

SOUTH AFRICA / JUDGMENT

Thulo v S (CA57/2023) [2024] ZANWHC 231 (11 September 2024)

[2024] ZANWHC 231

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid, NG Laubscher

CASE / FILE NUMBER

CA57/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER: CA57/2023

CASE NUMBER A QUO:

D89/2022

In the matter between:-

MOSALA

WALTER THULO

Appellant

and

THE

STATE

Respondent

CORAM:

REID J et

LAUBSCHER AJ

This

judgment is handed down by virtue of circulation to the legal
representatives' electronical addresses (e-mail). The date
of

the hand down is deemed to be 11 September

2024

ORDER

The

following order is made:

- i)
Condonation is granted for the late filing of the appeal.
- ii)
The appeal is upheld.
- iii)
The convictions and sentence are set aside.

JUDGMENT

FMM REID J

[1] This matter is heard in terms of section 19(a) of the Superior Court Act 10 of 2013, by agreement between the parties on the documents filed in the court file without the presentation of oral argument. The appeal is against both conviction and sentence with leave from the court a quo, Magistrate Ngakane at the Magistrates Court for the District of Mahikeng held at Molopo.

[2] The appellant was charged and found guilty on the following offences:

2.1. Theft read with the provisions of section 256, 264 and 276 of the Criminal Procedure Act 51 of 1977 (CPA) in that on 28 March 2022 at Shoprite, Mega City in the district of Mahikeng, the appellant unlawfully and intentionally stole 2 bottles of Nivea valued at R190.00 (One Hundred Rand), the property being in the lawful possession of Masego Mosala with the intention of permanently depriving him ownership of the property; and

2.2. Theft read with the provisions of section 256, 264 and 276 of the CPA in that on 14 February 2022 at Pick and Pay, Mga City in the district of Mahikeng, the appellant unlawfully and intentionally stole 1 packet of Pork meat valued at R146.00 (One Hundred and Forty Six Rand) and 1 Vaseline 400 millimetre tub valued at R48.00 (Forty Eight Rand). The property being in the lawful possession of Lesago Eva

Matsamai, with the intention of permanently depriving her ownership of the property.

[3] Magistrate Ngakane found the appellant guilty on 5 August 2022 and sentenced the appellant on 8 August 2022 to a period of 2 years imprisonment.

Condonation

[4] The appeal is launched outside the prescribed time period in which it had to be brought. The appellant requests condonation for the late filing of the appeal on the following basis.

[5] The application for condonation is not opposed by the State.

[6] After being found guilty and sentenced on 8 August 2022, he instructed his legal representative to proceed with the appeal, and the legal representative confirmed that she will do that.

- [7] On 31 October 2022 the appellant applied for leave to appeal against both the convictions and sentences, which were granted by the court a quo. The legal representative applied to have the records transcribed on the same day. A court order was issued in that regard.
- [8] On 6 February 2023 the appellant brought a bail application pending the appeal to this court of appeal and Magistrate Ngakane recused himself. The bail application was opposed by the State. On 1 April 2023 the appellant was granted bail in the amount of R500.00 with certain conditions.
- [9] During April 2023 the transcribed records remained outstanding.
- [10] During July 2023 the appellant was informed that Ms Khutsoane, his erstwhile legal representative was no longer in the employ of Legal Aid Sought Africa and Mr Setumu was appointed as the appellants new legal representative.
- [11] On 28 June 2023 and on 10 October 2023 the appellant was informed that the record is incomplete, and that Legal Aid is following up the issue of the outstanding record with the magistrate's court.
- [12] The transcription of the records remained a difficulty due to audibility issues.
- [13] It remains unclear when the transcribed records were received by the appellant and/or Legal Aid.
- [14] The appeal, together with the transcribed records, reached the Criminal Section of this Court on 8 April 2024.
- [15] The reason for the delay was the transcription of the record. No fault can be laid on the appellant for the timeous and difficulties in obtaining the transcribed record.
- [16] Justice dictates that condonation should be granted for the late filing of the appeal.
- [17] Condonation is consequently granted for the late filing of the appeal.

The appeal

- [18] The appeal is brought on the following grounds:

18.1. The Magistrate was biased in hearing the trial.

18.2. The sentence was too harsh and induced a sense of shock.

- [19] For reasons set out below, the State concedes that the Magistrate erred and that the appeal against both convictions and sentence should be upheld.

Material factual background

- [20] The appellant was arraigned on 2 charges of theft.

- [21] Prior to the commencement of the hearing, the appellant requested bail pending the trial. As it is custom in bail applications, the appellant's previous convictions were disclosed to Magistrate Ngakane.
- [22] The application for bail was refused by Magistrate Ngakane.
- [23] Magistrate Ngakane then proceeded to commence the trial hearing.
- [24] After the State closed its case, the appellant brought an application in terms of section 174 of the CPA. This application was refused.
- [25] Immediately after refusing the application in terms of section 174, the Magistrate proceeded with judgment and found the appellant guilty of the charges levelled against him.
- [26] The Magistrate requested the parties to address mitigating and aggravating circumstances in the determination of a sentence. After hearing mitigating and aggravating circumstances, the Magistrate sentenced the appellant to 2 years imprisonment.

Analysis

- [27] The Magistrate, prior to dealing with the trial, heard a bail application from the appellant in which the appellant's previous convictions were disclosed to the Magistrate. The appellant has 4 previous convictions of which 3 are for theft. The appellant also had a pending matter of theft. The current charge of theft was committed whilst the appellant was on bail for one of the previous convictions on theft.
- [28] Bail, pending trial proceedings, were refused.
- [29] After refusing bail, the Magistrate proceeded to hear the trial in which the appellant is accused of theft. The Magistrate was thus aware of the appellant's propensity to theft.
- [30] Having had knowledge of the accused previous convictions, which previous convictions are analogous to the current charges that the appellant was facing, the Magistrate should have recused himself from presiding in the trial. See: *S v Sibeko* and another 1990 (1) SACR 206 (T) and *S v Dozereli* 1983 (3) SA 259 C.
- [31] The failure of the Magistrate to recuse himself renders the trial irregular. On this basis alone, the appeal should succeed.
- [32] However, the actions of the Magistrate goes further. After the State closed its case, the appellant brought an application in terms of section 174 of the CPA.
- [33] The court a quo heard the application in terms of section 174, and then proceeded to find the appellant guilty on the charges levelled against the appellant, without giving the appellant an opportunity to present evidence.
- [34] The record reflects the following:

“Now after that, the state closed its case and after that the attorney for the (appellant) applied for a discharge in terms of section 174 of the Criminal Procedure Act. The said application the state was given an opportunity also to respond thereto.

The court after having heard the application by the defence of a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 as well as the response by the state thereto application by the defence of a discharge in terms of section 174 of the Criminal Procedure Act was denied, and after the defence closed its case they were then given opportunity to give closing arguments both the state and the defence.

Now the court having denied the application for a discharge in terms of section 174 of the Criminal Procedure Act meant that there was a case for the accused to answer, hence the accused is found guilty as charged on both counts.”

[35] The court a quo did not provide any reasons why the appellant was found guilty.

[36] The court a quo did not make any findings, whether on fact or in application of law.

[37] One of the principles in evaluation of evidence on appeal, is that an appeal court is not to intervene and disturb factual findings by the trial court on the evaluation of the evidence. The advantage of seeing and hearing the witnesses is difficult to surpass. In the matter of *Makate v Vodacom (Pty) Ltd* 2016 ZACC 13 at paragraph 37, the Constitutional Court held that:

“In these circumstances, interference with the factual findings made by the trial Court is neither necessary nor justified. Ordinarily appeal courts in our law are reluctant to interfere with factual findings made by trial courts more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.”

[38] In casu the trial court has made no findings, save for finding the appellant guilty and imposing a sentence of 2 years.

[39] In the absence of any findings, this court of appeal is obliged to intervene.

[40] The only question is whether the basic right of the accused to a fair trial has been affected by the irregularity to such a degree that it cannot be said, in principle, that justice was done. See: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147. This question has to be answered with a resounding “no” having regard to the gross irregularities that occurred during the trial.

[41] It follows that the appeal must succeed.

[42] When one considers the nature of the offence, the duration of the sentence and the gravity of the Magistrate’s irregular actions in the conduct of the trial, against the backdrop that the appellant was in custody pending the trial, I find that it would be in the interest of justice that the appeal be upheld and the finding and sentence set aside.

Order:

[43] In the premises I make the following order:

- i) Condonation for the late filing of the appeal is granted.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

I agree

NG LAUBSCHER

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING : 03 MAY 2024 DATE OF JUDGMENT : 11 SEPTEMBER 2024 APPEARANCES ON
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