

SOUTH AFRICA / JUDGMENT

Pholo v S (A207/2016) [2018] ZAFSHC 107 (7 June 2018)

[2018] ZAFSHC 107

COURT

Free State High Court, Bloemfontein

BEFORE

J P Daffue, M A Mathebula

CASE / FILE NUMBER

A207/2016

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

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NO

Of

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Case

No. : A207/2016

In

the matter between:-

RICHARD

LENYATSO PHOLO

Appellant

and

THE

STATE

Respondent

CORAM:

DAFFUE, J et

MATHEBULA,

J

HEARD:

04 JUNE 2018

JUDGMENT

BY J P DAFFUE

DELIVERED: 07 JUNE 2018

I

INTRODUCTION

[1] The appellant was convicted in the Regional Court, Virginia on a count of theft and sentenced to 5 (five) years' imprisonment,

wholly suspended on certain conditions.

[2] He appealed to this court with leave of the court a quo against his conviction only.

II THE PARTIES

[3] The appellant is Mr R L Pholo, a major male person, who was in temporary employment as a teller at the Virginia branch of Standard

Bank during 2012 when he allegedly stole R60 000.00 from the drop safe under his control and custody. He was represented by an attorney, Mr Kruger, during the trial, but Mr T J Modise of the Bloemfontein Justice Centre appeared on his behalf before us, the heads of argument having been drafted by Mr L Tshabalala.

[4] Adv R Hoffman appeared before us on behalf of the Director of Public Prosecutions.

III GROUNDS OF APPEAL

[5] Appellant's grounds of appeal can be summarised as follows, i.e. that the court a quo erred in finding that (a) it was impossible for any person to open the drop safe, also referred to as the inner safe; (b) appellant's

version about the problems experienced with the combination lock did not hold water; (c) there was no basis upon which any other

co-employee could have stolen money from the safe; (d) appellant failed to report for work and failed to return the keys to Standard

Bank; (e) appellant stole the money, well-knowing that the bank's security system was flawed; (f) the State witnesses did not contradict each other on material issues; therefore warranting a finding that the State has proven its case beyond reasonable doubt and (g) the circumstantial evidence was so strong that the only reasonable inference to be drawn from the established facts was that appellant had stolen the money.

IV EVALUATION OF THE EVIDENCE

Approach on appeal

[6] The court a quo could have been more precise in the manner that it came to its conclusions. It also incorrectly referred to civil judgments in respect of the test to be applied when circumstantial evidence is evaluated. However, eventually it came to the correct conclusion. An appeal is a re-trial on the record although the ambit thereof is limited to the issues raised by the appellant. There is no reason why this court may not reconsider the complete record of the entire proceedings in the court a quo. See *S v Zondi* 2003 (2) SACR 227 (W) at 242h.

[7] When an appeal is lodged against a court a quo's findings of fact, the appeal court should take into account that the court a quo was in a more favourable position than itself to form a judgment because it was able to observe the witnesses during their questioning

and was absorbed in the atmosphere of the trial. See *Schmidt and Rademeyer*, *Law of Evidence* 3 - 40.

[8] The appeal court will normally accept factual findings made by the court a quo, unless there is some indication that a mistake was made. See *R v Dhlumayo* 1948 (2) SA 677 (A) at 696 and 705. The Court of Appeal summarised this issue as follows in *S v Hadebe and Others* 1997

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

"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."

Therefore, the presumption is that the trial court's conclusion on the facts is correct. The appeal court will only reverse it where it is convinced that such conclusion is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, it will uphold it. The Supreme Court of Appeal in *S v Naidoo and Others* 2003 (1) SACR 347 (SCA) at para [26] reiterated this principle as follows:

"In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated

by material misdirection or are shown by the record to be wrong."

[9] The SCA emphasised that it could be useful for the understanding of the evidence as a whole to break it down into components, but the appeal court should, in assessing the court a quo's findings of fact, be careful not to focus too intently on the separate parts and in doing so losing sight of the fact that the whole body of evidence might shed valuable light on the evidential value of its components. See also *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426a - h and *S v Ramulifho* 2013

(1) SACR 388 (SCA) at 392g - h.

[10] I have referred to the court a quo's imperfect judgment. No judgment is perfect and the fact that certain issues were not referred to does not necessarily mean that these were overlooked. This case dragged on for two years in the regional court. It is accepted that factual errors do appear from time to time, that reasons provided by a court a quo are unsatisfactory or that certain facts or improbabilities are overlooked. The appeal court should be hesitant to search for reasons that are in conflict with or adverse to the court a quo's conclusions. See *Dhlumayo* loc cit at para [12] on 706. However, in order to prevent a convicted person's right of appeal to be illusory, the appeal court has a duty to investigate the court a quo's factual findings in order to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere. See *S v M* 2006 (1) SACR 135 (SCA) para [40] at 152a - c. I am satisfied that notwithstanding inconsistencies in the versions of the State witnesses, and the employees of Standard Bank in particular, the court a quo cannot be faulted for accepting the version presented by the State.

Probabilities

[11] The State has to prove its case against an accused beyond reasonable doubt, but in evaluating the evidence, the trial court is entitled to consider the probabilities and improbabilities. This issue was considered in *S v Chabalala* 2003 (1) SACR 134 (SCA) at para [15] where Heher AJA (as he then was) held:

"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."

See also: *S v Trainor* 2003

(1) SACR 35 (SCA) at 41b - c.

[12] In my view the probabilities are such that the State's version by far outweighs appellant's version. He clearly decided not to return to work and effectively absconded, keeping the keys with him. This is contrary to the conduct of any reasonable and innocent employee. It is just not probable that any of appellant's former co-employees would use the opportunity to gain access to the safe and steal R60 000.00 in circumstances that appellant absconded and took the keys with him. His version about the keys and the reasons for his absence from work is so improbable that it could safely be rejected as false. The same applies to the alleged knowledge of his former colleagues pertaining to the digits of the combination lock. In any event, the inner safe could not be opened without the keys in appellant's possession and therefore a locksmith had to be instructed to drill that safe open.

Rejection of an accused's version

- [13] To secure a conviction the State has to prove all the elements of the crime beyond reasonable doubt. The test in a criminal case has been restated in *S v V* 2000
- (1) SACR 453 (SCA) para [3] at 455b - c. If there is a reasonable possibility that the accused is not guilty, he should be acquitted. The accused should be convicted if the court finds not only that his version is improbable, but also that it is false beyond reasonable doubt. It is not necessary for the court to believe an accused person in order to acquit him.
- [14] An accused's version cannot be rejected merely because it appears to be improbable. It must be shown, in light of the totality of the facts, to be so untenable and/or improbable and/or false that it cannot reasonably possibly be true. See *S v Schackell* 2001 (2) SACR 185 (SCA) at para [30] and *S v V* supra. I have alluded to appellant's version above. I have no doubt that the court a quo correctly found that his version could not reasonably possibly be true. It is inconsistent with the inherent probabilities. Another aspect that may be mentioned is that appellant later testified that he found the keys between his mattress and the base of the bed. It remains a mystery how the keys found their way there from the laptop case which was left behind in Bloemfontein. However, that is not the end of the matter as no direct evidence was produced in respect of the actual removal and theft of the money.

Circumstantial evidence and test to be applied

- [15] The test has been authoritatively stated in *R v Blom* 1939 AD 188 at 202 – 203. Firstly, the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. Secondly, the proved facts should be such that it excludes every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct. The two rules referred to above are known as the cardinal rules of logic to be applied when no direct evidence of an offence is available. In *R v De Villiers* 1944 AD 493 at 508 – 9 the Court emphasised that the cumulative effect of all circumstances must be taken together to establish whether the inference of guilt is the only inference that can reasonably be drawn, or put differently, that the evidence as a whole is beyond reasonable doubt inconsistent with the accused's innocence. See also: *S v Reddy* 1996
- (2) SACR 1 (A) where Zulman AJA (as he then was) aptly referred to the following quotation at 8i:
- “A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish.....Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone...”*
- [16] All the factors that are either common cause or were duly proven by the State tend to establish one reasonable inference to the exclusion of all other inferences and that is that appellant stole the R60 000.00. Logic dictates nothing else, but such a conclusion. These facts are inter alia the following: (a) appellant was the teller at cubicle 3 of the Standard Bank, Virginia branch; (b) at the end of the working day of 10 October 2012 he was supposed to

have R82 456.77 in his safe as is evident from Exhibit F3, a document generated from information provided by appellant; (c) he absconded and did not return for work the next day or at all; (d) Ms Motshoeneng tried to contact him several times by SMS and telephone messages; (eventually she obtained appellant's home address from the employment agency and went there where she found appellant);

- (e) he told Ms Motshoeneng that he was not staying there and directed her to his flat where the Standard Bank's keys could be found;
- (f) when they arrived at the flat, appellant changed his version and told her that the keys were in his laptop case which he had forgotten in Bloemfontein, but he promised to deliver the keys once his friend, on his way from Bloemfontein to Rustenburg bring the keys to Welkom;
- (g) appellant never turned up at the Bank; (h) a locksmith was instructed to open the inner safe as there were no extra keys to open this, which he did, whereafter the money was counted by Ms Motshoeneng and double-checked by two other employees of the Bank, Ms Botha and Ms Ramsy; (j) they found that R60 000.00 was missing from the particular safe; (k) a criminal case was opened more than a month after appellant had absconded and when he was arrested he handed the keys to the detective, Captain Strydom.

Failure to cross-examine

- [17] The Supreme Court of Appeal made the following quite clear in *S v Boesak* supra at para [50], relying in para [51] on the well-known *Sarfu* judgment of the Constitutional Court:

"The cross-examiner must put his defence on each and every aspect which he wishes to put in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as catch-can, nor should it be turned into a forensic ambush."

- [18] Mr Kruger on behalf of appellant in the court a quo went on a fishing expedition during cross-examination, but never put it to Ms Motshoeneng that she in particular, or she in co-operation with Ms Christa du Plooy (later referred to by appellant in his evidence as Strydom) or any other employee, had access to the particular keys and combination code and that they were the people that might have stolen the money. In fact, Mr Kruger never put it to Ms Motshoeneng that the two ladies had to help appellant every day with the opening and closing of the outer safe as he did not know how to operate the combination lock although he remembered the digital code. Out of the blue appellant testified that the two ladies had to help him to open the combination lock as he "did not know how to operate" it. Mr Kruger, and appellant by necessary implication, failed to live up to the standard required in *S v Boesak* supra and the duty to put his defence properly on each and every aspect which he wished to place in issue to the witnesses implicating his client. A criminal trial should not be turned into a forensic ambush.

CONCLUSION

[19] I am mindful of the fact that Ms Motshoeneng was uncertain of herself in several respects during her cross-examination. This case is a typical example of what happens too frequently in our lower courts. Presiding officers should take care that postponements are kept to the minimum and for the shortest possible time. In casu Ms Motshoeneng testified on 3 October 2013 when her evidence in chief was led. The matter was then postponed a few times for

different reasons, inter alia the double booking of the attorney and also when appellant could not afford the services of his attorney anymore and needed to apply for legal aid. As a result Ms Motshoeneng's cross-examination proceeded thirteen months later in November 2014 whilst the theft occurred in October 2012. The other State witnesses, and in particular Ms Botha and Ms Ramsy, who were called to corroborate aspects of Ms Motshoeneng's testimony, testified in October 2015 and thus three years after the incident. Notwithstanding this delay, I am satisfied that the minor inconsistencies and contradictions are insufficient to find that the court a quo did not properly evaluate the evidence. The factual findings of that court cannot be criticised. The appeal has no merits and should be dismissed.

VI ORDER

[20] The following orders are issued:

- 1) The appeal against conviction is dismissed.
- 2) The conviction and sentence are confirmed.

J. P. DAFFUE, J

I concur

M.A. MATHEBULA, J

On behalf of appellant: Mr T J MODISE

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of the respondent: Adv R HOFFMAN

Instructed by:

Director Public Prosecutions

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