

SOUTH AFRICA / JUDGMENT

Melikhaya v S (C.A. & R.: 365/2014) [2015] ZAECHGHC 52 (7 May 2015)

[2015] ZAECHGHC 52

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, V Reddy

CASE / FILE NUMBER

C.A. & R.: 365/2014

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
GRAHAMSTOWN
C.A. & R.: 365/2014
DATE: 07 MAY 2015

In the matter between:

MELIKHAYA

BEN.....Appellant

And

THE

STATE.....Respo
ndent**JUDGMENT**

Date Heard: 29 April 2015

Date Delivered: 7 May 2015

EKSTEEN J:

- [1] The appellant has been convicted in the Regional Court of Port Elizabeth of housebreaking with intent to steal, kidnapping and robbery with aggravating circumstances. He was sentenced to three years imprisonment in respect of count 1, two years imprisonment in respect of count 2 and fifteen years imprisonment in respect of count 3. The sentences were ordered to run concurrently. The appellant's application for leave to appeal against his convictions and sentences was dismissed by the magistrate but subsequently granted on

petition to the Judge President.

- [2] It is common cause that at approximately 02h30 on the morning of 24 May 2013 three men broke into the home of the complainant, an 82 year old widow, in a retirement village, at no. 6 Dunant Park, 7th Avenue, Summerstrand. She woke up struggling for breath and noted a man on top of her putting his hands over her mouth. He had a knife in his possession and threatened to kill her if she did not keep quiet. The other two persons ransacked the room. During the course of these proceedings the person with the knife cut an electric cord in the room and tied up the complainant's hands with the electric cord. Her feet were tied with a belt and a scarf tied around her neck with the end pushed into her mouth so as to prevent her from screaming. They pulled down her trousers to her knees and touched her private parts, however, mercifully, she was not violated further.
- [3] As they ransacked the room they removed a number of items including a black toilet bag with white polka dots, a Vivitar camera, a pack of TLC cotton buds, a silver chain, a gold chain with a blue pendant, a gold ring with two aquamarine stones, a pair of New Balance white takkies, a gold watch with a brown leather strap various items of food stuff and toiletries. The total value of the stolen items was estimated at approximately R10 000.
- [4] When the intruders had left the complainant managed to get hold of a pair of scissors and cut the cord which tied her hands together. She pressed a panic button which is kept in the room and preceded to the burglar bars from where she screamed as loud as she could. The manager of the retirement village where she lived responded to the panic button and her next door neighbour heard her screams and came to her assistance. Security were called, however, the assailants had left.
- [5] The complainant's next door neighbour, Ms Green, confirms that she woke up at approximately 02h30 although she was unable to say what caused her to wake up. Approximately 15 minutes later she heard a smashing sound at her back door and, shortly thereafter, a second. She got up and proceeded to her kitchen door where she noted two men outside. As she retreated to sound the alarm she noted a third person outside passing her window and she immediately alerted the management of the retirement village. A few minutes later she heard the screams of her next door neighbour. The police and the manager of the retirement village, one Taljaard, arrived to assist and Ms Green ran to the assistance of the complainant.
- [6] Ms Groenewald, a constable in the South African Police Services was one of the officers who responded to the call. She confirms that she spoke to the complainant and that the complainant advised her that three African males in their mid-twenties, of average height, had perpetrated the deed. She was unable to give any further description of her assailants.
- [7] It is common cause that at approximately 08h00 that morning the appellant was confronted in Strandfontein Road adjacent to a graveyard carrying two bags. A number of the stolen items were recovered from these two bags. He was arrested and charged accordingly. The appellant pleaded not guilty to all the charges laid against him. In his explanation of plea he

states that on the morning of 24 May 2013 he was in the area of the Forest Hill Graveyard when he saw three black males hiding two bags in a bush at the graveyard. When they had left he proceeded there and opened the bags. He saw that the bags contained various items. He noted the jewellery inside one of the bags and put those in his pocket. He picked up the bags and proceeded towards Strandfontein Road intending to cross the road. There he was confronted by two police officials. When asked about the bags he informed the police officers that he had picked up the bags alongside the graveyard.

- [8] His plea explanation is largely confirmed by the evidence of Constable Grebe who confronted the appellant in Strandfontein Road that morning. Grebe states that he and his partner, Constable Marais, were on patrol duty when they noted the appellant standing alongside the graveyard in Strandfontein Road. They considered that he was suspicious looking although no particularity is provided in his evidence of any observation made which caused him to conclude that the appellant appeared suspicious. The appellant carried a green bag in his hand and had a further backpack on his back. Grebe states that the majority of pedestrians in Strandfontein Road normally walk on the opposite side of the road and that the appellant was alone on the graveyard side of the road. It would appear that this feature gave rise to the suspicion. He confronted the appellant and asked him whether he might search through his bags. The appellant immediately gave permission. On searching the green bag Grebe noted a number of articles which coincided with the property stolen during the robbery. Grebe thereafter requested permission to search the bag on his back and the appellant readily removed the bag and consented to Grebe searching it. In the bag he found further items matching those which had been stolen in the robbery. Grebe enquired from the appellant where he had obtained these articles to which the appellant said that he had picked it up in the graveyard. Under cross-examination Grebe states that he made no attempt to investigate the area where the appellant stated that he had picked the items up as he considered that nobody in their right mind was going to throw away such valuable items. He did not make any further enquiries as to the manner in which the appellant came to find these items and protested that it was irrelevant to him whether the appellant had noted other people hiding these items as the appellant was found in possession thereof.

- [9] Upon his arrest it was noted that the appellant walked with a marked limp. On the following day, the 25th of May 2013 the appellant was taken to a doctor for medical treatment. He prepared a medico-legal report which was handed in as evidence. The doctor recorded that the appellant had reported that he had fallen whilst running and that he had turned his foot and sprained his left ankle. The doctor recorded that save for the ankle injury the appellant was otherwise healthy. He recorded further that the likely date of injury was either late on 24 May 2013 or early on 25 May 2013 and that it was indeed likely to have been caused by a twisting force on the ankle. I pause to record that it is common cause that the appellant was in custody late on 24 May 2013.

- [10] The appellant, in his evidence, confirmed the version set out in his explanation of plea. He confirmed that he had sprained his ankle whilst playing football on the afternoon of 23 May 2013.
- [11] In cross-examination the appellant was extensively cross-examined in respect of the cause for his presence in Summerstrand on the morning of 24 May 2013. He testified that in the days preceding 24 May 2013 he had met a man in the parking area at the Boardwalk Centre in 2nd Avenue, Summerstrand who had indicated that he would have employment for the appellant on 24 May 2013. They had agreed that the appellant would meet this stranger at the Sasol Garage in Strandfontein Road at 7 o'clock on the morning of 24 May 2013 and the man provided his cellphone number to the appellant. He accordingly rose early and left his home at approximately 5 o'clock in the morning taking a taxi into town. He disembarked at the terminus taxi rank in the centre of town and then walked all along the beachfront taking a path through the veld up to the Sasol Garage. It is not in dispute that it was a considerable distance which he would have to walk and he explained that he did so as he considered that it was important to keep his ankle in movement. He explained that having arrived at the Sasol Garage at approximately 7 o'clock that morning the man who had promised him employment was not to be found. After waiting for some considerable time the man did not appear and he accordingly resolved to walk back towards the taxi rank. It did not occur to him, he says, to phone his would-be employer.
- [12] Whilst walking along Strandfontein Road adjacent to the cemetery he noted the three black males carrying these bags and stashing them under a bush approximately 10 metres away from the road. From where he was the bags remained clearly visible and he proceeded to investigate. He states that upon finding the bags he opened the backpack and noted that it contained a number of items, including a cellphone and certain jewellery items. He says that he resolved to take these items to the Humewood Police Station but nevertheless removed the cellphone and the items of jewellery from the backpack and put them into his pocket as he intended to keep those items for himself.
- [13] The State's case turned exclusively on circumstantial evidence. The fact that the appellant was found in possession of a substantial number of the stolen items approximately six hours after the offence had been committed and in an area approximately three kilometres away from the scene of the robbery gives rise, in the absence of an explanation, to a reasonable inference that the appellant was involved in the robbery. The magistrate, in evaluating the evidence before him, in particular that of the appellant, made no adverse demeanour finding in respect of the appellant. He made no finding of any contradictions contained in the evidence of the appellant. A perusal of the transcript of the proceedings does not reveal any significant contradiction in the evidence of the appellant nor any contradiction between his evidence and that which was put to witnesses on behalf of the State or that which was said in any extra-curial statement made prior to trial. The magistrate rejected the version of the appellant solely on a consideration of the probabilities of his version.

- [14] The magistrate, correctly, considered the evidence in its totality. He considered that it contained three areas of improbability. Firstly, the magistrate considered that because the items which were found in the possession of the appellant included items of clothing and toiletries as well as smaller items such as a camera, cellphone and jewellery it was improbable that persons who had taken all the trouble to commit a robbery and to steal these items would simply put them down in the veld and abandon them rather than to discard that which they did not want and to keep the more valuable items. Secondly, the magistrate considered it improbable that the appellant, clearly desperate for employment, would rise so early in the morning, proceed to town and then walk a very considerable distance to meet his would-be employer simply to abandon the opportunity for employment when the would-be employer failed to honour their appointment, notwithstanding that he had the telephone number of his would-be employer. Thirdly, the magistrate considered that this improbability was considerably compounded by the fact that the appellant had embarked upon this journey with an ankle injury and at very considerable discomfort only to abandon the possibility of his employment.
- [15] These considerations, viewed in the context of the totality of the evidence, the magistrate considered rendered the version of the appellant so improbable that it could not reasonably possibly be true. I do not agree.
- [16] In *Stellenbosch Farmers Winery Group Limited v Martel et cit* 2003 (1) SA 11 (SCA) at para [5] Nienaber JA found that to come to a conclusion on the disputed issues in a trial the court must make findings on (a) the credibility of the various factual witnesses; their reliability; and (c) the probabilities. The court's finding on the credibility of any particular witness will depend, he stated, on the court's impression about the veracity of the witness. This would depend upon a number of features, including, the candour and demeanour of the witness in the witness box, his bias, latent and blatant, internal contradictions in his evidence and external contradictions between his evidence and that which was pleaded or put on his behalf and the probability or improbability of particular aspects of his version.
- [17] As alluded to earlier the magistrate has made no adverse demeanour finding against the appellant nor has he raised any contradictions. There is therefore no basis to be found in the manner in which his evidence was presented to disbelieve him. The magistrate is, of course, entitled during the course of the evaluation of the evidence to consider the probabilities and to draw inferences therefrom. The probabilities, however, must be considered in the light of the proven facts. It is perfectly possible therefore to accept direct credible evidence even though it conflicts with the probabilities arising from ordinary human experience or even expert opinion. (See for example Schwikkard and Van der Merwe: *Principles of Evidence* (3rd ed) p. 529 and the authorities referred to therein.) The appellant was the only witness to testify in respect of the reasons for his presence in the area. As pointed out previously the magistrate has made no pertinent findings which detract from his credibility. Given the extent of poverty in South Africa and the socio-economic hardship experienced by many I do not think that it is necessarily so improbable that many would make considerable

sacrifices and endure physical hardship in order to secure an opportunity to earn a wage. In these circumstances I do not think that there is anything inherently improbable about the appellant walking a considerable distance with an injured foot in the hope of earning a wage. Given the considerable inequalities in our society and the exploitation of cheap labour which is frequently observed I do not find it so improbable that the appellant, who comes cap in hand to seek employment, would lack the confidence to call his would-be employer and to confront him with his failure to honour their appointment. There are no proven facts which exclude the appellant's explanation for his presence in the area as a reasonable possibility.

- [18] The real issue is whether it is reasonably possible that he, when he was in fact present in Strandfontein Road, observed three black males hiding the bags under a bush and that he found the property there. The evidence of Grebe was that he noted the appellant looking decidedly suspicious at the side of the road. I have recorded earlier that Grebe does not state what it was about the appellant which raised his suspicion, save that he appeared to be standing on the quiet side of the road where pedestrians do not frequently walk. When confronted by Grebe and Marais the appellant does not appear to have made any attempt to escape. He readily consented to his bags being inspected and immediately advised them that he had found the items in the graveyard, a version to which he continued to adhere in the trial. Grebe made no attempt to investigate the site where the items had allegedly been obtained.
- [19] It is on an acceptance of these facts that the enquiry must be made as to whether the explanation given by the appellant is reasonably possibly true. The fact that the true robbers had abandoned their loot "in full view of anyone who may pass" weighed heavily with the magistrate. I do not think that the evidence supports this finding. The bags were, on the appellant's version, placed under a bush some 10 metres away from the road. The appellant observed the three black males stashing their loot under the bush. It is true that the appellant testified that the bags were clearly visible from the road where he was. His attention, however, had already been drawn to them and they may not have been as obvious to other passers-by. Moreover, Grebe testifies that pedestrians are seldom seen on that side of the road and, but for the fact that the three black males had walked ahead of him, the appellant may not have been on that side of the road either. There is no evidence to suggest that the bags would have been fully visible to persons walking on the opposite side of the road where pedestrians usually walk. It may well be that the true offenders had every intention to return to retrieve all their loot, and not to discard any of it. There may also be any number of reasons why the true intruders did not wish to be seen to be in possession of small articles of jewellery upon their return to their own home on the morning in question.
- [20] In all the circumstances I think that the magistrate erred in concluding that the appellant's version is not reasonably possibly true. It follows that the convictions and sentences fall to be set aside.

- [21] The matter, however, does not end there. Theft is an on-going offence. The appellant, on his version, intended to deliver the articles which he had found to the police. He states, however, that the cellphone and jewellery he removed from the bags and put them into his pocket as he intended to keep those for himself. In these circumstances he is clearly guilty of theft. This Ms Mtini, who appeared on behalf of the appellant correctly conceded.
- [22] What remains to be considered is what an appropriate sentence would be in respect of the theft. The principles which apply in respect of the assessment of sentence and the personal circumstances of the appellant have been correctly set out in the magistrate's judgment. The appellant has a string of previous convictions, all relating to dishonesty and stretching over more than a decade. In all the circumstances of the case a sentence of three years imprisonment is appropriate.
- [23] In the result the convictions and sentences imposed by the magistrate are set aside and they are substituted with the following:
1. The accused is found guilty of theft.
 2. The accused is sentenced to three
 - (3) years imprisonment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

REDDY AJ:

I agree.

V REDDY

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv N P Mtini

Instructed by Justice Centre, Grahamstown

For Respondent: Adv Mdolomba

Instructed by the Director of Public Prosecutions, Grahamstown

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