

SOUTH AFRICA / JUDGMENT

Visagie v S (CA82/2019) [2020] ZANWHC 19 (12 March 2020)

[2020] ZANWHC 19

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Nonyane

CASE / FILE NUMBER

CA82/2019

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: CA 82/2019

In

the matter between:

MOSIMANEGAPE
KENNETH VISAGIE
Appellant
and
THE
STATE
Respondent

CORUM:

HENDRICKS DJP et NONYANE AJ
DATE
OF HEARING
:
28 FEBRUARY 2020
DATE
OF JUDGMENT
:
12 MARCH 2020
FOR
THE APPELLANT
:
ADV. MOKGOSI
FOR
THE RESPONDENT
:
ADV. RASAKANYA

ORDER

(i)

The appeal
succeed.

(ii)

The conviction
and resultant sentence is set aside.

JUDGMENT

HENDRICKS DJP

- [1] The appellant as accused 2 was arraigned before the District Court in Lichtenburg, together with his two co-accused (accused 1 and 3), and charged with the offence of theft of a copper cable valued at R14 000.00. He pleaded not guilty to this charge. He was convicted and sentenced to three (3) years imprisonment. Leave to appeal against the conviction and sentence was refused by the trial court. The appellant petitioned the Judge President of the North West High Court about his conviction and sentence. The High Court per Gura J and Petersen AJ granted leave to appeal against the conviction only on limited grounds. This appeal is against conviction only.
- [2] The facts can be succinctly summarized as follows. Constables Mamle and Mokoma who were on duty on the 23rd August 2018 were patrolling. At a four way stop leading to Lekuthle location, a white motor vehicle drove pass them. They followed this motor vehicle and tried to stop it by sounding the siren of their motor vehicle and flashing the lights, but in vain. Instead it increased speed. They called for backup from Coligny. They gave chase to this motor vehicle until it lost control and collided with a fence. The occupants of the motor vehicle alighted and ran off. The officers ran after one of the occupants and apprehended him. It was accused 1. They inspected the motor vehicle and found two rolls of cable, pliers and a hacksaw. Accused 1 was arrested and the motor vehicle was impounded.
- [3] Sergeants Sebatse and Moralate were the police officers from Coligny who were called as backup. When they arrived at the scene, they found that the motor vehicle had collided with the fence. It did not have any occupants inside. When leaving the scene, they received a call from a Community Watch member who informed them that they had apprehended a suspect. They drove to them and found them standing alongside the road. The suspect was the appellant (accused 2), who was then arrested. They received another call from one of the community members informing them that the farm workers apprehended another suspect. They went to him and found accused 3, who was also arrested. This is how the three accused persons were arrested.

- [4] David Gerber of Golden Eye Security testified that he received a call about the arrest of the suspects for allegedly stealing a cable at Afrisam, one of the companies where Golden Eye Security renders security services. Gideon Uys also confirmed that the cable was stole from Afrisam which caused a shutdown of the plant. That, in a nutshell, is the evidence tendered for and on behalf of the State.
- [5] An application was made in terms of the provisions of Section 174 of the Criminal Procedure Act 51 of 1977, as amended (CPA), for the discharge of the appellant (accused 2), since there was no evidence implicating him in the commission of the offence. The application for his discharge was refused. The case of the appellant (accused 2) was closed without him testifying or calling any witness to testify on his behalf. As already stated, he was then convicted.
- [6] It is quite apparent that there is no direct eye witness evidence presented that the appellant stole the cable at Afrisam. Furthermore, there is no evidence tendered that he was one of the occupants of the suspicious white motor vehicle that sped-off and was followed by the police in hot pursuit, in their motor vehicle. There is no evidence that the appellant alighted from this motor vehicle and was kept under constant surveillance until he was arrested.
- [7] The presiding Magistrate in her judgment stated: "It is further common cause that accused 2 was caught by the workers in one of their camps nearby the farm where the vehicle collided with the fence a few minutes after accused 3 was apprehended by the community neighbourhood watch." The appellant (accused 2) did not testify. Accused 1 testified and placed himself as well as accused 3 on the scene by admitting that they were in the motor vehicle. However, he denied that he stole the cable or was aware that the stolen cable was in the motor vehicle. He only hitchhiked a lift. During the trial, accused 3 absconded.
- [8] The presiding Magistrate quoted from the cases of *S v Mthetwa* 1972 (3) SA 766 (A); *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); and *S v Shabalala* 2003 (1) SACR 134 (SCA) about the right and consequences of an accused who remain silent in the face of evidence implicating him/her in the commission of an offence(s). With due respect to the presiding Magistrate, these cases speaks to the situation where there is prima facie evidence that implicates the accused in the commission of an offence. Such prima facie evidence may well be conclusive in the absence of any rebutting evidence. However, that is not the case in the matter at hand. There is no evidence, direct or circumstantial, implicating the appellant (accused 2) in the commission of this offence. Absent any such evidence, the appellant (accused 2) was entitled to his acquittal even after the close of the case on behalf of the State, in terms of the provisions of Section 174 of the Criminal Procedure Act. This much was correctly conceded to by Adv. Rasakanya on behalf of the respondent (State).
- [9] None of the state witnesses places the appellant at the scene where the crime was committed namely Afrisam. None of the witnesses positively link the appellant as one of the occupants that alighted from the white suspicious looking motor vehicle in which the cable, pliers and hacksaw was found. In the absence of such evidence and leaving aside suspicion

and conjecture, there is no evidence implicating the accused in the commission of this offence. Consequently, the conviction of the appellant must be set aside. It follows automatically that the sentence must also be set aside. I fail to understand why leave to appeal against sentence was refused in the petition for such leave. Be that as it may, if the conviction is set aside, the substratum for the sentence disappear and the sentence must also be set aside.

Order

[10] Resultantly, the following order is made:

- (i) The appeal succeed.
- (ii) The conviction and resultant sentence is set aside.

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

B R NONYANE

ACTING JUDGE OF THE HIGH COURT,

APPEARANCES:

DATE OF HEARING

: 28 FEBRUARY 2020

DATE OF JUDGMENT

: 12 MARCH 2020

FOR THE APPELLANT

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FOR THE RESPONDENT

: DPP

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COUNSEL FOR THE RESPONDENTS : ADV. RASAKANYA

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