

SOUTH AFRICA / JUDGMENT

Segalo v S (A298/2010) [2011]

ZAFSHC 10 (27 January 2011)

[2011] ZAFSHC 10

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai, Ebrahim

CASE / FILE NUMBER

A298/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: A298/2010

In the appeal between:

REITUMETSE LESLY SEGALOAppellant

and

THE STATERespondent

CORAM: RAMPAI J et EBRAHIM J

JUDGMENT:

RAMPAI J

HEARD ON: 6 DECEMBER 2010

DELIVERED ON: 27 JANUARY 2011

- [1] This is an appeal against conviction only. The appellant was tried and convicted in the Virginia district court on the 1st December 2008. He was found guilty on a charge of theft. On the 9th February 2009 he was sentenced to six months correctional supervision. Moreover, the court a quo directed that he must be placed under maximum house arrest for a minimum period of three months.

- [2] On the 12 February 2009 the appellant unsuccessfully applied for leave to appeal against his conviction. He then petitioned Musi JP for leave to appeal. On 26 October 2009 Van Zyl J and I considered his petition. He now comes on appeal with the leave granted by this court.
- [3] The version of the respondent was narrated by a certain Mr M P Mohlodi, a security guard at Checkers. His evidence was that on the 15 July 2008 he saw the appellant inside the chain store, Checkers at Virginia. The appellant first went to the stationery section of the store where he took a box of a mathematical set from the shelf and pocketed it. From there the appellant proceeded to the sweets section where he took a chocolate. The appellant then approached him, in other words the security guard, to enquire about the price of the chocolate. He helped the appellant by having the chocolate scanned.
- [4] Having ascertained the price of the chocolate the appellant walked away from him to the pay-point where he handed the chocolate to the cashier and paid for it only. The appellant was on his way out when he, the security guard, intercepted him between the paypoint and the exit. The appellant was in possession of two items only, to wit – chocolate and mathematical set. He confronted the appellant about the unpaid for mathematical set. Then and there the appellant tendered the chocolate back so he could recoup the money in order to pay for the set of mathematical instruments. This in a nutshell was the sum-total of the case against the appellant.
- [5] The defence case was narrated by two witnesses, namely: the appellant himself and Ms N S Nyaredi, a shop assistant of Ekhaya Stationers. The appellant's testimony was that he did not steal the set of mathematical instruments from Checkers but rather bought it from Ekhaya Stationers on the 15th July 2008 shortly before he went to Checkers. See composite exhibit "a" – top part - in connection with Ekhaya purchase dated the 15th July 2008.
- [6] The appellant testified further that, from Ekhaya Stationers, he proceeded to Checkers where he bought adhesive glue and chocolate – see composite exhibit "a" – bottom part - in connection with Checkers purchase. I cannot make out the date of this document. The exhibit is very faint.
- [7] Ms Nyaredi's evidence was that the appellant bought a set of mathematical instruments from her at Ekhaya Stationers on the 15th July
2008. She showed a set to the court. That set, she said, was similar to the set she sold to the appellant.

The trial magistrate commented that the set was precisely the same as the set the prosecutor alleged the appellant stole from Checkers. The witness confirmed that she was the author of the Ekhaya payment voucher – exhibit "a". She added that the appellant paid R9.90 for the Croxley set of mathematical instruments and that she issued proof of such payment the next day at the request of the appellant's mother. She stated that Ekhaya Stationers stocked and offered such mathematical instruments for sale.

[8] The court a quo accepted the respondent's version as true and rejected the appellant's version as false. The appellant was thus convicted

on the evidence of a single witness.

[9] Mr Reyneke submitted, on behalf of the appellant, that the court a quo erred in convicting the appellant on the strength of the evidence of a single witness which was not satisfactory and clear in all material respects and whose observation was questionable. See *R v MOKOENA* 1932 OPD 79:

"Though in terms of section 284 of Act 31 of 1917 the evidence of a single competent and credible witness is declared to be sufficient for a conviction, that section should only be relied on when the evidence of the single witness is clear and satisfactory in every material respect, and the section ought not to be invoked where for instance the witness ... has not had proper opportunities for observation."

[10] Mr Mohlodi was a single witness. That being the case, his evidence had to be treated with caution. At paragraph 58, line 24 – p59, line 7 the court a quo had this to say about this single witness:

"Die getuie vir die Staat kom in hierdie Hof 'n goeie getuie voor, 'n geloofwaardige getuie, 'n persoon wat in sekuriteitsdoeleindes aangestel is om die eiendom van Checkers te beskerm teen diewe. Hy hou observasie en hy sê dat dit om ongeveer 20 voor 5 was wat hy u by die skryfbehoeftes afdeling waargeneem het. Dat hy gesien het dat u 'n wiskunde stel neem en dat u slegs vir 'n sjokolade gaan betaal."

[11] However credible a witness may be, is not a decisive issue. In the instant case it is important to determine how reliable were the observations made by the single witness. In this appeal we are called upon to take a fresh look at the evidence of the respondent's sole witness. We have to determine whether there was any reliable feature which so adequately increased the confidence of the court a quo in the single witness as to overcome the caution – *S v BANANA* 2000 (2) SACR 1 (ZSC) at 8b – c:

"If the court is convinced beyond a reasonable doubt that the sole witness has spoken the truth, it must convict, notwithstanding that he was in some respects unsatisfactory. See also S v Nathoo Supermarket (Pvt) Ltd 1987 (2) ZLR 136 (S) at 138D - F.

Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution."

[12] The following passages of the single witness's testimony are significant to the finding made by the magistrate as regards the quality of the observations made by the security guard:

"Goed, u kan maar voortgaan? --- Hy wat toe 'n wiskundestel, hy kyk na dit en hy sit dit toe in sy sak."

(record: p11, line 10 – 11)

“Meneer het u gesien watter items hy voor betaal het? --- Hy het betaal vir ‘n sjokolade.

Niks anders nie? --- Net dit.

U is doodseker? --- Ja.

(record: p17, line 1 – 5)

“Ek het hier ‘n uitdruk en beskuldigde se instruksies is dat dit is wat hy die betrokke dag gekoop het, dit maak melding van ‘n PS caramilk wat ‘n sjokolade is inderdaad en dit maak melding van ‘n stafie gom. --- Ek kon sien dat hy besig is om net vir die sjokolade te betaal ek weet nie van die ander item nie.”

(record: p17, line 16 – 21)

“ME SIMPSON Meneer ek stel dit aan u dat beskuldigde daardie betrokke dag ‘n sjokolade, ‘n PS sjokolade gekoop het en ‘n gomstafie. --- Toe ek hom sien toe betaal hy net vir die sjokolade.”

(record: p18, line 13 – 16)

The passages are characterised by some unsatisfactory features.

[13] The court a quo held that the security guard had properly observed the appellant steal. The following comment is relevant here:

“Ek gaan hierdie getuienis nie weer in sy geheel herhaal nie, dit is nog vars in ons geheue, dit kom in kort daarop neer dat u by Checkers was, dat die sekuriteitsbeampte u waargeneem het by die skryfbehoeftes afdeling, vir u dopgehou het en dat u ‘n wiskundige stel in u regter broeksak plaas, na die sjokolade afdeling gaan, ‘n sjokolade neem en daarvoor gaan betaal terwyl hy vir u buite die betaalpunt staan en wag het om te kyk waarvoor u betaal, gesien het toe u vir die sjokolade betaal het, u voorgekeer het en u na die stoorkamer geneem het, waar hy vir u gevra het om die wiskundige stel uit te haal. Die polisie is ontbied en u is aangekla.”

(record: p58, line 8 – 18)

[14] The following further comment by the court a quo about the security guard’s observation is significant:

“Hy hou observasie en hy sê dat dit om ongeveer 20 oor 5 was wat hy u by die skryfbehoeftes afdeling waargeneem het. Dat hy gesien het dat u ‘n wiskunde stel neem en dat u slegs vir ‘n sjokolade gaan betaal.”

(record: p59, line 3 – 7)

[15] Now, the state could readily have called the cashier concerned to prove that the appellant produced and paid for PS caramilk chocolate only. The security guard or the investigation officer or the shop manager should readily have appreciated the importance of the invoice relative to the appellant’s transaction. One would have expected that a duplicate of such invoice would have been securely preserved for later use as evidence for the prosecution. Since the respondent did not tender the oral evidence of

the cashier or exhibit the documentary evidence of the transaction there was no corroborative evidence for the security guard as to precisely what the appellant paid for.

[16] The court a quo accepted that exhibit “a” (bottom part) was a genuine duplicate of the invoice issued by the cashier employed by Checkers

and handed to the appellant on the 15th July 2008 as proof of payment.

“As gekyk word na die Checkers BEWYSSTUK “B” wat by die Hof ingehandig is, dan is daar 2 artikels gekoop ter waarde van R6,99, R9,98 en R10,05 is kleingeld ontvang.”

(record: p 59, line 8 – 9)

Exhibit “B” is an assessment report – p 78 of the record. See p77 of the record for Checkers invoice.

It must be kept in mind that this exhibit forms part of the defence case and not of the prosecution case. The exhibit verified that two articles were bought. The respective prices were also shown. The goods were apparently described as Pritt glue and PS caramilk chocolate.

[17] This documentary evidence materially negated the version of the single witness that the appellant paid for one item only, the chocolate; that only two items were subsequently found in the appellant’s possession and that the appellant tendered to give the chocolate back in order to pay for only one stolen item, the mathematical set. We now know that besides the chocolate and the set the appellant also had glue in his possession. Therefore he had three articles at the time he was searched in the storeroom. If the appellant had stolen two articles, a tube of glue and a box of mathematical instruments from the stationery shelf in the chain store it seems unlikely that he would have made a proposal which, if accepted, would only have partially solved his problem in respect of the stolen set but not the stolen glue.

[18] The difficulty I have is this: If the observations made by the security guard not only at the paypoint where the payment was made but also in the store-room where the appellant was searched is demonstrated to have been clearly wrong, what redeeming feature could have instilled confidence in the mind of the trial court about the reliability of the observation this single witness had made earlier at the stationery shelf? MEYER v DIRECTOR OF PUBLIC PROSECUTION (KZN) 2006 (4) All SA 598 (N) at 606c – d:

“In the context of deciding whether it was possible for Steytler to falsely implicate the appellant, it is apparent that it would be the simplest of matters for Steytler to allege that money passed hands at these meetings.

The greatest caution must be exercised in evaluating the evidence of Steytler. He is a single witness ... and for reliance to be placed upon his evidence it has to be clear and satisfactory in every material

respect. In addition corroboration implicating the appellant in the commission of the offence must be sought in order to reduce the risk of a wrong conviction.

R v Mokoena 1932 OPD 79 at 80; and S v Hlapezula and others 1965 (4) SA 439 (A) at 440D–H.”

[19] The exhibit strongly militates against any contention or finding that the evidence of the respondent’s single witness was reliably clear and satisfactory in all material respects. The observation made on three different occasions was, in my view, so materially unclear, unsatisfactory and unreliable as to warrant some corroborative safeguards to ensure that a wrong conviction did not follow a wrong observation. There were no reliable features in the evidence presented by the respondent to overcome the caution the court a quo was required to exercise in analysing and assessing all the elements indicative of the guilt of the appellant vis-a-vis the elements indicative of the appellant’s innocence. The judgment extolled the inherent virtues of the prosecution case and levelled no critique about its inherent weaknesses. The approach adopted was incorrect. S v CHABALALA 2003 (1) SACR 134 (SCA) at 140a – b.

“The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.”

[18] Mr Hoffman, counsel for the respondent, correctly conceded that the court a quo did not treat the evidence of the single witness with the necessary measure of caution applicable to the testimony of a single witness. The main ground of the appeal and indeed of the cornerstone of Mr Reyneke’s argument on behalf of the appellant was that the court a quo erred by finding that the respondent’s single witness was a credible witness without paying proper attention to the applicable cautionary rule. In my view there was substance in the two submissions.

[19] The charge was that the stolen 11 piece set of mathematical instruments was the property of Checkers. Therefore Checkers was the alleged owner thereof. This was an element of the charge. Besides the evidence of the security guard there was no other evidence tendered by the respondent to establish ownership of the set allegedly stolen from Checkers. The respondent’s witness did not know whether the barcode 6001396037148 on the article was exclusively used to brand such items or stock sold by Ekhaya Stationers. Apparently the respondent’s witness did not have the article scanned to determine whether it formed part and parcel of such items as were stocked by Checkers. He could easily have done so as he had done with the chocolate. The scanning would have shown whether indeed the set was pre-owned by Checkers or Ekhaya Stationers. As regards the element of ownership the court a quo commented as follows:

“Dit word gesê Checkers kan nie sê dat dit hulle eiendom is nie, slegs as gevolg van ‘n kode, net so min kan Ikaia (sic) Skryfbehoeftes vandag sê dat dit hulle eiendom is want die prysetiket wat op alle behoeftes in daardie winkel behoort, waar ons inspeksie gehou het, verskyn glad nie op dié wiskundige stel wat in u besit gevind is nie.”

(Record, p61, reël 3 – 8)

[20] The aforesaid quotation creates the unfortunate impression that there was a duty which rested on the appellant to prove that immediately before the incident the article was owned by Ekhaya Stationers. Of course he was not required to do so. It was incumbent not on the accused but on the respondent to prove beyond reasonable doubt that immediately before the incident the article was owned by Checkers. The respondent failed to discharge that requisite onus.

[21] It must also be borne in mind that the incident happened on the 15th July 2008 and that the case was tried on the 1st December 2008, some 18 weeks later. I am uncertain as to when an inspection in loco, which the trial magistrate referred to, took place. However my informed guess is that such an inspection was not before December

1, 2008. Therefore any comparison between the price tags of the goods found in the stationery shop during such an inspection and the price tag on the article sold to the appellant at least 18 weeks before the inspection was not a very helpful exercise. The appellant was not required to convince the court of the truth of his version – R v DIFFORD 1937 AD 370 on 373.

[22] The defence witness materially corroborated the evidence of the appellant. She confirmed that identical Croxley mathematical instruments were sold at Ekhaya Stationers. (record: p44, line 14); that she immediately knew what the appellant’s mother was talking about when she came in the next day (record: p46, line 19); and that she was certain the appellant bought the set in dispute from her (record: p47, line 22 – 23):

“--- Al wat ek weet is, ons koop die stel van die vervaardigers af, ek weet ook nie wat is die kode maar ek weet beskuldigde het ‘n stel gekoop by ons.”

[23] She even vowed that the appellant bought the article from her (record: p49, line 11):

“--- Ek sweer hy het dit by my gekoop.”

There was, therefore, some serious doubt concerning ownership of the alleged stolen article and precisely where the appellant acquired possession thereof.

[24] On the facts it cannot objectively be concluded that the version of the defence, notwithstanding its unsatisfactory aspects as correctly outlined by the court a quo, was not reasonably or possibly true. To the extent that the court a quo found otherwise it misdirected itself in my respectful view. Since the misdirection was material, I am inclined to interfere with the resultant conviction by upholding the appeal.

[25] Before I propose the order, I want to make some brief comments. Mr Reyneke still relied on the decision in *S v KUBEKA* 1982 (1) SA 534 (W) where Solomon AJ endeavoured to reformulate the test to be adopted in dealing with the version of an accused person. The test so reformulated was criticised by Nugent J, as he then was, and finally overruled in *S v VAN ASWEGEN* 2001 (2) SACR 97 (SCA) on 100 (para 7 – 8).

[26] I propose the following order:

25.1 The appeal succeeds.

25.2 The conviction and sentence are set aside.

M. H. RAMPAL, J

I concur.

S. EBRAHIM, J

On behalf of appellant: Attorney J. D. Reyneke

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of respondent: Adv. R. Hoffmann Instructed by:

The Director: Public Prosecutions

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