

SOUTH AFRICA / JUDGMENT

Mogobatlou v S (A208/2017) [2019] ZAGPJHC 446 (25 October 2019)

[2019] ZAGPJHC 446**COURT**

South Gauteng High Court, Johannesburg

BEFORE

L R Adams, B Ceylon

CASE / FILE NUMBER

A208/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO:**

A208/2017

COURT

A QUO

CASE NO:

43/583/2013

DPP

REF NO:

10/2/51/1-(2017/313)

DATE:

25TH

October 2019

In

the matter between:**MOGOBATLOU:**

LEHLOHONOLO

Appellant

-

and -

THE

STATE

Respondent

JUDGMENT

Adams J (Ceylon AJ concurring):

[1]. On the 31st of July 2015 the appellant was convicted by the Protea Regional Court on one count of theft of R5 263 700 from his then employer, Absa Bank Limited. On the 29th of October 2015 the appellant was sentenced to direct imprisonment for a period of fifteen years. Throughout the trial the appellant was legally represented and he had pleaded not guilty to the charge against him.

[2]. This appeal by the appellant is against both his conviction and sentence, and is with the leave of the court a quo, granted on the 8th of September 2016.

Appeal against Conviction

[3]. The charge on which the appellant was found guilty was closely related to his employment as an 'ATM Custodian' at Absa Bank. On Saturday, the 29th of March 2013, a total amount of R5 263 700 was stolen from ATM's, being the property of Absa Bank and to which the appellant had access by virtue of the fact that on the day in question he was the Absa Bank employee responsible for the maintenance and service of these ATM's. It was part of his duties and responsibilities to top-up the ATM's in the event of them running low on funds. On the day in question no less than nine ATM's were 'relieved' of cash. These ATM's

were situated around the Soweto area and were at the following locations: one at AutoZone in Aeroton; one in Dube; five at the

Jabulani branch and two at the Jabulani Mall.

[4]. It is common cause that the cash, totalling R5 263 700 was in fact removed from the ATM's by the appellant during the course of the day from about 07:00 in the morning. The only question is whether the appellant removed the cash under threat from armed robbers or whether he in fact was the thief.

[5]. It was and still is the version of the appellant that on the day in question whilst on his way to go and service one of the ATM's, he was accosted by three armed men, who held a gun to his head and demanded that he takes them from ATM to ATM to collect cash. He obeyed the instruction, as he was worried that he would be shot and killed. So, what happened is that they would go to the one ATM, with the robbers watching him and pointing the gun at him whilst he emptied out the machines. Once they had gone to all nine of the machines and got all the cash, they then drove around for a while and he ended up in Balfour, where he had

been abandoned by the robbers. He then made his way to the Balfour Police Station, where he reported the robbery.

[6]. The Regional Magistrate rejected the appellant's version and accepted the State's version that he was in fact the one who stole the money and concocted the whole story about him being robbed. The regional court came to this conclusion based on the circumstantial evidence and the fact the appellant made a written confession that he was involved in the commission of the crime. The written confession was received into evidence by the trial court and the appellant did not object to the admission into evidence of the confession. There was therefore no need for a 'trial-within-a-trial'.

[7]. The appellant disputes that when the confession was obtained from him the correct procedure was followed. It is also contended by the appellant that his constitutional rights were violated and that the confession was obtained unconstitutionally. There is no merit in this contention. The evidence of Captain Madibo, who took down the appellant's confession, was that the appellant was explained his rights and he opted to make the admission freely and voluntarily. The confession also contained precise and exact details of how the theft was planned and executed.

[8]. In assessing the circumstantial evidence the Magistrate found that the version of the appellant was an inherently improbable one. He accepted the evidence on behalf of the State that at some point before he was arrested the appellant attempted to flee. If he was so innocent, then why, so the Regional Magistrate asked rhetorically, did he try to run away? The appellant had also admitted that he threw away the keys of his company vehicle, which made no sense if he had been robbed. The Magistrate found it strange, nay impossible that the appellant and the robbers were able to go to nine ATM's under the circumstances described by him without any member of the public noticing that he was being robbed. The magistrate found further support for his aforesaid view in the fact that all ATM's are fitted with panic buttons, which the appellant knew about, and it would have been the easiest thing for him to draw attention to the fact that he was being forced by the crooks to syphon money out of the machines.

[9]. The Magistrate found, correctly so in our view, that the only reasonable inference was that the appellant, together with his accomplices, had planned this theft and executed the plan on that fateful Saturday. The Magistrate correctly held that the guilt of the appellant, in respect of the theft charge, had been proven beyond a reasonable doubt.

[10]. In evaluating evidence the Court must be satisfied that, despite the fact that there are shortcomings or defects or contradictions in the testimony, the truth has been told. See: *S v Sauls and Others*, 1981 (3) SA 172 (A) at 180F.

[11]. 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. See: *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at 547I- 548B

[12]. I agree with the Learned Regional Magistrate that the guilt of the appellant had been established beyond a reasonable doubt. The evidence of the Police Captain who took down his confession was singularly telling.

[13]. In assessing evidence a court must ultimately look at the evidence holistically in order to determine that the guilt of the accused is proved beyond reasonable doubt. The inherent probabilities are in favour of the state's version. It cannot be said that the version of the appellant is reasonably possibly true. The Court a quo's impression of the witnesses in evaluating the evidence was correct in the totality of the evidence before it.

[14]. The magistrate in our view exercised his discretion in considering the evidence holistically and not misdirected himself in convicting the appellant.

[15]. Accordingly, the appeal against conviction stands to be dismissed.

Appeal against Sentence

[16]. Insofar as the sentence is concerned, the appellant's contention is that the punishment was overemphasized and induces a sense of shock and that the personal circumstances of the appellant were not given due consideration.

[17]. In *S v Sadler* 2000 (1) SACR 331 SCA at 335G – 336B, the court had this to say:

‘[11] So called ‘white-collar’ crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle.

Justifications often advanced for such inadequate penalties are the classification of ‘white-collar’ crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being ‘criminals’ or ‘prison material’ by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for ‘white-collar’ crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from ‘respectable’ backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it.’

[18]. The issue of sentence has been stated in *S v Rabie*, 1975 (4) SA 855 (A) at 857 to be ‘pre-eminently a matter for the discretion of the trial Court’. Holmes JA stated that a court of appeal will only interfere with the sentence of a trial court where the sentence imposed is shockingly inappropriate or where the court did not exercise its discretion properly or at all. See *S v Kibido*, 1998 (2) SACR 213 (SCA) and *S v Pieters*, 1987 (3) SA 717 (A).

[19]. The offence which the appellant was convicted of is of a serious nature and the sentence imposed is neither inappropriate nor misdirected. Importantly, the appellant stole a huge sum of money from his employers whilst he was in a position of trust and abused his authority. The court a quo clearly also had regard to the personal circumstances of the appellant and in that regard it was assisted by a pre-sentence report.

[20]. Accordingly I am of the view that the appeal against sentence should also be dismissed.

Order

In the circumstances, I make the following order:-

1. The appeal by the appellant, Lehlohonolo Makgobatlou, against his conviction is dismissed.
2. The appellant's appeal against his sentence is similarly dismissed.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I agree,

B CEYLON

Acting Judge of the High Court of South Africa

HEARD ON: 24th October 2019 DATE OF JUDGMENT: 24th October 2019 FOR THE APPELLANT: Advocate A Mbungela INSTRUCTED BY: Ranthako Attorneys FOR THE RESPONDENT: Adv A Kalikhan INSTRUCTED BY: The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg

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