

SOUTH AFRICA / JUDGMENT

S v Carstens (1486/2009) [2011] ZAWCHC 98; 2012 (1) SACR 485 (WCC) (26 April 2011)

[2011] ZAWCHC 98

COURT

Western Cape High Court, Cape Town

BEFORE

Dlodlo, Fortuin

CASE / FILE NUMBER

1486/2009

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IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE, CAPE TOWN)

REPORTABLE

REVIEW CASE NO. 1486/2009 MAGISTRATE'S SERIAL NO. 09/2010

HIGH COURT REF. NO. 10604

In the matter between: THE STATE

And

FRANCOIS CARSTENSACCUSED

Coram : DLODLO, J

Judgment

by : DLODLO, J

Review Judgment delivered on : 26 APRIL 2011

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REVIEW JUDGMENT DELIVERED ON TUESDAY, 26 APRIL 2011

DLODLO, J

[1] On 20 May 2010 I caused the following direction to be sent to the trial Magistrate in this matter:

"Hierdie Beskuldige moet vrygelaat word, terwyl daar gewag word op hierdie Hersieningsuitspraak.

What follows are my reasons why the above direction was sent. This matter came before me by way of Review envisaged and provided for in the Criminal Procedure Act 51 of 1977 as amended ("the Criminal Procedure Act"). The Accused person faced two (2) charges before a magistrate's Court. The first charge is that of theft of "2 x Bruin Miranti Houtstoele" allegedly committed on 10 September 2009 at Malherbe Street, Wellington. The second charge is that of Housebreaking with the intent to steal and theft allegedly committed on 2 January 2009. I want to state categorically from the beginning that I have no concerns at all on the second count save for the fact that the two (2) counts were taken together for purposes of sentence and the Accused was sentenced to undergo imprisonment for the period of six (6) months. My serious concerns centres around the first count i.e. that of theft' of two (2) wooden chairs. In order to properly demonstrate my concerns, I have decided to first and foremost summarize all the evidence adduced in this matter. What follows infra is such summary.

[2] The first witness, Alida Burger (apparently the owner of the alleged stolen chairs) testified that she arrived at the offices of Veenstra Marais Attorneys at about ten minutes to eight o'clock in the morning and the garage doors were opened. She discovered that the imbuia chairs which were kept inside the garage were nowhere to be found. There were altogether ten (10) such chairs. These belonged to Ms Burger but were stored at this garage at her workplace. The incident was reported to the Police. However, two (2) of the ten (10) chairs were recovered. These were identified accordingly by the complainant at the Police Station when she was called to come and identify same. Piet Booysen, a Policeman with ten

(10) years experience attached to the Dog Unit at Boland testified that he was dressed in full police uniform when he patrolled the area around Malherbe Street. It was about nine o'clock in the evening when Sergeant Booysen met an unknown man who reported to him that he has recently seen that a man was running away from number 6 Malherbe Street carrying two (2) chairs.

[3] Upon hearing this, Sergeant Booysen reacted and was given a description of such a man's clothing. He testified that he saw the person and approached him. He asked the person where the chairs were. The man answered that he has no knowledge about what Sergeant Booysen was asking. Sergeant Booysen testified that he went and looked over the fence. The fencing is made of plank. He saw the two (2) chairs on the other side of the fencing. According to Sergeant Booysen the man could give no explanation about the chairs. In his actual words "hy het net daarby gehou nee dit is nie sy sroele nie hy was op daai moment was hy 'n bietjie oproerig en ek het horn, gevra nou waar kom k\" aan die sioele, want, dit is wat die persoon vir my gegee die beskrywing en die twee sroele war hy mee geloop het. "

- [4] Sergeant Booysen emphasised that this person (who turned out to be the accused in this matter) was the only person in the surrounding area. There were no other persons in the surrounding area. The accused insisted that these were not his chairs - "hei die heeltyd daarby gehou en so het hy meer aggressief geraak en opstandig geraak en ek het horn geneem na die Polisiestasie. " The prosecution asked Sergeant Booysen the following question: "Vraag
- Verder Sersant wat is die moontlikheid dat beskuldigde miskien die waarheid kon praat ten opsigte van die Steele self — bestaan daar so (n moontlikheid? " The Sergeant answered as follows:

"Antwoord

- Edelhagare die moontlikheid kon nie bestaan nie, want die tydsberekening en die tydsduur vanaf die persoon wat my gewys het waar hy is en ek horn gesien het kon dit nie 'n ander persoon wees nie. Hy was al persoon in die onmiddellike omgewing wat voldoen het aan daai spesifieke beskrywing van die bruin "top" en kamoefleer kleurige broek. " Asked in what condition he found these chairs, the Sergeant told the trial Court that, "die stoele was vol stof gewees. Ek neem aan dit was erens gestoor, want dit was vol stof en dit het net gele agter - agter die heining soos ek dit gevind het. "
- [5] Upon being asked by the prosecution if he had anything to add to his testimony, Sergeant Booysen mentioned the following: "Edelagbare ek wil bitter graag 'n verklaring geneem het van die persoon wat aan my die inligting gegee het, niaar omdat hy bang was en hy wou annoniem bly, ek het die klagte hanteer soos ek enige ander klagte hy oor ons radio wat 'n annonieme klaer is het ek die klaer — die klaer- die huidige klaer gese as hy annoniem wil bly ek kan horn nie for seer nie, want hy dit "straight" aan my gese hy is bang. Hy ken die beskuldigde. Hy weet hy kom uit die tronk uit, en as hy moet 'n verklaring gee en hy moet kom getuig dan gaan hy moontlik geviktimiseer word dew die klaer- deur die beskuldigde. " Among many questions the accused asked in cross-examination was that it was 8h30pm and Pick (n Pay was still open and there were many people moving in the streets. Sergeant Booysen maintained that he saw no other persons at that moment.
- [6] The next witness was one Herman us Manango, a security officer. Fie testified about an incident that took place on 2 January 2009 at his place of employment. He testified that he was on duty during the early hours of the morning. Apparently the place was under construction. However, there was a place where possessions belonging to the personnel were stored. This particular store-room

was situated on the corner of the building that was being constructed. Mr. Manango in his capacity as security officer heard a noise of glass being broken. He proceeded to where the noise came from in order to investigate. He then saw a person climbing next to the broken glass window. He approached the person and asked him a pertinent question as to what he wanted there. The response he got was that the person works on the premises; he had come to fetch certain things that belonged to him. Mr. Manango knew there was then nobody on the premises

and as such no goods could be there to be fetched. At that time all the workers were on holiday. The specific time when the incident took place was ten minutes past ten (10:10am). According to Mr. Manango the owner of the building had made it clear to him that he would contact him if anybody at all has to come to the building to fetch whatever things or goods. He had received no such a call from the owner of the building.

- [7] This person was caught inside the store-room. When asked if that person (we now know that that was the accused) was already in possession of certain goods. Mr. Manango answered thus: "Daar wat ek horn gesien het toe hy inklim hy het nie 'n sak by horn gehad nie, maar daai tyd wat hy — wat ek horn daar Jay hy het 'n sak wat hy hinne die gehou gekry het. Hy het goeters begin inpak in daardie rugsak. " According to Mr. Manango when he caught the accused inside that store-room he was busy packing the goods in the bag. Inside that bag there was already a roll of telephone cables and small things like "tandepasta." Ricardo Ruiters, a Policeman confirmed that he came to the premises in response to the telephonic message of housebreaking and that he effected an arrest of the accused person in this matter. Upon explanation of his Constitutional rights, the accused merely said he will speak to his lawyer.
- [8] The accused testified in this case. He denied any knowledge of the two (2) chairs found at night by Sergeant Booysen. He emphasised that the Sergeant arrested him along the road. The accused also denied that he broke into the premises guarded by Mr. Manango. He was thereafter extensively cross-examined by the prosecutor. But despite this vigorous cross-examination, the accused' evidence or version was hardly shown to be wanting in any way. The version stood unshaken.
- [9] It is common cause that the trial magistrate found the accused guilty of both charges preferred by the State against him. I have, however, grave difficulty in accepting that the first charge, namely theft of the imbuia chairs was proved beyond a reasonable doubt against the accused. The only evidence on the strength of which the accused was convicted on this particular charge was that of Sergeant Booysen. The latter never saw the accused carrying these two (2) chairs, in his testimony he was told by another person that the accused carried these chairs and was given a description of the clothing the accused had on. This person who told Sergeant Booysen about the accused was never called to testify.
- [10] All that which Sergeant Booysen testified about which he gathered from the unknown person became inadmissible evidence. The admission of this evidence dangerously prejudiced the accused person. I would understand if Sergeant Booysen testified that he received a certain report from this unknown person and that on the strength of that report he investigated and independently

found the accused person carrying these chairs and that he saw when the accused person threw those chairs on the other side of the fence. That is not what Sergeant Booysen testified. On the contrary, he freely put before the Court hearsay evidence.

- [11] One can hardly blame the Presiding Magistrate for admitting this evidence. It had all features of being evidence that necessarily had to be provisionally allowed as the source person would thereafter be called to enable it to be finally allowed in. The person who should have guided Sergeant Booysen in this regard is the prosecutor. The prosecutor clearly knew that the unknown person was not one of the witnesses he intended calling. He should have alerted the Presiding Officer also that he was not going to call the so-called unknown source person. Therefore, if one puts aside the hearsay evidence inadvertently led in this matter all what remains is that Sergeant Booysen patrolled the area along Malherbe Street. At a certain stage he saw the accused person walking in the street carrying nothing. He subsequently found the two (2) chairs on the other side of the fence. He suspected that the accused had something to do with those two (2) imbuia chairs. However, the accused person denied any knowledge of such chairs on being confronted.
- [12] Would such evidence be said to be proof beyond a reasonable doubt? No, it cannot be. The accused was admittedly walking along that street as much as the unknown person was. No criminal conduct can be ascribed to a person for merely being found walking along the public road even if it was late at night. As matters stand presently, the Court was never told why the accused was said to be associated with the two (2) chairs found on the other side of the fence. It remains more than sufficient for him to have told Sergeant Booysen and the Court that he has no knowledge of such chairs. I would understand if such chairs were found in his possession because then he would have had to account on the basis of recent possession. The accused person had no control over that vicinity where the chairs were found. This was never his place. It is irrelevant that the place was not far from where he walked.
- [13] One must at all times bear in mind what Flemming J said in *S v Alex Carriers (Pty) Ltd en (n Ander 1985 (3) SA (T) at 88 I - 89 D* about the burden of proof, namely:

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"[O]ortuiging bo redelike twyfel is die krag wat die Staat moet uitoefen voordat hy daarin slaag om die muur van skuld op die besktdidigde te laat intuimel; dit is onnodig vir die beskuldigde om enige deel van die muur na die Staat se kant om te stoot. 'n Besktdidigde sal gevolglik vry uitgaan as die Staat se saak nie sterk genoeg is nie en dit sou daarom volgens heginselfs soms voldoende wees dat die beskuldigde hoegenaamd niks doen nie en soms dat hy daarmee volstaan om swakhede in die Staat se saak aan die kaak te stel (deur bywoorbeeld kruisverhoor wat 'n getuie se onbetroubaarheid laat blyk) of uit te wys. Nornate die Siaat 'n sterker saak voorle, is die praktiese uitwerking dat sulke beperkte optrede onvoldoende sal blyk en dat aktiewe weerlegging van die Staat se saak prakties nodig is om die krag wat die Staat uitoefen, teen te werk. Selfs dan is daar geen bewyslas op die beskuldigde nie. (Omdat verwarring steeds voorkom, mag dit helderheid bevorder om te se dat 'n beskuldigde 'n weerleggingsnoodzaak ondervind eerder as dat hy 'n weerleggingslas dra). Hoeveel en hoe sterk die beskuldigde se weerleggende oorwegings moet wees om te verhoed dat die Staat 'n oortuigende saak het, hang dan uiteraard van die sterkte van die Staat se saak af. Die beskuldigde hoef niks meer te doen nie as om te veroorsaak dat wanneer die hof sy beslissing veL In redelike twyfel omtrent die beskuldigde se skuld aanwesig is. "

Numerous decisions by the Supreme Court of Appeal have exhaustively dealt with the question of proof beyond a reasonable doubt. It is not necessary to overburden this short Judgment with any such decisions. In any event in the instant matter the admissible evidence leaves doors wide open for numerous possibilities. It is very-possible that the unknown source person was himself the culprit. It is possible that some other thieves stole these chairs and that when they became heavy to carry they threw them away and that same came to land on the spot where Sergeant Booysen found them. How can it then be contended that the State proved the guilt of the accused person in the light of such remarkably weak testimony that allows of so many possibilities? Evidence intended to be supportive of the theft charge in this matter lacks cogency and sufficiency such that even if the accused chose not to testify at the end of the State's version, he still would have qualified for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 as amended. It does not matter that Sergeant Booysen may have been a good witness in the knowledge of the trial Court. The fact of the matter is simply that his testimony standing alone as it does cannot be used to sustain a conviction in the instant matter. This is quite apart from the fact that he was a single witness whose evidence necessarily had to be approached with caution.

[14] Another aspect which perhaps deserves to be mentioned in this matter is that evidence tendered in the instant matter, like in all other matters, fell to be considered holistically before any conclusion of guilt or otherwise was arrived at. This is not to say that it is wrong for a trial Court to look at the individual components of the evidence advanced at trial. But the point is that the Court must at all times guard against focusing too intently upon the separate and individual parts of the body of evidence. As correctly stated in *S v Hadebe and Others 1998*

- (1) SACR 422 (SCA), the call of duty is that the mosaic as a whole falls to be considered. The trial Court most certainly fell short of pursuing this call of duty as efficiently as it could. The State had onus of proof (in respect of the first count too) to be discharged only if the evidence establishes the guilt of the accused person beyond a reasonable doubt. The accused person remains entitled to be acquitted if it is reasonably possible that he might be innocent. The Court must be satisfied upon a consideration of all the evidence. Importantly, a Court does not look at the evidence implicating the accused person in isolation in order to make a determination whether there is proof beyond a reasonable doubt. Neither does it look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it may be true. See: S v Van Der Meyden 1999
- (1) SACR (WLD) at 448 f-h. The proper handling of the criminal trial I agree with is stipulated in S v Tellingien 1992 (2) SASV 104 (K) as follows: "Indien daar wel na behoorlike evaluering van al die getuieis en redelike moontlikheid bestaan dat die beskuldigde se weergawe dalk waar mag wees sal die voordeel van die twyfel aan die beskuldigde

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vergun moet word. "

- [15] In the circumstance this matter is hereby reviewed and the finding of guilt on the theft charge is set aside. In its place the following is substituted: "The accused is found not guilty and he is discharged on the first count of theft. " However, the finding of guilt on the second count (Housebreaking with intent to steal and theft) is confirmed. But, the sentence part thereof deserves to be revisited. I mentioned that the Magistrate treated these two counts as one for purposes of sentence and proceeded to sentence the accused to undergo imprisonment for the period of six (6) months. In view of the fact that I have found that the accused was wrongly convicted on the first count and have set aside the conviction, it becomes obligatory to revisit the sentencing portion of this matter. I shall consider facts and circumstances placed before the Magistrate prior to sentence. Having taken into account all deserving personal circumstances and the seriousness of the offence of which the accused was found guilty, the prevalence thereof and the need to contain same, I come to the

conclusion that, the following would be the most suitable one: "The accused is sentenced to undergo imprisonment for the period of sic (6) months. However, the sentence is wholly suspended for the period, of five (5) years on condition that the accused does not render himself guilty of housebreaking with intent to steal and. theft, theft, possession of stolen goods knowing them to be stolen, committed during the period of suspension." DLODLO, J FORTUIN, J

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-carstens-unknown-topic-awchc-2011>

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