hof geplaas deur die applikant en sy regsverteenvoerder, in ag te neem of genoegsaam in ag te neem nie. Vera/ met verwysing van die volgende:

8.2.2.1 Die applikant is op 44 jarige leeftyd as eerste oortreder voor die hof;

8.2.2.2 Dat die applikant oar n goeie betekking as sekuriteits beampte beskik het en dat al sy kinders finansieel van ham ajhanklik is;

8.2.2.3 Dat hy finansiele skade ly in die bedrag van R89 000.00, synde sy voertuig waarop beslag gele is, en welke die applikant nie weer

sal terugkry nie;

8.2.2.4 Dat die applikant die slagoffer was van fl ongelukkige sameloop van omstandighede en die feit dat hy die verkeerde persone vertrou het en fl oordeelsfout begaan het op die betrokke dag.

8.2.3 Dat die Agbare Hof te veel klem gele het op die belange van die gemeenskap en die ernstigheid van die misdryf en nie genoegsame oorweging gegee het aan die applikant se persoonlike omstandighede met die oog op Rehabilitasie nie.

8.2.4 Dat fl total opgeskorte vonnis, n korrektiewe vonnis of'n vonnis in terme van Art 276(l)(i) van die Strafproseswet - meer van pas sou wees in hierdie aangeleentheid, wat tot gevolg sou gehad het om die applikant af te skrik en te weerhou van sulke optrede in die toekoms.

8.2.5 Dat daar redelike vooruitsigte op sukses is dat die vonnis verminder sal word, indien die aansoek om verlof tot appel toegestaan word. "

[4] In S v HADEBE AND OTHERS[1] Marais JA held:

"Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary. "

THE APPELLANT'S ADMISSIONS IN TERMS OF S 220 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 ("the CPA")

[5] It is common cause that the offence was committed between the 12th and 13th of December 2012. Ms De Bruyn, for the appellant, recorded admissions in terms of s 220 of the Criminal Procedure Act, 51 of 1977 ("the CPA"), as follows:

"Ons erken dat die Beskuldigde die eienaar is van 'n dubbelkajuit GWM bakkie, silwer van kleur met 'n registrasienommer BZ 217 FR GP..

Die Beskuldigde wil verder ook erken dat op die betrokke oggend van die voorval op die 13de van Desember 2012 ongeveer 01:30 die oggend hy in hierdie voertuig was op die R382 openbare pad vanaf Port Nolloth na Steinkopf, dat die voertuig ongeveer 10 kilometer voor Steinkopf deur die polisie efgetrek is en dat die polisie agter op die dubbelkajuit voertuig se bak koperkabel met 'n gewig van 521 kilogram ter waarde van R31, 260.00 gevind is en dat die polisie daarop beslag gel? het, Edslagbare. Ons wens oak te erken dat die koperdraad wat agter op die bakkie voertuig gevind is, dieselfde koper is wat 10 kilometer buite Port Nolloth afgesny en gesteel was op die 12de van Desember 2012 en dat hierdie koperkabel dan die eiendom is en behoort aan Telkom. "

THE EVIDENCE OF STEFANUS MARTINUS SMUTS AND CONSTABLE YVETTE ROSETTA VAN DER POLL

[6] Mr Stefanus Martinus Smuts, an employee and a technician of Telkom, testified that on a Wednesday 12 December 2012 about ten kilometres out of Port Nolloth on the R382 between Port Nolloth and Steinkopf he and other unnamed officials discovered 6 copper cables. He stated that the cable were telephone connections between two towns, Eksteenfontein and Lekkersig including farms surrounding the areas. The theft resulted in communication breakdown in the affected areas. The cost of the cable was R60 900-79 and the total loss was R62 908-68. He testified that the copper cable was recovered at the back of the bakkie of the

appellant. The quantity found was approximately the same as the one stolen from the scene. He testified further that it would not have been possible for

one person to commit the alleged theft.

- [7] Constable Yvette Rosetta Van der Poll, a member of the K9 Unit of the South African Police Services ("SAPS") stationed in Springbok, testified that on the day in question she received a report from Mr Dawie Wiese concerning the theft of copper cable around 21h00. She and her two colleagues, W/o Saal and another unnamed police officer, drove about ten kilometres out of Port Nolloth and waited at a certain spot. Around 01h35 they spotted a silver GWM bakkie later identified as that of the appellant, driven at a high speed. They immediately put on the blue lamp and also used torches indicating to the motor vehicle to pull over but it drove past them as they were standing alongside the road. They pursued it and it ultimately pulled over about 200 metres away from them. It reversed towards their motor vehicle. The appellant alighted and stood next to his motor vehicle on the driver's side. The engine of his motor vehicle was still running. When Constable Van der Poll asked him whether he was alone he responded that other people in his company fled the scene and disappeared in the dark. She said:

"Ek kan noem dat dit baie donker die spesifieke nag was. Daar was geen maanlig nie. Ek het op daardie stadium nie kon sien of enige persone in die veld gehardloop het.nie."

- [8] Constable Van der Poll testified that W/o Saal removed the cover at the back of the appellant's motor vehicle and they noticed the copper cable. When confronted about it the appellant denied knowledge of it. She testified further that there was no other luggage found in the bakkie. The appellant was then apprehended.

That concluded the State case.

THE EVIDENCE OF THE APPELLANT

- [9] The appellant testified in his own defence and did not call witnesses to testify on his behalf. His version was that on the specific day he drove from Benoni to Port Nolloth in the company of one Amos and two of his (Amos') acquaintances. He met his companions in Daveyton. He initially intended to drive to Kathu but proceeded to Springbok because his companions needed to go to Springbok in his motor vehicle. From Springbok they directed him to Port Nolloth. He remained in a tent in Port Nolloth while they borrowed his motor vehicle to collect some clothing. They drove away and took more than two hours before they returned. On their return Amos was the driver and they were on their way to Kathu. The appellant testified that he occupied the passenger seat while the other two took the back seat. According to him he fell asleep. He was woken up by the two men seated at the back telling Amos to "press", meaning speed off. When he turned he noticed the blue lamp of the police motor vehicle and told Amos to stop the motor vehicle, which he did. It is at that stage that Amos and the two men alighted from the motor vehicle and fled the scene. He proceeded to the driver's seat and reversed the motor vehicle towards the police.

[10] When the police confronted him about his failure to stop he explained

that he was not the driver but Amos and that his companions had fled. When the police discovered the copper cable at the back of the bakkie he denied knowledge of such.

That concluded the defence case.

[11] The court a quo highlighted what it found as shortcomings in the State's case regarding the main count of theft and said:

"Die klagtes teen u is een van diefstal. Hier is geen getuienis voor hierdie Hof dat u inderdaad self beplan het om die koperkabels te steel nie. Hier is geen getuienis direk of omstandigheidsgetuienis voor die Hof dat u inderdaad die koperkabels gesteel het nie. Die staat het nie bewys dat u die mens rea gehad het om die kabels te steel nie en die Staat het ook nie bewys dat die contractatio

handeling deur u plaasgevind het nie.

Die Staat maak staat op 'n leerstuk van onlangse besit. Dit bepaal dat indien u in besit gevind word van items wat onlangs gesteel is, dan kan die Hof u skuldig bevind aan diefstal.

Die Staat se getuie, Mnr Steyn/Smuts se hy was by die perseel van die voorval op die 12de Desember 2012 en dat dit vir hom onmoontlik was om te sê watter tyd die kabels gesteel is. Die Hof is van mening dat hierdie leerstuk slegs aangwend kan word indien dit ho redelike twyfel bewys is die tydperk wanneer dit gesteel is en in hierdie geval is dit nie bewys nie.

GEVOLGLIK WORD U ONSKULDIG BEVIND OP DIE KLAGTE VAN DIEFSTAL."

[12] Regarding s 36 of the Act the Regional Magistrate found:

"Die alternatiewe klagte verwys na die bepalings van Artikel 36 van die Algemene Regswysigingswet wat bepaal dat indien u in besit gevind word van vermoedelik gesteelde goedere en indien u nie in staat is om voldoende rekskap van sodanige besit te gee nie, dan kan die Hof u skuldig bevind op hierdie wetsbepaling. Soos Mnr de Vries korrek aangetoon het is hier 3 elemente. Eerstens u is in besit gevind van die goedere. Tweedens bestaan daar wel 'n redelike verdenking dat dit gestelde goedere is.

Die enigste verdere aspek waarvoor hierdie Hof dan moet bevind is of u 'n redelike verduideliking kan gee. Nou eerstens moet die Hof van meet af aan sê dat u weergawe, u storie bei'ndruk glad nie die Hof nie, dat u en Amos beplan om Kathu toe te ry en dan net om klere te gaan haal word daar 'n verdere 740 kilometer gery. Op u eie getuienis was dit vroeë toe julle in Kathu stilgehou het toe die ander manne vir u gevra het om die voertuig te leen en u wou dit nie aan hulle leen nie.

U tog vanaf Kathu na Port Nolloth word gekenmerk deur die volgende en ek haal die woorde aan, u worry oor die afstand, die verdere afstand wat gery word. Amos se vir u by verskeie geleenthede u moenie worry nie. U kom op n heeltemal vreemde plek naamlik Port Nolloth waar u nog nooit in u lewe was nie en u laat toe dat Amos en ander vreemde manne vir u net drop of aflaai by die liggies fees en verder alleen met u voertuig ry. Dit nadat u geen benul het waarnatoe hulle ry nie, want u was nog nooit op Port Nolloth nie.

Hulle sou aanvanklik net 200 kilometer vanaf Kathu gery het en toe het hulle 740 kilometer van Kathu af gery en die heeltyd is u geworried en u argumenteer met Amos. Daarom vind die Hof dit totaal en al onwaarskynlik dat u dan nou u voertuig vir hulle sal leen. U antwoord is dat hulle sou tyres gekoop het en brandstof betaal het. So u was bereid om dit vir hulle te leen.

Hierdie argument of stelling gaan natuurlik glad nie op nie, want hulle kon net sowel u voertuig gesteel het, veral aangesien die lig waar u vandaan kom in Daveyton in Benoni en daar aan die rand, die Wesrand of die Oosrand, daar aan die Oosrand waar u is in Benoni, daardie grater gedeelte van die Oosrand, hoeveel voertuie daar

op n daaglikse basis gesteel word. Daar is niks wat u verhoed het om saam met hulle te ry nie, die aand hier in Port Nolloth. En die storie dat u toe afgelaai is by die liggie fees. en toe met rastas gepraat het wat hulle eie goed gerook het en toe daai tyd van die nag na die see uitsig gekyk het, word nie aanvaar deur hierdie Hof nie.

As ons nou kyk na die Artikel van die Algemene Regswysigingswet, dan kyk ons eerstens na die goedere wat gevind is, 1.8 kilometer

telefoondraad met 'n gewig van 561 kilogram. As ek kyk na die bundel Jatos wat ingehandig is en veral vanaf fotos 5 aan tot by Joto 24, 25, 26, 27, 28 dan dit is dit baie duidelik dat hierdie koperkabel, hierdie telefoondrade is van die telefoonpale af verwyder en die Hof vind dit ook onmoontlik dat 3 manne daardie tyd van die nag hierdie lengte draad en die gewig daarvan self kon verwyder het. As n mens kyk na rolle koperdraad op Joto 5 van die Joto album, met inagneming van die gewig, is dit duidelik dat meer as een of 2 persone benodig sal word om een ronde van hierdie koperkabel op te tel. "

[13] The Regional Magistrate continued:

"Die Hof bevind dus dat die beskuldigde wel in besit gewees het van hierdie goedere terwyl daar 'n redelike verdenking bestaan het dat dit gesteelde goed is en dat die beskuldigde geen redelike verduideliking en rekenskap kon gee van sodanige besit nie.

Die Hof sluit af deur te bevind dat die beskuldigde van meet af saam met die ander 3 manne beplan het om hierdie koperkabels in Port Nolloth te kom laai en terug te vervoer na die Oosrand.

GEVOLGLIK WORD DIE BESKULDIGDE SKULDIG BEV/ND AAN 'N OORTREDING VANARTIKEL36 VANWET62 VAN 1955."

ARGUMENT ON CONVICTION IN THE HIGH COURT

[14] Mr Van Tonder, for the appellant, submitted that the version of the appellant is not so improbable that it could be rejected as false beyond reasonable doubt. In response Ms Van Heerden, on behalf of the State, argued that the court a quo correctly convicted the appellant. However, she further argued that the Regional Magistrate misdirected himself when he found that the respondent did not prove the offence of theft against the appellant. The reasons for her submission can be summarised as follows:

14.1 The copper cable was stolen the very same night it was found in the appellant's position having driven from Benoni to Port Nolloth, a distance of about 1360 kilometres;

14.2 The possibility exists that the appellant was not alone during the theft especially considering the evidence of Smuts, the Telkom employee that not one person would handle the copper cables in question. The concluded would therefore be that he was in the company of other people namely, Amos and two others; and

14.3 That it was never his version that he had knowledge of the copper cable but that he was unaware that it was stolen.

[15] For this assertion Ms Van Heerden relied on *S v NDLOVU*[2] where Nicholas AJA had this to say:

"Where an accused person has in his evidence given an account which is not true, it is not for the Court to speculate about possible defences not advanced by the accused himself. So in a case where a person, who has dealt with recently stolen goods, has given an explanation which has been rejected,

"The Court should not ... find on his behalf some explanation which, might perhaps have been true, but which he himself has not given. "

[16] Ms Van Heerden also relied on s 304 (2) (c) (iv) of the CPA which

provides that the court may, on review of the proceedings in the magistrates court, give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question. I do not agree with this contention for the following

reasons:

16.1 The appellant's version was corroborated by Constable Van der Poll in the following respects:

16.1.1 She was present in the police vehicle that pursued the appellant's motor vehicle on the night in question;

16.1.2 The appellant's vehicle was driven at a very high speed at the time the police gave chase;

16.1.3 When confronted about failure to stop his motor vehicle he explained that he was not the driver and that his companions fled into the dark. Ms Van der Poll confirmed that it was dark and that she was uncertain that she would have been able to see the appellant's companions when they fled from the scene when the motor vehicle ultimately stopped;

16.1.4 She observed the brake lights, the motor vehicle reversing towards the police vehicle and also break marks on the road; and

16.1.5 Although she could not remember that the appellant mentioned Amos on the day in question, she mentioned the name of Amos in her statement.

[17] According to Ms Van Heerden it is inconceivable that the appellant

would be misled to an extent of driving about 600 kilometres to Springbok to collect clothing and to drive another 140 kilometres to Port Nolloth, considering that he was a long distance taxi driver or that he trusted Amos and the two others with his motor vehicle though they were not his friends.

[18] The issues for determination are:

(18.1) whether the version of the appellant is reasonably possibly true;

(18.2) whether the Regional Magistrate erred in convicting the appellant on a charge of contravention of s 36 of the Act; and

(18.3) whether the sentence imposed is shockingly inappropriate.

[19] Ponnann JA in *S v MONYANE AND OTHERS*[3] stated:

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2)

SACR 641 (SCA) at 645e-f [supra]). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204e)."

[20] In *S v CHABALALA* [4] Heher JA stated:

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

[21] In S V V[5] Zulman JA held:

"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is impermissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true. "

[22] In my view the appellant's evidence was indeed convoluted but that does not mean that his version is false in the face of Constable Van der Poll's evidence which confirms his version especially the details of what took place at the scene. He maintained that version throughout. In my view the Regional Magistrate committed a misdirection when he convicted the appellant under the circumstances. When there is a doubt the benefit is given to the accused. The appeal should succeed.

In the circumstances I make the following order:

1. The appeal against conviction and sentence is upheld. The conviction and sentence imposed by the Regional Magistrate are set aside.

BM PAKATI

ACTING DEPUTY JUDGE PRESIDENT

NORTHERN CAPE DIVISION, KIMBERLEY

I concur

A STANTON

ACTING JUDGE

On behalf of the Appellant: ADV A V AN TONDER

Instructed by:

LEGAL-AID SA, KIMBERLEY

On behalf of the State: ADV AH VAN HEERDEN

Instructed by:

DIRECTOR OF PUBLIC PROSECUTIONs

[1] 1997

(2) SACR 641 (SCA) at 645e-f

[2] 1987

(1) PH H37 (A) at p 68 [3] 2008

(1) SACR 543 at para 15 at p547i to 548b

[2] 1987

(1) PH H37 (A) at p 68

[3] 2008

(1) SACR 543 at para 15 at p547i to 548b

[4] 2003

(1) SACR 134 (SCA) at para 15

[5] 2000 (1) SACR 453 (SCA) at p 455a-c

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