

SOUTH AFRICA / JUDGMENT

Mokgaratso and Another v S (A22/2018) [2020] ZAGPPHC 420 (11 August 2020)

[2020] ZAGPPHC 420

COURT

North Gauteng High Court, Pretoria

BEFORE

Leso, Maumela

CASE / FILE NUMBER

A22/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case Number:

A22/2018

In

the matter between:

EDWIN

MANASE

MOKGARATSO

APPELLANT 1

TSHEPO

EPHRAIM

MAKHUBO

APPELLANT 2

and

THE

STATE

RESPONDENT

JUDGMENT

LESO, AJ

INTRODUCTION

1. Appellants appeals against conviction of housebreaking with intent to steal and theft. The Regional Court Magistrate, Mr. Mkwentla who presided over this matter under case number SH334/15, in the North Gauteng Regional Court, held at Evaton, found the appellants guilty of the above offence on 12 April 2017 and passed the sentence on 20 April 2017. Appellants were sentenced to 10 years' imprisonment.
2. The State alleged that, on 01 December 2015, at Everton, appellants committed an offence of housebreaking with intent to steal and theft in that they wrongfully and unlawfully entered and broke into a building, being a tuck shop that was owned by Ms. Vuisile Mea. The appellant stole the following items which were in the lawful possession of Vuisile Mea: MTN public phone valued at R700.00, a printer flash valued at R500.00, a flash machine valued at R700.00, mixed groceries including cold drinks and blankets to the value of which is R30 000.00. POINTS IN LIMINE
3. In the heads of argument, the appellants raised points in limine, alleging that the record was incomplete because the evidence in chief of Mr. Paulos Makhanya was not transcribed. The appellants filed heads of argument on 21 February 2019 despite their argument that it was impossible to draft their heads of argument without a full transcribed record.
4. On 18 April 2019, the matter was postponed sine die for the clerk of the court a quo to reconstruct the record. Same was received on 3 June 2019. Appellants failed to file their heads of argument on the 14 August
2019. On the day of the application, the appellants' counsel did not ask for postponement nor did he raise any preliminary point. For that reason; this court will not entertain this point further. GROUNDS FOR APPEAL
5. The first question to arise is, whether there are grounds upon which this court can, or should interfere with the findings of the court a quo. In their heads, the appellants raised a number of grounds of appeal as follows: - that, the learned Magistrate misdirected himself in finding that the evidence presented by the state suffices for purposes of founding a conviction against them . - That the evidence submitted by the state witnesses at the close of the state case did not suffice for putting appellant 2 on his defence and therefore the learned Magistrate erred in not finding him not guilty and discharged on a mero motu basis in terms of Section 174 of the Criminal Procedure Act. - That the learned Magistrate erred in finding that there is evidence that linked appellant 2 to the actual crime of housebreaking based on the evidence to the effect that he was later seen in possession of the stolen goods by Mr. Makhaya. - That, there is no causal link between the items retrieved from Mr. Makhaya and

those that were shown to the complainant. - That the evidence of Mr. Makhaya was not clear satisfactory in every material aspect and - That, the learned Magistrate misdirected himself by relying on circumstantial evidence to convict the them. SUMMARY OF EVIDENCE

6. The state relied on the evidence of three witnesses namely, Ms. Vuisile Khatwa Mea; the complainant and the owner of the tuck shop Mr. Paulos Msebezi Makhanya, the witness whose evidence constitute a first report on the possession of stolen property and the identification of appellant 1 and Ms. Eunice Ntombela, whose evidence constitutes a first report on the housebreaking.
7. Both appellants were legally represented throughout the proceedings. They pleaded not guilty. Appellant 1 tendered his plea explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977. In that regard, he denied having committed the offence of housebreaking with intent to steal and theft. The basis of his defence was that, he was forced at gunpoint, by the actual perpetrators to carry the goods from the complainant's tuck shop. Appellant 2, through his legal representative tendered his plea explanation, denying both his involvement in the offence or having been at the scene of the crime. He tendered an alibi stating that, he was at home in Sebokeng on the night of the alleged offence.
8. From the record, certain facts are common cause because parties agreed or those facts were not disputed either party as follows: that on the 30 November 2015, Ms Vuisile Mae locked all the windows and the doors of her tuck shop before she left for home. On the 01 December 2015 she found the tuck shop door slightly open and the corrugated iron roof was bended. That appellant 1 entered the tuck shop and he was identified by Paulos Makhanya and Ms Eunice Ntombela when he was in possession of the property form the tuck shop. ISSUES IN DISPUTE
9. The following issues are in dispute this case: - the identification of appellant 2 as one of the suspects and - the involvement of appellant 1 in the actual house breaking and theft of goods as set out in the charge sheet is in dispute. STATE'S CASE
10. Ms. Vuisile Mea testified that when she entered the tuck shop, she realised that the it has been broken into. She found the items mentioned in the charge sheet together with the airtime machine and the public phone missing. She stated that she later received information from Eunice Ntombela who told her that that she saw six boys carrying boxes coming from the tuck shop. Eunice Ntombela stated that she saw appellant 1 coming out of the tuckshop, carrying a crate of cold drinks. This witness told court that there was an airtime machine and a public phone handset on top of the crate. From the stolen items, she only recovered globes.
11. Ms. Eunice Ntombela testified that, on 1stDecember 2015 at 01h30 in the morning, she was woken up by the noise of the door opening. She said that she peeped through the window and saw that the door of Mea's tuck shop is slightly open. She told court that she saw the appellant walking past the washing line which is about 4 meters from the window where she stood. She heard the voice of appellant 1 who was well known to her from his childhood and

who stays in the same area. She said that appellant 1 sometimes buys bunny-chows from her. The visibility was clear because of the proximity of the tuck shop, the light in the shop, the spotlight which was mounted on the pole and a 100 watts light bulb hanging on the shack. She said that Appellant 1 was in the company of another boy, who is shorter than him. She said that the other boy she saw is not appellant 2. According to her, the boys were walking freely and Appellant 1 had a beer bottle in his hand. She said that both boys proceeded and entered Mia's Tuck shop through the slightly open door. Two male persons came out of the tuck-shop, carrying boxes. She said that the two male persons were carrying something wrapped in a blanket, but appellant was not one of them. She testified further that the appellant came out with another boy, carrying a crate of cold, a public phone handset and an airtime machine. This witness stated that she told the complainant about what she witnessed.

12. Mr. Paulos Makhanya testified that, on 01 December 2015, at about 2h20 in the morning, he was woken up by a knock on his door. When he peed through the window, he saw appellant 1 and 2, Popi, Potsostso and two other male persons and are unknown to her. He said that Appellant 1 told him that they are selling stock, including groceries and a public phone handset at a price of R1000.00. He told appellant 1 that he does not have money, whereupon appellant 1 told him that they can make arrangement for him to pay later. He sold 1 packet of globes for R30, which he bought for R20 after he negotiated with appellant 1. He said that Appellant 2 who stood behind appellant 1 was carrying groceries and blankets in boxes. He told court that Appellant 1 is well known to him because

they attended primary school together and that Appellant 1 is a client of his aunt. He said that Appellant 2 is also well known to him because both of them grew up in Zone 3. He said that the Appellants often buy alcohol from his neighbour and they buy cigarettes from him. The witness also identified his cousin as one of the accused. He knew that the property was stolen and the appellant came to him because his place is closer to Mea's tuck-shop. APPELLANTS CASE

13. Appellant 1's testimony is briefly that, he was in the company of his friend, in the company of whom he was returning from a stokvel. While passing near Mea's tuck-shop, the two of them heard the sound of voices. They decided to enter the tuck-shop in order to find out what is happening. Inside the tuck-shop, they found 6 male persons. One of the six males instructed them at gunpoint to carry items or goods out of the tuck-shop. He stated that that the person who pointed at him with a firearm threatened to kill them all if they disobey him. He said that out of fear, he obeyed the instructions. Under cross-examination, he told court that his friend, Tshepiso Motsapi, would have corroborated his alibi but for the fact that he was not given an opportunity to take the Community Police Forum and the Police officers to Tshepiso's

place. He stated that he knows the complainant because he is her client and she would even sell to him on credit. He admits knowing appellant 2 stating that he and the latter grew up together in Zone 3. He said that on the day after the day of the alleged offence, he was confronted by Eunice and the other CPF members who accused him for of being involved in the offence however, he did not tell them that he was threatened with a firearm and that he was forced to carry stolen goods.

14. Appellant 2 denied that he was at Mia's tuck-shop or Mr. Makhaya's place, or that he was involved in the housebreaking with intent to steal and theft. He denied knowing where the tuck-shop is situated. He testified that he was at Zone 6 next to Molifi's place, consuming alcohol. He said that around 20:00 to 20:30 he left for home. He does not know why Mr. Makhaya falsely accuses him of committing a crime. ANALYSIS OF EVIDENCE
15. In order to arrive at a decision, it is necessary to make some reference to the substance of the charges preferred against the appellants, to the evidence adduced in substantiation thereof and to the defence raised by the appellants. The appellants were charged with the offence of housebreaking with intent to steal and theft. On this offence, (housebreaking) the learned Magistrate held that, "there is no witness who saw the break in the house. According to the evidence, entry was made from the roof top and nobody saw anyone

removing the rooftop or forcefully opening the locked door; it was only when the eye witness peeped through the window and saw the tuck-shop door half open and later saw appellant 1 coming out of the tuck shop, passing next to the washing line with stolen goods;" (page 100 of the record), that he was able to see someone inside. The state relied on the evidence of a single witness that he had locked the doors and the windows of the building before he left and the following day he found the roof bended and the door slightly opened.

16. The court a quo relied on circumstantial evidence in order to make its findings concerning the offence of housebreaking. It found that the state evidence could be relied on contending that the witnesses tendered reliable and credible evidence. It found that there is no reasonable possibility that the defence raised by the appellants can be true. The Magistrate substantiated the reasons why the appellants evidence was not possibly true and ultimately rejected same. Most of the evidence tendered by the state witnesses was not challenged. In fact, some of the material facts were confirmed by the appellants themselves. The court relied on the evidence of the witness regarding the identity of appellant 1 when theft was committed and regarding the time at which appellant 1 left the crime scene in possession of some of the stolen property. Appellant 1 was walking freely, holding a beer bottle in one hand. The consideration of circumstantial evidence has to be based what is commonly known as "the two cardinal rules of logic". This approach was put forward by Watermeyer JA in *R v Blom* 1939 AD 988 at 202-203, as follows: "1. In this regard, the court stated that: the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. 2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not, then there must be a doubt whether the inference to be drawn is correct".

17. There is no direct evidence implicating the appellants in the commission of the offence of housebreaking. However, the guilt of the appellants may be deduced or determined on the basis of inferences made from the proven facts. The case of the state rests on common purpose between the appellants and the other perpetrators. In the case of *S v Mgedezi and Others* 1989 (1) SA 687 (A), the court laid down the principle regarding the drawing inferences. In that regard, it stated: "Inferences can only be made on proved facts and not on mere speculation or conjecture. One of the questions which the Court has to answer is whether the inference that the appellant associated himself in the commission of the crime is the only reasonable inference which can be drawn from the proved facts". In his judgment, the magistrate relied on the following facts to justify a deduction that the appellants acted in common purpose with the perpetrators: the witness heard sounds from the building and then that the door is slightly open. Appellant 1 entered the building together with another person. The two later exited the building with the other person carrying stolen goods. The total number of people who came of the tuck shop were 6 in total. The total number of people who were later seen by Mr. Makhaya selling the stolen goods at his place was 6. Among the 6, he positively identified both appellants and the other two were Poppi and Potsotso. The other two were unknown to him.

The only reasonable conclusion the court came to is that, the appellants knew or were aware of the intended criminal activity and they associated themselves therewith by taking the stolen goods and selling them. The reaction of appellant 1 after the alleged criminal activity does not support his version that he was forced and was threatened with his life to compel him into participation in the offence. The evidence of the complainant that she locked the doors and closed the windows of the tuck-shop before leaving, as well as the evidence of the witness that she heard the sound of voices was not disputed.

18. Appellant 2 was not identified at the scene of the crime however, he was positively identified while in possession of the stolen property, together with appellant 1. This was a few hours after the commission of the offence. The magistrate correctly found that the doctrine of recent possession and common purpose is applicable. The principles are mutually inclusive in this particular set of facts. In the case of *S v Thebus and Another* [2003] ZACC 12; 2003 (2) SACR 319 (CC), at 335 Moseneke J sets out the following requirements pertaining to the doctrine of common purpose: "the liability requirements of a joint criminal enterprise fall into two categories: The first is where there is a prior agreement, expressed or implied, to commit a common offence. In the second category, no such prior agreement exists or gets proven. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state". The court further held that, for the court to convict the appellant on common purpose, there must be evidence that the appellant either participated in the commission of the crimes or associated himself with the conduct of the other accused either in the planning of the crimes, or by aiding or

advancing their cause in the commission of the crimes. In the absence of direct or physical evidence of appellant's participation, his guilt can be deduced from other proven facts.

19. The appellants allege that the witness has a motive to falsely implicate them because he also has a shop and he wants to protect his

co-conspirators. This is a desperately and opportunistic version, raised at the time when the witness had run out of plausible versions to rely on. It cannot be said that the court misdirected itself by not finding that the witness had a motive to implicate the appellant if that was not the evidence before the court a quo. The fact that the appellant attempts to implicate the witness as being involved due to his interest in the merchandise and the fact that appellant 1 placed himself on the scene at Mr. Makhaya's house on the date of the alleged possession of goods does not assist the appellant's case. This submission makes the state case even stronger on the identity as well as possession of stolen goods. Complainant testified that appellant 1 supports her business because he buys bunny chows at her place. Their relationship is good and this testimony was confirmed by the appellant under cross examination. Mr. Makhaya testified that appellant 2 is a client of her aunt. There is no bad blood between the witnesses and the appellants.

20. The appellants submit that although the regional court magistrate referred to the cautionary rule, he did not properly apply it. This court does not agree with this view. In his judgement it is clear that the magistrate was alive to the cautionary rule when dealing with the evidence of a single witness.
21. There is no basis for the appellants' argument that the magistrate wrongly failed to acquit them in terms of section 174 of the Criminal Procedure, Act 51 of 1977. Appellant's attorneys made an application at the close of the state case for the accused to be found not guilty and to be discharged. Both the state and the appellant presented their arguments after which the magistrate made a ruling. There is no doubt that the learned magistrate was alive to the application in terms of Section 174 of the CPA. He also referred to the case of *S V Mashele 1990 (1) SACR 678 (T)*, where the court held as follows: No prima facie case was ever made compelling the accused to answer. In this case, both accused were undefended and the appellate court found that, it was the duty of the trial court to mero motu discharge them in terms of Section 174 of Act 51 of 1977 rather than allow them to testify. The appellants gave a plea statement, they were positively identified while in possession of stolen property and their version was put to the witnesses surely there was a prima facie evidence which required an answer from the appellant. Appellant 1 was one selling the goods and bargaining with Mr. Makhanya, surely those cannot be there actions of a person who is being forced or threatened as alleged by the appellant. The appellant was arrested 7 days after the day of the alleged crime. It is improbable if not impossible that the appellant was forced to steal the goods and to carry them where after he negotiated the prices and the terms of payment and then sold some of the items by dint of coercion into participation in a crime. The appellant had ample time to report the matter to the police if he was indeed forced to participate in a criminal activity at gunpoint.
22. The court cannot fault the court a quo for analysing the evidence and finding that, the totality of the balance weights heavily in favour of the state. The magistrate found that appellant 1's evidence is full of improbabilities and that the state witnesses were honest and

reliable. In the case of *Rex v Dhlumayo* 1948 (2) SA 677 (A), the court ruled that, the ambit of interference in factual and credibility findings by the trial court is constrained due to reasons that unlike the trial court, the appeal court has no live experience of the actual trial court. The court held that, it will not interfere with the factual finding of a trial court unless the latter had committed a misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only interfere with the decision of the court the court a quo where it is convinced that it is wrong.

23. Appellant 1 was identified by two witnesses. One of them also recognised his voice. Appellant 2 was identified by a witness who knew him way back from school. The witness stated that he was standing behind appellant 1 while he was carrying groceries. The only reasonable conclusion one can draw is that, the appellants acted in common purpose because appellant 1 was seen at the scene of the crime. Besides, a few hours after the offence, he was seen in possession of stolen goods together with appellant 2. During the presentation of oral arguments, appellants' counsel conceded that their version and or evidence was not impressive, however he had nothing to add further than what he submitted on the appellants' heads of argument.
- CONCLUSION
24. There is no doubt that the state has proved a causal nexus between the actions of the appellants and the crimes of housebreaking. Recent possession of stolen goods by the appellants was also proven beyond a reasonable doubt. Consequently, the court finds that the court a quo correctly found that the appellants acted in common purpose with the other perpetrators in the commission commit of the offence.
25. The court finds that the court a quo correctly found that the appellants' version of events is improbable and their evidence is unreliable. It also correctly found that the state has discharged its onus beyond a reasonable doubt and that the appellants are guilty as charged. Consequently, the appeal stands to be dismissed.
26. In the result, the appeal is dismissed and the following order is made:

ORDER.26.1. The appeal against conviction is dismissed.J.T. LESO. ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA.

I agree and it is so ordered.

T.A. MAUMELA.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA.

DATE OF THE HEARING: 22 OCTOBER 2019

DATE OF JUDGEMENT: 11 AUGUST 2020

APPEARENCES

FOR THE APPELLANT : MR BOTHA

LEGAL AID SOUTH AFRICA

2ND FLOOR FNB BUILDING

CHURCH SQUARE

Tel : 079 081 0282

FOR THE STATE : DIRECTOR OF PUBLIC PROSECUTIONS

28 CHURCH SQUARE

REF: SA 9/2018

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