REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A418/2013
DDP Ref No: 9/2/5/1-2013/438

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

28/03/2014
DATE

SIGNATURE

In the matter between:

SMITH, RICARDO Appellant

and

THE STATE Respondent

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] The appellant was convicted in the Germiston Regional Court of housebreaking with the intent to steal and theft for and incident which occurred on 21 December 2001 (count 1), and of assault of Yolanda Langemaat on 28 April 2010 (count 3).

COUNT 1 - HOUSEBREAKING WITH THE INTENT TO STEAL AND THEFT

[2] On Friday, 21 December 2001, Mrs Van der Merwe's motorbike was stolen from her closed garage. During the morning of 22 December 2001, the appellant together with his friend Mohamed were apprehended riding the motorbike. Mohamed was the driver of the motorbike and the appellant the passenger. Sgt. Skondo was the person who had apprehended the appellant and Mohamed and he testified that when they were asked who the owner of the motorbike was, they did not tell him.

[3] The appellant testified that Mohamed had fetched him from his home and that they were on their way to a couple of friends in Dipotal. He said he had told the police that they should ask the Mohamed who the owner was. Mohamed was initially a co-accused but he did not honour his bail conditions and did not make an appearance. The charges against the appellant were, accordingly, withdrawn.

[4] The appellant testified that he was 17 at the date of his arrest on count 1.

[5] The trial court had misdirected itself in a number of respects. They include:

5.1. The trial court had entirely overlooked the fact that Sgt. Skondo was a single witness. He was required to find that his evidence was clear and satisfactory in all material respects (see *R v Mokoena* 1932 OPD 79 at 81; *S v Webber* 1971 (3) SA 754 (A); S *v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G and *S v Janse van Rensburg and Another* 2009 (2) SACR 216 (C) at 220G). *In casu*, the trial court did not have regard to the fact that the incident occurred almost nine years prior to the evidence of Sgt. Skondo being given. It is highly improbable that the two suspects, i.e. Mohamed and the appellant would have given no explanation;

5.2. the trial court rejected the appellant's evidence on the basis that he had failed to give an explanation to the police. The appellant had, however, testified that he had given an explanation to the police, i.e. that Mohamed had picked him up from his home with the motorbike. The magistrate advanced no reasons why the appellant's evidence in that regard should be rejected as false beyond reasonable doubt. Indeed, It is highly improbable that he would not have given an explanation at all;

5.3. the trial court did not deal with the issue of whether the appellant had been in possession of the motorbike. Had the magistrate considered and applied the principles enunciated in *S v Adams* 1986 (4) SA 882 (A) at 890G-J and 891A, *S v Mbuli* 2003 (1) SACR 97 (SCA) at para [72] and *S v Kwanda* 2013 (1) SACR 137 (SCA) at para [5], he ought to have concluded that the evidence had gone no further than proving that the appellant had been a passenger on the motorbike and not that the appellant was in possession of the motorbike.

[6] It is clear that the State failed to prove:

6.1. that the appellant had actual physical control over the motorbike; and

6.2. that the appellant had the intention of keeping the motorbike for himself as if he were the owner, alternatively that the appellant had the intention to control the motorbike for his own purpose or benefit, and not as owner.

[7] The State has conceded that there is no evidence which links the appellant to the housebreaking itself and that the appellant's version in regard to count 1, is reasonably possibly true, which concession, I might add, was quite correctly made.

[8] In the result the appeal against count 1 is upheld and the appellant is acquitted.

COUNT 3 - COMMON ASSAULT

[9] Capt. Yolanda Langemaat is the complainant and she testified that on or about 28 April 2010 she had received a report of housebreaking in progress and went to the property at Dunwoody in Germiston. She was with Const. Elliot Mahlasela. Mr Deninga is a reaction officer employed by SWS Security. He says that on his arrival at the property in Dunwoody, he saw the appellant sitting on a couch outside the house. The appellant had told him that he was "*breaking the premises because of the guys owing him money for drugs*". Thereupon he investigated the house and established that the window of the cottage had been broken. It did not appear to him that anything had been stolen. Mr Deninga was then shown his statement, which he had deposed to under oath, in which he had stated that, when the appellant was asked what he was doing there, he had told him that he was there to buy drugs.

[10] Upon arrival Capt. Langemaat had met Mr Deninga who then pointed out the appellant, whereupon she arrested him for housebreaking.

[11] The appellant was placed in a Mazda motor vehicle and they proceeded to the police station.

[12] En route to the police station, the appellant harassed Capt. Langemaat.

[13] Const. Mahlasela testified that after the appellant was arrested, he sat in the front seat, whilst Capt. Langemaat was driving. The

appellant was handcuffed and was sitting behind his seat in the back seat and was kicking Capt. Langemaat's cell phone whilst she was driving.

[14] The transcript of Capt. Langemaat's evidence is mostly inaudible. The notes of the reconstruction of her evidence by the magistrate records that:

"While driving along Joubert Street the accused kept on insulting me, he knocked my upper arm and that he would find me."

[15] It was only during cross-examination that she testified that the appellant had kicked her.

[16] Const. Mahlasela's evidence was equally inaudible in many portions of the transcription. The magistrate's reconstruction of his evidence is to the effect that:

"The accused kicked the cell-phone from behind as she was driving."

[17] Once again the allegation contained in the charge sheet is only made during cross-examination.

[18] Const. Mahlasela did not make any mention of the appellant having insulted Langemaat. One would've assumed that being in the same vehicle, he would've heard such insults.

[19] The appellant denied having kicked Langemaat. He testified that he had been assaulted and that he had intended to open a case of assault against the police.

[20] In the magistrate's judgment, which is mostly inaudible, and which consists of one-and-a-half pages, he deals with the third count in

three sentences. It appears as though he reasons that the two state witnesses have nothing to gain by falsely implicating the appellant and thus rejects the evidence of the appellant insofar as count 3 is concerned.

[21] In *Rex v Difford* 1937 AD 370 at 373, the Court remarked as follows:

"It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied that, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal .."

[22] These sentiments have been repeatedly stated in our law reports. In *S v Shackell* 2001 (4) SA 1 (SCA) at paragraph [30] Brand JA put the matter in relation to inherent probabilities as follows:

"Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[23] The court a quo did not make any finding on the impression that the appellant made as a witness with regard to count 3. The Court did not analyse the merits or the demerits of the appellant

as a witness. Indeed, he did not assess and apply himself to the evidence adduced by the appellant at all.

[24] The appellant was very candid with the court. Startlingly so. The following example springs to mind which is an extract from his evidence in chief:

"Now what actually brought you to that particular house, what was your intention of visiting that house? -- You see, as you see I am addicted to crack, to drugs, now I am used to buying drugs there, that is the thing that attracted me to go to that house, it is to buy drugs."

[25] The State's concession that the appellant's version in respect of count 1 i.e. that Mohamed had picked him up with the motorbike in order to visit friends in Dibatol, is reasonably possibly true, must have a bearing on an assessment of the totality of his evidence. Also, the magistrate accepted the appellant's version in respect of count 2 alternatively found that there was nothing to link the appellant to count 2 which was a charge of housebreaking with the intent to steal in respect of speakers and a bicycle which is the charge that gave rise to the arrest.

[26] The appellant's version in respect of count 3 is that he had been assaulted by the security officer, Mr Deninga and that when the police arrived they had assaulted him even further. He had intimated that he was going to lay a charge. It is because of this, he contends, that a charge of assault was laid against him.

[27] Neither of the two state witnesses who testified in respect of count 3 mentioned that the appellant had kicked Capt. Langemaat. In respect of both witnesses, this only emerged during cross-examination. Furthermore, Const. Mahlasela, who was sitting in the same vehicle as Capt. Langemaat, did not hear the appellant insulting her. These are material contradictions and the evidence of these two witnesses can never trump the evidence of a witness who did not contradict himself in any respect.

[28] I therefore find that the State did not prove its case against the appellant beyond a reasonable doubt.

[29] However, insofar as I might be wrong in this regard, I would find that the record is, in any event, inadequate for a proper consideration of this appeal and that such fact should lead to the conviction and sentence of the appellant being set aside. In *S v Chabedi* 2005 (1) SACR 415 (SCA) at 417, paras [5] and [6] Brand JA said the following:

"[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. …

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal."

[30] Counsel for the appellant, advocate Guarneri, in his very able argument, submitted that the record was adequate. I do not hold such view, in particular, in respect of count 3. Capt. Langemaat's evidence is mostly inaudible and the reconstruction does not assist much. This, coupled with the court a quo's judgment being inaudible, makes the consideration of the appeal challenging, to say the least. I must record my displeasure at the failure of the trial magistrate to have ensured that a proper record was kept.

[31] What is by far more concerning though, is the fact that the appellant was convicted of common assault and given ten years imprisonment for this offence. It is completely unprecedented. The State conceded immediately that this sentence was shockingly inappropriate.

[32] To compound matters, the sentences were ordered to be successive. The appellant was sentenced to 10 years imprisonment on count 1 and 10 years imprisonment on count 3. The appellant was thus sentenced to 20 years imprisonment. Almost a year later, the magistrate dismissed the appellant's application for leave to appeal. It was only with leave of this Court that the appellant's appeal was heard two-and-a-half years later.

The appellant has now been in prison for 4 years. The conduct described herein is outrageous and calls for sanctioning.

[33] In the result, I make the following orders:

33.1. The appeal is upheld and the convictions and sentences of the appellant are set aside;

33.2. Ms L R Surendra, counsel for the respondent and the representative of the Office of the Director of Public Prosecutions is directed to cause a copy of this judgment to be brought to the attention of the Chief Magistrate for the Regional Division of Gauteng to investigate the conduct of the magistrate referred to herein before.

I OPPERMAN
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I Agree

B Mashile
Judge of the High Court
Gauteng Local Division, Johannesburg

Gauteng Local Division, Johannesburg

Heard: 27 March 2014
Judgment delivered: 28 March 2014

Counsel For The Appellant: Adv. E Guarneri

Instructed by: Legal Aid Board South Africa

Counsel For The Respondent: Adv. L R Surrendra

Instructed by: Office of the Director of Public Prosecutions