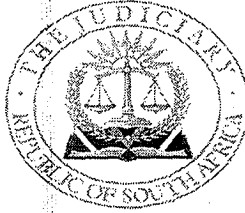


REPUBLIC OF SOUTH AFRICA



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

CASE NO: A321/17

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
14/01/19	
DATE	SIGNATURE

THAPELO MATSHITISHO

APPELLANT

And

STATE

RESPONDENT

JUDGMENT

KEKANA AJ:

- [1] The appellant and his co-accused, Thabo were charged with one count of theft in that upon or about 12 April 2016 at or near TCM Property Ltd they unlawfully and intentionally stole 10 laptops and 5 chargers valued at R104 000. He pleaded not guilty to the charge. He was found guilty and sentenced to 6 years imprisonment. The appellant is appealing both conviction and sentence.

- [2] The appeal is centered on whether the appellant knew what was in the package and whether he attempted to remove the laptops and the chargers from the employer's premises without authorization. The state's main witnesses were Mr Coolman Rikhotso (Rikhotso), the security guard who was responsible for searching the employees when they left the premises and Mr Alfred Masilela (Masilela) whose computer was used to create a forged trip sheet.
- [3] The state's version was that the appellant created a trip sheet from Masilela's computer and attempted to remove the laptops and chargers concealed in an Oki printer box. In his defence the appellant stated that he did not know what was in the Oki printer box and that he had been set-up.
- [4] It was submitted on behalf of the appellant that the trial court erred in finding that the state proved the guilt of the appellant beyond reasonable doubt. It was further submitted that the appellant did not receive a fair trial as the trial court kept on interfering with the cross examination of Mr Rikhotso.

INTERFERENCE WITH CROSS EXAMINATION

- [5] I firstly wish to deal with the contention that the appellant did not receive a fair trial as the trial court kept on interfering with the cross examination of the state's main witness, Mr Rikhotso. The trial court was actively involved in the case but it cannot be said that the perception had been created that it had become partisan or partial. It pressed witnesses for answers and disallowed some of the questions but in my view there is no evidence that the trial court was not impartial or that the appellant did not receive a fair trial therefore find the appellant's submissions in this regard to be without merit.
- [6] It is trite that the powers of the appeal court to interfere with the factual findings of the trial court are limited to where there has been a material misdirection on the part of the trial court. (see *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645f; *R v Dhlumayo and another* 1948 (2) SA 677 (A)). The state bears the onus to prove its case beyond reasonable doubt. The corollary to the abovementioned onus of proof is that the accused is entitled to be acquitted if it is reasonably possibly true that he might be innocent.

- [7] The evidence by the state is that the appellant attempted to remove 10 laptops and 5 chargers concealed in an Oki printer box without authorization. He generated the trip sheet, which he presented to Rikhotso as authorization to remove the Oki printer box from the employer's premises. In his defence the appellant denied that he had anything to do with the Oki printer box, the contents thereof or the trip sheet and stated that he had been set-up.
- [8] To prove their case the state relied on the evidence of Rikhotso, Masilela and the video footage. The gist of Rikhotso's evidence is that the appellant approached him at the exit pushing a trolley containing an Oki printer box and a trip sheet for the Oki printer. When he lifted the box he realized that it was heavier than the expected weight of an Oki printer. The seal on the box made him more suspicious as it was not the Oki printer seal. When he opened the box he found 10 laptops and 5 chargers. The appellant could not provide an explanation for the contents of the Oki printer box.
- [9] Masilela's evidence was that earlier that day the appellant assisted him to print some documents from his laptop. He did not print the trip sheet for the Oki printer, as he was not working with that account. He disputed the proposition that was put to him that the trip sheet for the Oki printer could have been printed from Simon's laptop as his laptop was utilizing that port. The video footage supported Masilela's evidence. The appellant could be seen collecting a document from the printer.
- [10] The appellant denied that he attempted to remove the Oki printer box from the premises and stated that he was set up. He provided numerous versions to the court as to who set him up. His own legal representative pressed him under re-examination as to which version was correct. His evidence was unconvincing; he seemed to be adapting it as the case went along
- [11] He does not deny that Rikhotso found laptops and chargers in the Oki printer box. He provided the following versions as to who instructed him to remove the Oki printer box from the company premises: (a) one version was that Rikhotso and Thabo are the ones that told him there was a package that needed to be taken away. He testified that Rikhotso had already opened the Oki printer box

when he went back to the entrance; (b) the second version that was put to Mr Baron was that he was instructed by Mr Pillay to take the package to the head office; (c) the third version was that the company set him up but he did not say who; (d) When pressed under cross-exam he conceded that no one gave him the instruction to remove the Oki printer box and stated that the instructions were on a paper.

[12] The appellant's evidence defies logic. It is either the appellant was instructed to remove the package and he did so not knowing what was in it or he had nothing to do with the package and was set-up by Rikhotso, it cannot be both true. In my view the appellant's explanation cannot be said to be reasonably possibly true. The trial court noted that the appellant changed his version many times and cannot be faulted for finding him to be an untruthful witness.

[13] The appellant's counsel sought to rely on the inconsistencies between the written statement made by Rikhotso after the incident and his testimony at the trial. According to the appellant's representative the trial court erred in failing to deal with the inconsistencies. It was submitted on behalf of the appellant that Rikhotso contradicted himself as follows: (a) He testified that Thabo turned back before they could reach the exit door while this fact is not mentioned in his statement. It was submitted on behalf of the appellant that the abovementioned fact is material because in his statement he does not mention who was pushing the trolley but testified that it was the appellant; (b) He testified that appellant never said anything when he found laptops in the Oki printer box but in his statement he stated that appellant told him that he was surprised by what was in the box; (c) He testified that Thabo turned and walked towards the office while on the other hand he testified that the appellant spoke to Thabo about the contents of the Oki printer box.

[14] In my view the inconsistencies complained of are not material. Rikhotso's evidence was that appellant approached him pushing a trolley. In the trolley there was an Oki printer box together with a trip sheet. The information on a trip sheet corresponded with the information on the Oki printer box. His suspicions were raised by the weight of the package and the seal on the package. He

opened the box and found the laptops and the chargers. Even when pressed under cross-examination his evidence remained consistent in this regard.

- [15] It was further submitted that the evidence of Rikhotso supports the appellants version that Rikhotso was jealous of him and wanted him to be dismissed which he did. I find the submission to be without merit.

THEFT IS INCOMPLETE

- [16] It was contended on behalf of the appellant that the theft was not completed and therefore the trial court should not have found the appellant guilty. According to the appellant the laptops never left the warehouse and therefore the appellant was not deprived of the items.
- [17] The test to distinguish between completed and attempted theft is whether at the time the appellant was apprehended with the laptops and the chargers the employer had already lost control of the property. The question whether or not the appellant removed the items from the employer's control is matter of fact. The physical act in respect of the property and the distance it has been removed are not decisive. What is important is whether the appellant had succeeded in excluding the employer from its control over the property.
- [18] In my view the appellant had already gained control of the property when he presented them as an Oki printer. When Rikhotso checked the serial number on the box and on the trip sheet, they corresponded. It cannot be said that at this point the employer still exercised control over the property. It was by chance that Rikhotso became suspicious and opened the box.
- [19] The learned author CR Snyman 6th edition, at page 490, in his work Criminal Law stated that:

"once 'X' concealed the article in his clothing, it ceases to be visible to the shop owner and that exactly for this reason the shop owner, from that moment, ceases to exercise control over the article". Furthermore, there is merit in the argument that the moment X concealed the article in his clothing, it ceased to be visible to the shop owner and that exactly for

this reason the shop owner from that moment ceased to exercise control over the article. Viewed in this light the decisions in which X was convicted of completed theft cannot be faulted."

- [20] The evidence before the trial court was that the appellant concealed the laptops and the chargers in an Oki printer box *animo furiandi*. He clearly intended to remove the items from the employer's premises and almost succeeded. In line with what was stated by Snyman above, the company ceased to exercise control over the laptops and the chargers. In my view there can be no finding of attempted theft in such circumstances.
- [21] Turning back to the question whether the state succeeded in proving the guilt of the appellant beyond reasonable doubt. The appellant was caught with the ten laptops and 5 chargers cleverly concealed in an Oki printer box, he had a forged trip sheet of an Oki printer, the video footage corroborated the evidence of the state that the appellant had access to the computer where the trip sheet was generated, he was at Masilela's computer at the approximate time the trip sheet was generated. These factors coupled with the fact that he gave several different versions regarding who gave him instructions to take the items out of the company points to the guilt of the appellant. I am satisfied that the state proved its case beyond reasonable doubt. Accordingly, the trial court correctly found the appellant guilty as charged.

SENTENCE

- [22] It is trite that sentencing pre-eminently is a matter falling within the discretion of a trial court. The appeal court can only interfere with sentence where the sentence is vitiated by irregularity or misdirection or is shockingly inappropriate. See *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA)
- [23] In sentencing the appellant the trial court took into account the triad in *Zinn* 1969 (2) SA 537 (A) consisting of the crime, the offender and the interest of

the society. In particular it considered the fact that the appellant had a strong family base in Limpopo, he was employable as he had grade 12, the appellant's children; it considered the fact that the offence was planned and the value of the goods was a substantial amount. It found that the appellant did not show remorse. The trial court also considered the pre-sentence report and found it to have down played the interest of the society and the interest of the complainant. It found that the fact that the appellant has children as emphasized by the pre-sentence report cannot be used by the appellant to avoid a custodial sentence.

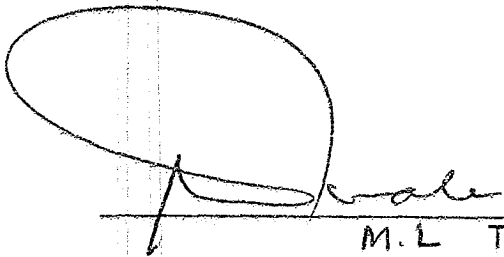
[24] In my view the court took into account all the relevant factors including the pre-sentence report. It cannot be said from the record that the trial court failed to consider any important fact or overemphasized one fact over the others. I therefore find that there was no misdirection on the part of the trial court.

[25] In the result I make the following order:

1. The appeal on both conviction and sentence is dismissed


P D KEKANA
ACTING JUDGE OF THE HIGH COURT

I AGREE


M.L. TWALA
JUDGE OF THE HIGH COURT

Date of hearing: 28 May 2019

Date of Judgment: 14th August 2019

For the Appellant:

T T Thobane

Instructed by:

T.T Thobane Attorneys
Tel: 078 1396 506

For the Respondent:

V Mongwane

Instructed by:

Director of Public Prosecution
Tel: 011 220 4228