

SOUTH AFRICA / JUDGMENT

Toli v S (CA & R 292/2006) [2011] ZAECHGC 39 (24 August 2011)

[2011] ZAECHGC 39

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Dhlodhlo, Chetty

CASE / FILE NUMBER

CA & R 292/2006

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA &

R 292/2006

SITHEMBELA ZACHARIA TOLI

.....Appellant

And

THE STATE

.....Respondent

Coram: Dhlodhlo ADJP and Chetty J

Heard: 27 July 2011

Delivered: 24 August 2011

Summary:

Evidence –
Sufficiency of evidence – Evidence tendered by State
contradictory – Appellant's evidence reasonably
possibly
true – Conviction based on finding that petrol disappeared –
No basis for concluding appellant guilty of theft
– Conviction
occurring in 1996 – Co-accused not appealing – Case of
appellant and co-accused similar –
Although no appeal noted,
Court in exercise of its inherent discretion setting aside his
conviction and sentence

JUDGMENT

Chetty, J

- [1] On 9th April 1996, the appellant and one Ismael Olifant (Olifant) were arraigned for trial in the Aliwal North Magistrates' Court on a charge of theft. They were duly convicted and sentenced to pay a fine of R400, 00 or in lieu thereof to undergo imprisonment for a period of 40 days. The sentences were however suspended in their entirety for 4 years on certain conditions. Given the passage of time that has elapsed since the imposition of sentence various documents, including the charge sheet, have, not surprisingly, been lost. Fortunately, a transcript of the evidence adduced survived. It appears therefrom that the appellant and his co-accused were charged with stealing a 20 litre container of petrol which they had filled at the Aliwal North police station.
- [2] The appellant and Olifant both pleaded not guilty to the charge and in amplification of his plea the appellant admitted that on the day in question whilst he and Olifant were on patrol duty in the township they observed that the lights in the particular area they were patrolling went off for a short while. Fearful that this might occur again and that their police station could be affected, he and Olifant went to the Maletswai police station to fetch a container which they then took to the Aliwal North police station where they filled it with petrol before returning to the Maletswai police station. On their arrival, Olifant took the container to the storeroom adjacent to the generator at the rear of the police station whilst he went into the charge office where he encountered one Sergeant Kabeli, apparently in charge of the police station that night. Olifant's plea explanation mirrored that of the appellant. It is common cause that the Maletswai police station was equipped with a generator which was used in cases of power failures.
- [3] The state's case against the appellant and Olifant rested on the testimony of no fewer than six witnesses. Both the appellant and Olifant testified and in addition, Olifant called a fellow policeman. In his judgment, the magistrate appears to have accepted that the appellant and Olifant had fetched the petrol as they alleged. It was common cause that Olifant in fact signed for the petrol at the Aliwal North police station. It is furthermore common cause that the appellant and Olifant came to the Maletswai police station in the early hours of the morning.
- [4] The magistrate's judgment is not a model of clarity. His factual findings are in many instances at variance with the evidence adduced and echo the confusion underlying the entire judgment. The following passage therefrom unequivocally demonstrates that the magistrate appears to have forgotten much of the evidence. At page 152 of the transcript he says:-

“And according to the evidence before this Court it appears the petrol were in your hands and it got missed while in your hands. There is nobody who knows that you, after coming here at the Aliwal Police station you went to Maletswai Police Station because nobody saw you there. Sergeant Kabeli who was on duty said that he never saw you. He was not aware that you had come and fetched the petrol until he was informed by Mr Slinger.

As you know that this is the property of the State, there must be one who must incur a responsibility of that loss of that petrol. To me, you would escape that liability if for instance when you arrived at the police station you handed over the petrol to Sergeant Kabeli, then he will incur the responsibility today of that petrol or any member on duty on that day. But you did not do that.

Concerning the accused No 1, you were always with accused No 2 on the day in question. It means that you know what was happening despite the fact that you did not sign any document, you did not take the petrol container and put it back at the engine. The fact that you were always with accused No 1(?) it means that you were acting in concert with him.”

[5] It would serve no useful purpose to tabulate the many instances where the state witnesses contradicted not only themselves but each other. Kabeli, whom the magistrate appears to have regarded as a reliable witness, was untruthful in several respects. On the crucial question whether he had seen Olifant at the police station, he gave a conflicting account. If Bezuidenhout’s evidence that he personally inspected the generator and found it to be half full is to be believed then Kabeli’s evidence that the generator was completely empty must be untrue. A cursory reading of the evidence of the state reveals a mass of contradictions of such proportions that it warrants the rejection of such evidence in its entirety. The appellant’s evidence and that of Olifant, notwithstanding the fact that they were unrepresented, on the other hand, was consistent, clear and in fact, in several instances corroborated by the state’s evidence.

[6] The magistrate’s finding that the appellant and Olifant were not observed at the Maletswai police station on their return from the Aliwal North police station is in direct conflict with Kabeli’s initial evidence that he saw both of them at the Maletswai police station. His later disavowal of having seen Olifant demonstrates his capacity to adapt his evidence. The conflict between his evidence and that of Bezuidenhout shows that his version of having inspected the generator to be a complete fabrication. The fact that the generator was half full did not assist the state in proving that the appellant and Olifant had stolen the petrol. None of them admitted to the fact that they inspected the generator prior to fetching the petrol nor did they state that petrol had been poured into the generator. Their consistent version was that they had obtained the petrol in the event of there being a power failure.

[7] A substantial amount of time was spent on whether a police station code or the particular police vehicle code had to be entered in the petrol logbook during the process of filling petrol. The state’s evidence hereanent was of such a poor quality that no reliance whatsoever could be attached thereto. During their somewhat rudimentary cross-examination of the

various witnesses, both the appellant and Olifant not only exposed the inherent weaknesses in their testimony but showed the evidence to be so unreliable that no weight whatsoever can be attached thereto.

- [8] The unfortunate consequence of the conviction is that the appellant, and no doubt Olifant too, were dismissed from their employment. The appellant's resilience and fortitude in seeking to have his honour restored, a quest which took the better part of 15 years has finally yielded results. His appeal must succeed. Although Olifant has not noted an appeal, his position is no different from that of the appellant. In his case too a grave injustice has occurred and we are at liberty to set his conviction and sentence aside. In the result the following orders will issue:-

The appeal succeeds.

The appellant's conviction and sentence are set aside.

The conviction and sentence of Ismael Olifant is likewise set aside.

The Registrar of this court is directed to ensure that a copy of this order is forwarded to him.

D. CHETTY

JUDGE OF THE HIGH COURT

Dhlodhlo, ADJP

I agree.

A.E.B DHLODHLO

For the Appellant: Adv D. Geldenhuys

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For the Respondent: Adv S. S Mtsila

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