TIMOTHEUS THEOFELUS v THE STATE

CASE NO. CA 49/2003

2005/06/14

Gibson , J. *et* Maritz, J.

CRIMINAL PROCEDURE
CRIMINAL LAW

Criminal procedure – failure to allow accused to call witness - not *per se* constituting an irregularity vitiating conviction – testimony of witness not on issue material to outcome of case – even if the witness' testimony would have been accepted, conviction would still have followed – irregularity not tainting the conviction

Criminal law – theft – intention to permanently deprive the owner of the full benefits of his ownership – appellant purportedly taking goods as "pledge" for debt he knew owner denied and would not pay – retention would have been indefinite – sufficient degree of permanency attaching to unlawful taking to justify conviction

CASE NO. CA49/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TIMOTHEUS THEOFELUS

APPELLANT

versus

THE STATE

RESPONDENT

(HIGH COURT APPEAL JUDGMENT)

CORAM: GIBSON, J *et* MARITZ, J.

Heard on: 2003.07.24

Delivered on: 2005.06.14

JUDGMENT

MARITZ, J: The appellant was arraigned in the Magistrate's Court, Swakopmund, on a charge of housebreaking with the intent to steal and theft.

The Prosecution alleged that the appellant had unlawfully and intentionally broken into and entered the garage of the complainant with the intent to steal and that he had stolen property of the complainant to the value of N$3 986,00. The appellant, maintaining that he had taken the property as a "pledge" for a debt in the amount of N$750-00 owing to him by the complainant for services rendered, entered a plea of "not guilty". At the conclusion of the trial, the Magistrate convicted the appellant and sentenced him to 18 months imprisonment without the option of a fine. Protesting his conviction and the severity of the sentence imposed in a letter received by the Clerk of the Court more than 8 months after he had been sentenced, the appellant appealed to this Court to set them aside. When the appeal came before us four months later, the appellant had already been released from prison. By then, it seems, he had lost interest in the appeal. He did not appear at the hearing thereof but Ms Briers, who was requested by the Court to argue the appeal *amicus curiae,* took up the cudgels on his behalf. She argued the appellant's case with vigour and it was apparent to us that she had set aside a considerable amount of her time to research case

law on issues relevant to the appeal and to prepare heads of argument. The Court is grateful for her efforts.

Before I deal with the arguments presented by her, it is perhaps apposite to first summarise the evidence on which the Magistrate convicted the appellant. Katrina Gamses, a domestic worker in the employ of the complainant, recalled that the East-wind had been blowing very strong in Swakopmund on the day in question. As she was walking towards an outbuilding on the premises to close a window, her attention was drawn to a noise in the vicinity of the complainant's garage. Upon investigation she noticed a man, whom she later identified as the appellant, leaving the premises with a bag. He crossed the street and sat down in an open area where he inspected the contents of the bag. She immediately phoned the complainant to report what she had observed.

Whilst waiting for her employer to arrive, she saw the appellant returning and removing three five-litre tins of paint from the garage. She followed him up to the main gate of the premises and enquired from him where he was working. He told her that he was working in town and was waiting for a taxi to take him to work. In the course of that conversation he crossed the street where he put down the paint. At that stage the complainant arrived by car and called the appellant. The appellant did not respond and when the complainant

drove closer to him the appellant ran away in the direction of a nearby supermarket. The complainant gave chase and eventually apprehended the appellant. The goods were recovered by an acquaintance of the complainant who happened to drive by where the goods had been abandoned. She returned them to the complainant.

The appellant's version of the events differs substantially with those of the prosecution witnesses. According to his testimony, he had rendered services to the complainant as a painter for which the complainant had agreed to pay him N$1 100-00. He was only paid N$350-00 and promised payment of the balance at a later stage. He thereafter called regularly on the complainant for payment, but to no avail. He complained to the police who referred him to the Workers' Union but, when they too turned down his complaint, he decided to go to the complainant's home, demand payment and, should the complainant refuse to pay him, take some of the complainant's goods a "pledge" and retain them until he would be paid.

Upon his arrival at the house, he knocked and enquired from Ms Gamses about the complainant's whereabouts. She told him that the complainant was working in the area and shortly afterwards the complainant arrived. The complainant demanded of him to leave

the premises but the appellant refused, saying that he would not leave without the money due to him. The complainant denied that he owed the appellant any money and when the complainant's friend arrived, he also denied that the appellant had ever worked for him. The complainant then followed him around with his car and, when the appellant stopped on one occasion, the appellant took out a saw and a plane. The complainant and his friend wrestled with him to recover the tools. When they succeeded, the appellant took three tins of paint, saying to them that he would keep the paint until he would be compensated for the services he had rendered. When the complainant realised that he could not overpower the appellant, he phoned the police. Upon their arrival, he was firstly manhandled and then arrested by the police.

The Magistrate rejected the appellant's evidence as false. She accepted the evidence of the State witnesses as reliable and trustworthy and concluded that, even if the appellant had previously been employed by the complainant, he had no right to take the law into his hands by entering onto the complainant's premises and removing the goods.

In making this assessment of the evidence, the Magistrate obviously enjoyed advantages which this Court, sitting as one of appeal, does not. The witnesses appeared before her in person and she could

make those findings with regard to their appearances, demeanor and personalities. This Court, on the other hand, has only the type-written record of appeal to judge the issues. Intonations in a witness' voice, hesitation to respond to a question, stuttering, discomfort, irritation and the like get lost in the transcription. The trial Magistrate is "steeped" in the atmosphere of the trial and must therefore be allowed some margin of appreciation in assessing the reliability and credibility of a witness' evidence (see generally: *R v Dhlumayo & Another*, 1948(2) SA 677(A) at 705-6). In the absence of a "demonstrable and material misdirection by the Trial Court" its findings of fact are presumed to be correct (*S v Hadebe & Others*, 1997(2) SACR 64 (SCA) at 645e-f), and the Court of Appeal would not be inclined to reject them - *S v Robinson & Others*, 1968(1) SA 666(A) at 675G-H.

Counsel for the appellant did not suggest any misdirection in the *extempore* judgement of the Magistrate and I was unable to find any. It is also my considered conclusion that the factual findings made by the Magistrate are supported by the evidence on record.

The prosecution's case is based primarily on the evidence of Ms Gamses. She was an eyewitness to the event with no apparent direct interest in the outcome of the case. She was, I remind myself, an employee of the complainant with seven years standing and her

evidence must be considered with that relationship in mind. Her evidence was lucid, following a logical sequence of events and is corroborated not only by her conduct (for example, by immediately phoning her employer when she noticed the appellant's suspicious conduct) but also by the evidence of the complainant and the place where the stolen goods were eventually recovered by a third party. Her evidence has a clear ring of truth to it and I did not find any improbabilities which may cast a shadow on the reliability thereof. She emphatically rejected the appellant's assertion that he had knocked at the door and had asked her about the whereabouts of the complainant. She also rejected his suggestion that the tins of paint had still been on the premises shortly before the arrival of the complainant. She told the court under cross-examination that after the appellant had told her that he would be going to work with the paint and was waiting for a taxi, she queried him about doing paint work with the wind blowing as strong as it did. This is but an example of the originality and spontaneity which permeate her evidence. The manner in which she gave her evidence militates against the inference that is a concoction generated to discredit the appellant.

The evidence of the appellant, on the other hand, contains a number of improbabilities and inexplicable leaps in logic. The appellant testified that he had refused to leave the complainant's premises

until he was paid. Immediately thereafter he testified how the complainant had been “following me ... around with his car”. That must have happened outside the premises because the appellant later testified that during the wrestling match for the saw and the plane, they had moved back into the yard. The one moment he testified that the complainant and his friend had overpowered him when they had taken away the saw and plane. Yet, they did not even attempt to take the three five-litre tins of paint from him and, he testified, only phoned the police when the complainant had realised that he could not “overpower me”. It seems to me entirely improbable that two men, who were strong enough to take away the plane and the saw from the appellant would not be able to take away at least one of the three five-litre tins of paint from the appellant. Given the size thereof, three five-litre tins of paint would have been difficult enough to handle all at the same time, let alone to be clutched so strongly that two other men would not be able to remove at least one of them!

It is also of some significance that the appellant was conveniently vague about the services he had allegedly rendered to the complainant. He did not put to the complainant where in Swakopmund he had actually worked; when he had done the work; for which period and precisely what the nature of the work had been. As it were, he did not even put it during cross-examination to

the complainant that he had rendered services for the complainant. The closest he came to such a suggestion was, when he put to the complainant that he had refused to leave the complainant's premises unless he would be paid - without mentioning why the complainant had allegedly been indebted to him.

Counsel appearing on behalf of the appellant must have realised the difficulty which the appellant would face in attacking the Trial Magistrate's findings of fact on appeal. Hence, the centrepiece of her attack is the allegation that the appellant was deprived of his constitutional right to call a witness to testify in his defence at the trial. That attack is based on an indication given by the appellant at the commencement of the case for the defence that he wished to call a witness who was aware that he had been employed by the complainant. The witness was, however, not available in Swakopmund at the time. After the conclusion of the appellant's evidence the following was recorded:

> "Court: Any witnesses or can we finalise your case? --- Yes, your Worship.
> Thank you very much. Defence case closed."

Counsel argues, so I understand her submission, that the appellant was asked a double-barrelled question and that it is not clear to which one of the two questions he answered in the affirmative.

Having indicated earlier that he intended to call a witness, it must be assumed that he answered in the affirmative to the question whether he had “any witness”. By closing his case, the Magistrate denied him the right to call that witness, thereby committing an irregularity which prejudicially affected the appellant (see: *R v Sibia*, 1947(2) SA 50 (A) and *S v Hlongwane*, 1982(4) SA 321 (N)).

Ms Briers, however, concedes that such a refusal does not *per se* violate an accused’s right to a fair hearing (see: *S v Behan*, 1990(3) SA 18 (ZS) at 24C) unless it is shown the evidence would have been both material and favourable to the appellant’s defence and that the irregularity so prejudiced the appellant that the verdict has been tainted - *S v Shikunga & Another*, 2000(1) SA 616 (NmS) at 629F-J. She submits that the witness could have confirmed that the appellant had been employed by the complainant and, if accepted as credible, it would not only have constituted corroboration for the appellant’s defence but also impacted on the credibility and reliability of the evidence of the prosecution witnesses.

The intended meaning of the appellant’s response to the Magistrate's double-barrelled question was already queried by my brother Hoff, J when the case was forwarded to him on automatic review prior to the noting of the appeal. Quoting the same passage, he remarked as follows:

> "Two questions were asked in one sentence. To which question did the accused reply 'yes' ?
> Should this not have been clarified by the Presiding Officer without assuming that he said 'Yes' in respect of the second question?
> Was the accused not prejudiced in his right to a fair trial?"

The Magistrate responded as follows to this enquiry:

> "After asking the accused 'Any witnesses ?', I paused and the Accused person shook his head indicated (*sic*) no. It seemed as if he changed his mind that is why I proceeded to ask 'or can we finalise the case?' He then indicated 'yes'."

It often happens that Magistrates omit to record gestures made by witnesses and accused persons alike. This case presents one of those examples. Magistrates are again urged to record all gestures made or demonstrations and indications given in Court insofar as they may bear either on the evidence of the particular witness or on the proceedings in Court. Having said that, there is no reason why the Magistrate's explanation should not be accepted as part of the record on appeal. I did not understand counsel for the appellant to take issue with the fact that the magistrate had simply omitted to record that the appellant had shaken his head in response to the first part of the question. This, by itself, will dispose of the alleged irregularity on which the appellant relies.

But even if the Magistrate's explanation is to be disregarded, it does not follow that the verdict is vitiated by the irregularity. This much is apparent from the judgment of Mahomed, CJ in *S v Shikunga & Another* supra at 629F-J where the Learned Chief Justice summarised the position as follows:

> "It would appear to me that the test proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative, the verdict should stand. What one is doing is attempting to balance two equally compelling claims – the claim that society has that a guilty person should be convicted and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where, however, the irregularity is such that it is not of a fundamental nature and does not taint the verdict the former interest prevails. This does not detract from the caution which a Court of Appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the Accused in any way or taint the conviction which followed thereupon."

The appellant initially indicated that he wished to call the witness merely to confirm that he had been employed by the complainant at some stage. Even if the Court would have accepted the evidence of that witness, it would only have impacted on the credibility of the complainant's evidence. It would not have had any effect whatsoever on the evidence of Ms Gamses, the domestic worker – and it is her evidence which, in my view, was pivotal to the appellant's conviction.

Furthermore, the acceptance of such evidence would at best have corroborated the appellant's motive for taking the goods in question. The motive of an accused person when he or she deprives the owner of possession is generally irrelevant to the question whether the accused had the requisite intention to appropriate the *res* – unless, of course, the motive is in itself an indication that the accused did not have the intention to permanently deprive the owner of the full benefit of his rights in and in relation to the goods. In the latter instance, accused persons have escaped conviction on charges of theft where they have taken the goods *imvito domino* but not with the intention to deprive the owner permanently of the full benefits of his ownership (see: Milton, *South African Criminal Law & Procedure*, Vol. 2 (3rd Ed.), p 620). Even if I accept the appellant evidence that he wanted to take the goods in order to enforce payment, it should have been apparent to him that the complainant denied liability and

would physically resist the taking of the goods. This situation is not entirely dissimilar to the one which arose in the case of *R v Mtshali*, 1960(4) SA 252 (N) where the appellant took the complainant's wireless and gramophone with the intention to hold it until the complainant had paid him the money which the appellant suspected she had stolen from him. The complainant denied that she had stolen the money.

After an analysis of the degree of permanency required before a Court may conclude on the facts of a particular case that an accused intended to permanently deprive the owner of the full benefits of his rights, Holmes, J said in *R v Mtshali*, *supra*, at 254H-255B:

> "Termination of an owner's enjoyment of rights connotes a reasonable measure of permanency. An intention to suspend temporarily such enjoyment ... excludes a conviction for theft. Each case must turn on its own facts. The question of permanency may often be one of degree, in relation to such matter as the durability of the thing taken and the contemplated period of retention ...
>
> In the present case the appellant's intention was apparently to hold the wireless and gramophone until the complainant paid him the money which he suspected she had stolen from him. How permanent did he intend that situation to be? It seems to me to be relevant to enquire whether he had reasonable grounds for suspecting that the complainant had stolen his money, for if he had no such grounds, he could not have expected that she would pay the money, and his intended retention of the goods become indefinite. That, in the absence of factors pointing the other way, would give rise to an inference of an intention to terminate the

> complainant's enjoyment of her rights; and a conviction of theft would be in order."

Similarly, the appellant knew that the complainant denied that he owed the appellant any money. Hence, he must have foreseen that the complainant would not then or in future pay him the debt in respect of which he intended to take the property. That knowledge notwithstanding, he took the items in question and it is therefore to be inferred that he had the intention to permanently deprive the complainant of the full benefit of his rights.

For these reasons I propose to dismiss the appellant's appeal against his conviction. Turning now to the custodial sentence imposed. I am mindful of the appellant's personal circumstances and the fact that he was a first offender. Housebreaking with the intent to steal and theft is, however, not only a very prevalent offence but also a serious one. In this context, it is perhaps apposite to quote what Strydom, JP (as he then was) said in the case of *Thomas Goma Jacobs v The State*, (unreported judgment of this Court handed down on 22 April 1996):

> "All levels of society have fallen victim to thieves and housebreakers alike. Whether we want to believe it or not, we are involved in a war against crime which at present shows no sign of abating. The situation calls for exceptional measurements and in this process the

> Courts play an important role. In this regard the imposing of a prison sentence for housebreaking and theft, even in the case of a first offender, has become more or less the general rule. Because of the prevalence of the crime the shoe is now on the other foot and it is only in exceptional circumstances where a non-custodial sentence is imposed by the Court."

I agree. I have recently remarked (in the unreported case of *Basil Drotsky v The State*, case no. CA195/2004 delivered on 12 May 2005) that –

> "the crime of housebreaking with intent to steal and theft is ... regarded by the law and society as a particularly insidious form of theft. It is said that a man's home is his castle. If there is one place where a person should feel safe and secure it is in his home. Housebreaking with intent to steal and theft strike at and destroy the sense of safety and security which the occupants are entitled to enjoy. It constitutes an unlawful invasion of the complainant's privacy and an illegal misappropriation of his or her possessions – sometimes commercially irreplaceable goods of great sentimental value.
>
> For these reasons, society has a particular interest that the commission of this crime should be discouraged by an appropriate judicial response. Perpetrators should know that the norm is imprisonment without the option of a fine unless the circumstances of a particular case justify the imposition of a lesser sentence.

I do not find special circumstances present in this case. Neither do I find any grounds to justify interference with the sentencing discretion as contemplated in *State v Tjiho*, 1991 NR 361 at 366A.

In the premises the appeal must fail and the following order is made:

The appeal is dismissed.

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MARITZ, J.

I concur

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GIBSON, J.