IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No A82/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

September 2017
DATE

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SIGNATURE

In the matter between:

KHANYE, ABEL TEKO — **APPELLANT**

and

THE STATE — **RESPONDENT**

JUDGMENT

R. FRANCIS, AJ:

[1] The appellant, Mr. Khanye was granted leave to appeal against both the conviction and the sentence imposed upon him in the Regional Court of Boksburg. He was found guilty on a charge of contravening s 36 of the General Law Amendment Act 62 of 1955, as amended, being the inability to give an account of possession of goods suspected to be stolen which offence occurred on 18 December 2015.

[2] At all times the appellant was legally represented by Mr Nkuna from Legal Aid. The appellant had pleaded guilty and had tendered a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 ('the CPA'). The court, not satisfied that all the elements of the offence were admitted, altered the plea and recorded a plea of not guilty in terms of s 113 of the CPA.

[3] Two witnesses testified on behalf of the State, Johannes Matome Rasesemola and Xolisa Sishuba. They recounted the events of a robbery from a Pep Cell Store and the apprehension of the appellant. A sum of R35 175 in cash had been stolen, as well as 1x LG mobile cellphone, 1x Blackberry cellphone and 1x Samsung J1 cellphone. All such stolen property was found on the appellant. It was not in dispute that the property was stolen from Pep Cell Store during a robbery which had occurred shortly before the appellant had been apprehended. Apart from the robbed items, a knife and a shirt were also found inside the same bag possessed by the appellant.

[4] The issue in dispute is whether the appellant suspected that the goods found in his possession were stolen. Section 36 of the General Law Amendment Act 62 of 1955 provides as follows:-

> "Any person who is found in possession of any goods,.....in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

[5] In *S v Mojaki*[1] and *S v Aube*[2] it was held that an accused person's account will only be regarded as satisfactory if it is reasonably possible and shows that he *bona fide* believed that his possession was innocent with reference to the purpose of the Act, namely the prevention of theft.

[6] The evidence adduced on behalf of the State was not challenged in any significant way. The one witness testified that the appellant had told them at the Pep Cell Store that he was given the bag. At the trial, the appellant elected not to testify nor did he call any witnesses to testify in his defence. It was held in *S v Buda*[3] that there is never a duty on an accused to say anything or to lead evidence, but failure to do so may lead to adverse consequences.

[7] It is trite that where the appellant declines to give evidence it does not inevitably follow that the State's evidence is accepted. In *S v Francis*[4] it was held that a failure to testify may be a factor in deciding upon guilt in appropriate circumstances but only where the State has *prima facie* discharged the onus resting on it.

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[1] 1993 (1) SACR 491 (O).
[2] 2007 (1) SACR 655 (W).
[3] 2004 (1) SACR 9 (T).
[4] 1991 (1) SACR 198 (A) at 203B-204A.

[8] It follows that the onus on the State is not to prove the case against the appellant beyond all doubt but beyond *reasonable* doubt and nothing more. In this regard in *Miller v Minister of Pensions*[5] the court remarked as follows:-

> "It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible', but not in the least probable', the case is proved beyond reasonable doubt."

Evaluation of the Facts

[9] The learned magistrate in his evaluation of the evidence established that the appellant knew that the goods that were in the bag were stolen from the Pep Cell Store. This he surmised from Ms Sishuba's testimony when she told the court that when she met the appellant after the robbery she informed him that the store had been robbed. He then volunteered to assist to look for the perpetrators. He told both the court during the plea questioning and Ms Sishuba that he found the bag where the dustbins were. Mr Rasesemola also testified that when he confronted the accused, the appellant agreed to go with him to the office to be searched. On their way to the security office the appellant ran away and hid in the reeds. Upon being accosted and taken to the office where he was searched, he was found in possession of the stolen goods. All of this evidence was left unchallenged by the appellant.

[5] 1947 (2) ALL ER 372 on 373H

[10] The learned magistrate found that it was highly improbable that the appellant would not open and inspect the contents of the bag when he discovered it. He found that the appellant knew what the contents of the bag was and that he had suspected that it was the stolen goods from the Pep Cell Store. Mr Rasesemola also testified that at the stage that the Appellant had walked past him, talking on the cell phone, the Appellant had spoken to a person on the phone and had told such person that he was out and that everything was fine. Finding no contradictions in the evidence of the State witnesses the learned magistrate found that the state had proved its case against the appellant beyond reasonable doubt.

[11] The appellant, on the basis of *S v Doma*[6] claims that the security officer (Mr Rasesemola) was not entitled to demand an explanation from him for his possession of the robbed goods. Mr Rasesemola testified that at the stage that he apprehended the appellant in the reeds the police had already arrived. They took the appellant back to the Pep Cell Store where the police officers opened the bag. The appellant then and in the presence of the police, gave an explanation for his possession. The appellant did not place any of these facts in dispute. The appellant could have rebutted the evidence of the State. He still had the opportunity to provide an explanation whilst before the court. However, he chose not to do so and made this election at his peril perhaps because he had already made the fatal concession in his section 112 statement in which he had admitted that he was unable to give a satisfactory account of his possession.

[6] 2013 JDR 1116 (GSJ) at para 40.

[12] I find no misdirection in the magistrate's evaluation of the evidence and the conclusion reached.

The Appropriate Sentence

[13] The power of the appeal court to interfere with a sentence is constrained. In *S v Rabie*[7] the court held that the imposition of a sentence is solely within the discretion of the trial court and that a court of appeal will not interfere with that discretion unless it is satisfied that the trial court exercised its discretion unreasonably. In the evaluation of a judicial discretion an appeal court may not interfere with a sentence merely because it would have imposed a different sentence than the one imposed by the trial court[8]. Nevertheless, a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court remains an element for interfering with the trial court's sentencing discretion.[9] Additionally the power of the appeal court to interfere with a sentence extends to a finding of irregularity and misdirection of its sentencing powers.

[14] In determining an appropriate sentence the court has to consider the offence, the offender and the interests of society. The ideal outcome is to achieve a proper balance between this triad: the nature of the crime, the personal circumstances of the appellant and the interests of society.

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[7] 1975 (4) SA 855 (A).
[8] *S v Skenjana* 1985 (3) SA 51 (A).
[9] *Director of Public Prosecution KZN v P* 2006 (1) SACR 243 SCA.

[15] Society has called on courts to deal with offenders of such crimes sternly and decisively. Any person convicted of such offence should be sentenced as if they had committed the offence of theft.

[16] In *S v Pillay*[10] the court held that:-

> '...mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'

[17] In determining the sentence the Magistrate took into consideration a number of factors. He considered that the offence the appellant was convicted of is prevalent in the court's jurisdiction. That a sentence aims to deter others from committing such offences and the severity of the crime must together with all the mitigation and aggravating factors surrounding the offender be considered.

[18] One of the mitigating factors was that the property stolen was recovered. The personal circumstances of the appellant were that he was 26 years old at the time of sentence, he had a child of three years and his girlfriend was five months pregnant. He was employed and earned R750 per week. The court held that the young girlfriend could find work and child care grants from the State would assist in taking care of the children. The seriousness of the offence outweighed the appellant's role to support his children.

[19] From day one the appellant wanted to plead guilty. The court considered a suspended sentence and correctional supervision not appropriate with regard to the

[10] 1977 (4) SA 531 (A) at 535E-G.

seriousness of the crime. Further, that a fine would not convey the appropriate message of how these crimes are dealt with. The court instead found that a term of imprisonment would be appropriate and should sufficiently rehabilitate the appellant. It would also restore the community's faith in the courts to deal harshly with people who commit offences of this nature. The court for instance in *S v Mashia* [11] also took a similar view that a prison term sentence for a s36 offence was appropriate and in those circumstances 4 years was suitable. In the present matter the store suffered temporary loss, employees were traumatized, the appellant was deceitful and intended enriching himself with the stolen property.

[20] It follows that the Regional Magistrate in exercising his sentencing discretion took into account the factors necessary to impose an appropriate sentence and there was no misdirection in his sentencing powers. The appellant was lucky enough that he was not charged with theft. In the circumstances the sentence imposed by the Regional Magistrate is confirmed.

[22] In the result the appeal is dismissed.

R. FRANCIS

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

[11] 2013 JDR 0622 (GSJ) at para 90

I agree.

I. Opperman

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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Date of Hearing:	10 August 2017
Date of Judgment:	12 September 2017