

SOUTH AFRICA / JUDGMENT

S v Morrow (382/95) [1996] ZASCA 4 (28 February 1996)

[1996] ZASCA 4**COURT**

Supreme Court of Appeal

BEFORE

R M Marais, Smalberger, Vivier

CASE / FILE NUMBER

382/95

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MARAIS JA/

Appellant was charged in the magistrate's court for the district of Johannesburg with eight counts of fraud and five counts of theft as an alternative to the last five counts of fraud. The magistrate convicted her upon all but three of the fraud counts (counts 4, 5 and 6). He took the first three counts of fraud (counts 1, 2 and 3) together for purposes of sentence and imposed a fine of R500 or 125 days imprisonment and in addition a further 200 days imprisonment suspended for 5 years on condition appellant is not convicted of fraud or theft committed during the period of suspension. He imposed the same sentence in respect of count 7 and did so again in respect of count 8. On appeal to the Witwatersrand Local Division appellant's conviction upon counts 1, 2 and 3 and the sentence imposed as a consequence were set aside. The Local Division was of the opinion

that counts 7 and 8 had been improperly split but thought that the remedy lay in amending those counts by combining them in one count which it numbered 7 A. It considered that count to have been proved beyond reasonable doubt but felt that an adjustment of the sentences originally imposed was required as a result of its consolidation of counts 7 and 8 and, in the result, imposed a fine of R 1000 or 250 days imprisonment and 200 days imprisonment suspended for 5 years on condition that appellant is not convicted of theft or fraud committed during the period of suspension. An application for leave to appeal to this court was refused but subsequently granted on petition to the Chief Justice. At the conclusion of the argument we allowed the appeal and set aside the only remaining extant conviction and sentence which were of course those which the Local Division had substituted for the convictions and sentences upon counts 7 and 8 arrived at by

What was before this court was an appeal against the conviction upon the amended count and the sentence imposed in respect of it. The gravamen of the charge was that while appellant was employed by Westinghouse Brake and Equipment (hereinafter "Westinghouse") as a clerk, she knowingly falsely represented to another firm, Action 17 000, that orders for goods purporting to emanate from her employer were genuine orders placed by her employer whereas in fact they were not and were in truth orders placed by appellant herself for her own benefit and without the consent of her employer. Appellant's defence was one of total denial reinforced by the putting forward of an alibi confirmed by a third party.

It was common cause that appellant was not at work on the day in question so that she could, if so minded, have used the opportunity to acquire the goods in question. It was also common cause that she was aware that, if given permission to do so, employees of Westinghouse could purchase goods from Action 17 000 and have the cost debited to the account of Westinghouse. The relevant documentation would be endorsed appropriately in the offices of Westinghouse and the employee concerned would pay the relevant sum to Westinghouse at the end of the month in which the goods were purchased. It was also common cause that appellant, amongst others, had access to the particular order form in use at Westinghouse and which was used on this occasion to deceive Action 17 000 by inducing the belief that the bearer of the document was authorised to purchase "hardware as selected" and to have the costs of such goods debited to

the account of Westinghouse. Yet another fact which was not in dispute was that appellant had resigned from her employment on the day following the day upon which this particular crime was committed. The State's case was founded partly upon that circumstantial evidence but chiefly upon the direct evidence of identification of appellant given by the particular employee at Action 17 000 from whom the goods in question had been bought by the person who committed the crime. In her defence, appellant gave evidence herself and called a witness to support her claim that she had not been to the premises of Action 17 000 on the day upon which the crime was committed.

The magistrate considered that the witness who purported to identify appellant as the culprit was an honest and reliable witness with acute powers of observation and that the circumstantial evidence

also tended to strengthen the accuracy of her identification. The Local Division took the same view of the matter. On appeal before us counsel for appellant raised a number of issues one of which related to the curtailment by the magistrate of the defence attorney's cross-examination of the State witnesses. On the view that we took of the case, it was not necessary to consider whether or not that complaint was justified and whether, if so, it alone would have resulted in the setting aside of the verdict. In our view there were more obvious reasons why the appeal had to succeed.

The witness who purported to identify appellant as the culprit had never seen her before and no identification parade was held. The first occasion upon which she identified appellant as the culprit was when she saw appellant upon her arrival at the magistrate's court on the day of the trial. That was some 2 months after the

incident had taken place. It is true that her evidence reads well and that her opportunity for observation on the day of the incident was good. She appears to have been a particularly observant person with a very good memory. However, the problem which confronted the State was that both the Local Division and the magistrate misdirected themselves in a material and serious respect in assessing the reliability of her evidence. Both laboured under the mistaken belief that immediately after the culprit had left the premises of Action 17 000 on the day in question, the witness, having become suspicious, telephoned Westinghouse to query the authenticity of the order form and that, when so doing, she furnished a physical description of that person which enabled her to be identified at Westinghouse as appellant. The following was said in the judgment of the Local Division:

"Also, whilst the courts have emphasised the need, in a case such as the present where identification is in issue, for the person concerned to give a description at some stage of the suspect, that occurred in a sense in the present case, for when the witness Zwane became suspicious and telephoned Westinghouse, she gave a description and was at once met with the answer that 'that is Odette', whom we now know was the appellant. So at one stage that requirement was met of giving a description, a description which was so accurate that the Westinghouse people were at once able to identity it as being Odette."

It is true of course that the issue is not whether the Local

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phoned (he accused's firm, she referred to the accused, she spoke to some of the people there and also spoke to Mr Ramsammy and she also pointed out the accused". In additional reasons for judgment furnished by the magistrate in response to the notice of appeal the following statement occurs:

"This was after the state witness had already testified how she had seen accused on the day, how she phoned the firm where appellant was working. How she was notified this person is Odette (the appellant)".

These quoted passages showed quite clearly that the magistrate had misinterpreted the evidence in exactly the same way as the Local Division had misinterpreted it. At no time did the witness claim to have furnished anyone at Westinghouse with a description of the person who had purchased the goods in question. Indeed, she did not claim to have given a physical description of the person to anyone.

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What she said was that there was a notation in the documentation at the offices of Action 17 000 that, if any query arose in regard to accounts, the person at Westinghouse to whom such queries were to be referred, was Odette. It was solely for that reason that when she became suspicious and decided to phone Westinghouse, she asked for Odette. When told that Odette was not there she spoke to someone else and alerted that person to what had happened. At no time during the telephone conversation did she suggest that it was Odette who had purchased the goods. She had never seen Odette before and had no reason whatsoever to assume that Odette was in fact the person who had bought the goods.

A misdirection in that regard could not simply be brushed aside as insignificant or immaterial. It had plainly played an important part in the magistrate's evaluation of the evidence of the

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witness and a causative role in his decision to accept that her identification of appellant was accurate. It followed that this court could not accord to the magistrate's finding of fact the weight which would ordinarily be given to the findings of fact of the trial court. The position was aggravated by a number of other factors. The magistrate's evaluation of the evidence given by appellant and the witness called by appellant to confirm her alibi was, to say the least, perfunctory. Indeed, no specific reference was made to the evidence of the witness called by appellant despite the fact that her evidence, on the face of it, was credible evidence and despite the absence of any questions by either the prosecutor or the magistrate going to her credibility or reliability. All that the magistrate had to say on that score was this:

"Now the accused's defence is that she was not there, she

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called a witness, that person also said the accused was not there. It is very difficult with such an alibi to break the accused down and I must say that the alibi of the accused was not broken down under cross-examination, but there are so many other facts that point to the accused that the court must accept the evidence of this witness Tandeka that the accused was in fact the person who took these goods".

The magistrate had not specifically identified the "many

other facts" that point to the accused and one was left to speculate as to what he had in mind. If they were merely the circumstantial factors to which I have alluded, they carried little weight. Indeed, some of those factors could well have been regarded as pointing away from, rather than to, appellant. We did not consider it likely that appellant would have chosen to commit this crime on a day when everyone at her office would have realised that she would have had an opportunity to do so because she was not at work on that day, and then have

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chosen to resign suddenly on the following day. It was, in our view, more likely than not, that she would have realised that she might be regarded as an obvious suspect if she behaved in that manner. If what the magistrate had in mind were some of the facts relevant to the other counts upon which appellant was acquitted, not only would that have been irregular, it would also have been of no probative value given her acquittal upon those counts.

It is trite law that where the trier of fact has misdirected himself or herself in respects so material that they vitiate the presumption that the findings of fact are correct, an appeal court is obliged to re-evaluate the evidence afresh, as best it can given the limitations inherent in it not having seen and heard the witnesses testify. Recognizing the dangers which attend such re-evaluation of the recorded evidence, an appeal court will sustain a conviction in

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such circumstances only if satisfied that a trial court which had not misdirected itself would inevitably or, without doubt, have convicted the appellant. In the circumstances of this particular case that meant that one had to be quite sure that a properly directed trial court would inevitably have found that the identification of appellant by the witness Zwane was both truthful and accurate, and that the evidence given by appellant and the witness whom she called to support her alibi could not reasonably possibly be true. In the absence of any adverse findings regarding the demeanour of appellant and her supporting witness which might, if uncontaminated by the misdirections which occurred, have assisted us in evaluating the evidence on record, it was not possible to feel confident that appellant's guilt would

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inevitably have been found to have been proved beyond reasonable doubt. Hence the success of the appeal. R M MARAIS SMALBERGER JA) VIVIER JA) CONCUR

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