

SOUTH AFRICA / JUDGMENT

Tsiane v S (A504/2016) [2018] ZAGPPHC 881 (3 August 2018) [2018] ZAGPPHC 881

COURT

North Gauteng High Court, Pretoria

BEFORE

Sardiwalla, Ntloko-Gobodo

CASE / FILE NUMBER

A504/2016

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED.
CASE NO: A504/2016
3/8/2018
In

the matter between: PETER
TSIANE
Appellant
and
THE
STATE
Respondent
Delivered on: 3 August 2018

JUDGMENT

SARDIWALLA J

INTRODUCTION:

[1] The appellant was charged with the following counts:

Count 1 - Housebreaking with intent to steal and theft

Count 2 - Possession of housebreaking implements

[2] The appellant pleaded not guilty in the district Court Piet Benoni. The appellant was convicted on 24 July 2015 by the presiding Magistrate Skosana. The trial Court sentenced the appellant in terms of section 276(1)(I) of the Criminal Procedure Act 51 of 1977 to a period of 1 year and 6 months imprisonment. The appellant was granted leave to appeal in respect of conviction only.

[3] The grounds of appeal submitted on behalf of the appellant are, inter alia, the following:

- (a) The State failed to prove the reliability of the identification of the appellant by the complainants;
- (b) The magistrate erred in convicting the appellant of 'house breaking and theft';
- (c) The magistrate erred in convicting the appellant of housebreaking as there is no proof that the appellant entered the premises and therefore only amounts to malicious injury to property;
- (d) The State failed to prove that there was an intention to commit another crime after the housebreaking which is a requirement to sustain a conviction;
- (e) The State failed to prove theft and therefore the only offence that would have been committed is attempted theft.

[4] It is not in dispute that the State proved that the crime which featured in the trial occurred. The central issue however arising is whether the court a quo erred in concluding that the State had proved beyond a reasonable doubt that it was the appellant who had committed the offences of which he was convicted, or was guilty of those crimes.

[5] It is abundantly clear from the facts of the case that there were no fingerprints found connecting the accused to the crime scene. The evidence against the accused was based on his identification by Mr Taylor who had apprehended him, the clothes that the accused was wearing, specifically a red/ burgundy hooded top and dark coloured pants. Lastly by video footage taken from the restaurant where the crime had been committed.

- [6] As pointed out earlier, the evidence relied upon by the State to prove that the accused was one of the perpetrators of the crime in that the accused was identified by Mr Taylor who had apprehended him after he saw the accused and his accomplice jump over the wall of the restaurant. This constitutes direct evidence placed before the court identifying or implicating the appellant as a perpetrator in the offence.
- [7] Direct evidence in this case is evidence which a person gives relating to what he perceived through his senses, what the accused person did relating to the crime with which he was charged. In that case the witness relates what he saw, heard and felt the accused person do, as one would expect, for example, in the testimony of the complainant in a rape case.
- [8] A court must always examine all the evidence; it must neither look at evidence implicating the accused in isolation to determine whether there is a proof beyond reasonable doubt, nor should it look at exculpatory evidence in isolation to determine whether an accused's version is reasonably possibly true. The correct approach is to consider all the evidence 'in the light of the totality of the evidence of the case'. This court, as a court of appeal, shall not interfere in the findings of the trial court in regard to conviction unless there is a material misdirection which resulted in an incorrect conclusion being reached. An appeal

lies against the conclusions reached and not against the trial court's reasons for convicting. If the reasoning of the trial court

might be open to criticism, but the conclusion reached is nevertheless correct for different reasons, then the appeal must nevertheless fail.

- [9] On the aspect of identification of the appellant, the case advanced by the State was that the appellant was identified by Mr Taylor who apprehended the appellant. Mr Taylor had arrived and parked outside the restaurant when he noticed the suspects jumping over the restaurant wall. He then got into his car and chased the suspects and subsequently apprehended the appellant. It was the State's submission that the type of clothes the appellant was wearing was also confirmed by the video footage. Mr Mohlala confirmed that although he did not see the suspect's faces he could confirm that the suspect was wearing a red top and white scarf. Mr Van Der Stelt testified that the suspect was wearing a burgundy top and blue coloured pants. Further that the accused was present in Court wearing the same clothes as on the day of the incident. The Defence averred that Mr Taylor had wrongly identified the appellant

as being the suspect who jumped over the wall and that his identification was not reliable because the witness would have lost

sight of the suspect when he got into his vehicle to give chase to the suspect. Further that the video footage to which the State relied on was in black and white and therefore the colour of the clothing that the appellant was wearing could not be confirmed. The State correctly relied on *S v Mthetwa* and *S v Mofokeng* that the factors in a particular case are not decisive and must be weighed against each other in the totality of the evidence and the probabilities. The video footage corroborated the version of Mr Taylor and that of the other witnesses specifically in regards to

the type of clothing the appellant wore I.e. a hooded jacket which is clearly distinguishable despite the colour not being visible . The Court is also cognisant of the fact that Mr Van Der Stelt pointed out that the appellant was wearing the same clothes during the trial. The view held in *S v Chabalala* was correct and therefore this piece of evidence is crucial to the question of identification.

- [10] The accused was a poor witness and from his evidence clearly attempted to fabricate his version and failed to present a version that the Court could find to be reasonably possibly true. His explanations regarding his whereabouts at the time of the commission of the crime were contradictory. He provided no explanation for the fact that the clothing which he wore during the trial matched the description by the witnesses and that in the video footage. In light of all the evidence this Court finds that the probabilities of a misidentification were highly improbable. This, in my view, favoured and strengthened the argument by the State, excluded any reasonable doubt as to the appellant's identification or guilt and therefore was sufficient to sustain a conviction.
- [11] In *S v Maswetswa* it is correctly pointed out that a charge of housebreaking with intent to commit an offence and the commission of another offence in the house consists of two substantive crimes. First, housebreaking with the intent to commit a crime. Second the substantive crime itself. Wepener J opined that the practice in terms of which accused are charged with one offence whereas two offences were committed should change. He suggested that the better practice would be that an accused person should be separately charged with the offence of housebreaking with intent to commit a crime and the crime itself, especially when the substantive crime is one mentioned in Schedule 2 of the Amendment Act. He put it thus, at para 16: "There now appears good reason why the offence of housebreaking with the intent to commit a crime and the crime should be charged as separate offences and not as a single offence in the case of robbery, murder and rape and any offence for which a minimum sentence is prescribed. In matters where the charges involve housebreaking with the intent to rob and robbery a first offender for robbery would attract a minimum sentence of 15 years imprisonment, whilst the housebreaking charge would attract a different, albeit lesser, minimum sentence of 5 years imprisonment. The same would apply to housebreaking with the intent to murder or rape..."
- [12] It is not in dispute that there was a 'breaking' of the window and the burglar proofing. However before the suspects could 'enter' they were disturbed by Mr Mohlala or Mr van Der Stelt and therefore only committed the offence of 'attempted housebreaking' to which the magistrate correctly inferred.
- [13] The court a quo however also convicted the appellant of theft in removing the umbrellas off the stands and placing them near the gate stating that the appellant formed an intention to permanently deprive the owner/s of their property. I quote the following passage:

"Even though the umbrellas were not removed from the premises, removal from their stand and being packed in one corner proved that the intention was being formed."

[14] I refer to the definition of theft provided by CR Snyman in the fourth edition of *Strafreg* which definition also appears in Snyman CR, *Criminal Law*, 5th ed, 483 and reads as follows:

"A person commits theft if he unlawfully and intentionally appropriates moveable, corporeal property which

- (a) belongs to, and is in the possession of, another;
- (b) belongs to another but is in the perpetrator's own possession; or
- (c) belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property."

[15] The evidence proved an attempt on the part of appellant and his accomplice to steal the umbrellas from the complainant. Further that such attempt to steal clearly indicates that an intention to steal was formed. In the case of *R v Schoombie* the court stated that there are two types of attempt to commit an offence. The two of attempt are:

"(a). Those in which the wrongdoer, intending to commit a crime, has done everything which he set out to do but has failed in his purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise, and

(b). Those in which the wrongdoer has not completed all that he set up to do, because the completion of his unlawful act has been prevented by the intervention of some outside agency. To the latter may be added the case where the completion by the wrongdoer of his unlawful acts has been prevented by his changing his mind and the desisting from the actual commission of the crime."

[16] In the present case the umbrellas were safely secured on their stands. The appellant and his accomplice had entered the premises, removed the umbrellas off the stands and packed them into a corner. The reason behind removing them and packing them into a corner was clearly with the intention to steal them. They however could not succeed in committing the crime intended because they were interrupted by Mr Mohlala.

[17] In *S v Du Plessis* Corbett JA stated:

"The decision any particular case as to whether or not, at the moment of interruption or prevention (of the accused's unlawful acts), the conduct of the accused had progressed beyond the stage of preparation and constituted a commencement of the consummation must in the last resort become effectual enquiry relating to the particular circumstances of the case in which the following factors, among others, would play a part: whether the state the accused had made up his mind the crime, the degree of proximity or remoteness with that arrested conduct bore to

what would have been the final act required for the commission of the crime and, generally, considerations of practical common sense. It is doubtful whether any greater precision than this can be achieved.

To constitute an attempt (a) there must have been at the time of interruption an intention to commit the contemplated crime, and

- (b) it must appear that the party concerned had embarked upon a series of acts, which had beyond the preparation stage, and which, if not interrupted, would have led to the commission of the crime."

[18] From the facts of the present case when Mr Mohlala interrupted the appellant and his accomplice they had already conceived the intention to break into complainant's premises and to steal property from within. They had broken a window and while doing so they made enough noise to draw the attention of Mr Mohlala. They had already embarked upon efforts by breaking open a window so as to gain entry and to steal property as intended. This, in my view, indicates that they had clearly formulated the intention to steal and had progressed past the stage of preparation.

[19] It is clear that appellant and his accomplice did not have a change of heart about their intended crime. They were rather interrupted by Mr Mohlala. If Mr Mohlala had not been home, the appellant and his accomplice would have proceeded to break into complainant's premises and they would have stolen property therein. In this regard the attempt to steal on the part of appellant was completed. The only reasonably justifiable inference then that can be drawn from removal or displacement of the umbrellas off their stands was that the suspects intended to steal them. Therefore the Court correctly inferred that the intention was being formed and therefore sufficient to constitute an intention in a crime of theft.

[20] The trial court made a credibility finding, having had the opportunity of observing the witnesses, which a court of appeal should not interfere with lightly, not that it means it can never be interfered with, and ever mindful of the fact that demeanour might not be an altogether reliable indicator of reliability. In light of my findings above, weighing the evidence I am unable to find that the trial court erred in inferring that the appellant was guilty as there is sufficient evidence to identify the appellant to sustain a conviction. I am satisfied that the State proved beyond a reasonable doubt and that the appellant was guilty. However I do agree that the trial court incorrectly convicted the appellant of 'attempted housebreaking and theft' and ought to have convicted the appellant of 'attempted housebreaking with intent to steal and theft'.

[21] ORDER:

1. The appeal against conviction is dismissed.
2. The conviction by the magistrate is set aside and substituted with the following conviction: Attempted housebreaking with an intent to steal and theft.

JUDGE OF THE HIGH COURT

I agree

NTLOKO-GOBODO AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Date of hearing

: 01 August 2018

Date of judgment

: 03 August 2018

Counsel for the State

: Adv.: A Roos

Counsel for the Appellant : Ms. M Masete

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Prepared on 10 October 2026 · Esheria