

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A47/2019

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

5 AUGUST 2019

FHD VAN OOSTEN

In the matter between

KHUMALO BONGANI

MAGUBANE MABUTHO

FIRST APPELLANT

SECOND APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] The appellants were convicted in the Regional Court, Germiston of theft, involving 112 truck tyres to the value of some R4m, and sentenced to 7 years' imprisonment each. They now appeal against the conviction and sentence with the leave of this court on petition for leave to appeal.

[2] The evidence against the appellants was entirely circumstantial. Both the appellants testified in their own defence and in essence denied having been involved in the theft of the tyres. The court a quo held that the circumstantial evidence adduced was sufficient to prove the appellants' involvement in the commission of the theft beyond reasonable doubt.

The facts

[3] By and large all facts I will refer to, are either common cause or unchallenged. The theft occurred at the Primrose distribution warehouse of Goodyear, situated in Primrose, Germiston. Truck tyres are manufactured in Port Elizabeth and then conveyed by trucks to the Goodyear warehouse where they are received in stock and stored for distribution. The appellants were employed by Secure Group, a security company that provided security services to Goodyear.

[4] During March 2016 stock losses at the warehouse were discovered, resulting in a stock checking system being introduced. In accordance therewith, stocktaking was conducted on a daily basis in the morning and afternoon. On Friday 22 April 2016, at the close of business, Goodyear's then manager, Mr Viljoen, performed a stocktake of the warehouse contents. No business activities occurred during weekends and no-one except the two appellants, who were on duty as security guards, was allowed on the premises without permission. On Monday 25 April 2016, when business activities resumed, a follow-up stocktaking revealed that 112 truck tyres were missing. An investigation by an internal investigating team of the Super Group, consisting of Viljoen, Mr Coetzee and Mr Du Preez, diligently searched for evidence of how the theft could have occurred but they were unable to find anything untoward pointing to a possible administrative mishap or a break-in or signs of a forceful entry to either the premises or the warehouse.

[5] During the investigation, however, Du Preez obliquely noticed a CCTV camera attached to a building across the street from the warehouse, which was angled in the direction of the Goodyear warehouse. The CCTV video footage of that particular camera was eventually obtained, downloaded onto a memory stick and made available to all parties which in due course became pivotal in the trial.

[6] The video footage was not challenged at the trial and, although the CCTV camera was some distance away from the Goodyear premises, affecting the clearness of the

recording, revealed the following: On the Saturday afternoon of this particular weekend (23 April) at 15h31 a white 8 ton truck entered the Goodyear premises, through the back gate (controlled by the security officers on duty) without stopping at the gate and waiting for it to open, drove up the ramp towards a blue security gate (which is always locked and only opened by security officers on duty inside the warehouse with a key which is permanently kept inside the warehouse to provide thoroughfare to trucks for collections and deliveries at the warehouse during business hours) in the direction of the dispatch/receiving area of the warehouse (the warehouse was beyond the range of view of the CCTV camera) and, after seemingly having made a U-turn, returned and left the premises through the same back gate at 15h45. A similar truck, ostensibly the very same truck than before, returned at 16h36 and exited the premises at 17h49.

[7] Coetzee testified that from watching the video footage, one of the security guards can be seen walking towards the gate before the truck entered the premises.

[8] Coetzee further testified that during the investigation, a forklift on the premises was examined and showed three hours more on its dial than the hours it has recorded on Friday, which he said constituted proof that the forklift had been in use during the weekend.

[9] Coetzee was re-called by the Regional Magistrate after closure of the defence case in order to clarify certain aspects relating to an earlier inspection-in-loco at the premises by the Regional Magistrate and the legal representatives. He explained that there were two entrances to the premises, the main entrance and guard house at which the appellants were stationed while on duty, and secondly, the bottom gate, to which I have already referred. He added that foot patrol duties were performed by one of the security guards, alternating every 15 minutes, in accordance with a so called 'blood hound' system. The system comprises electronic tags fixed to the walls at certain spots along a route traversing the premises, from the main entrance up to the blue gate, which as I understand his evidence, in some way registers the times the security guard passes each tag. He confirmed that the keys of the bottom gate were under the control of the security guards on duty at the main entrance gate. The alarm system inside the warehouse upon investigation was found to be inoperative due to a security flaw.

[10] In conclusion, a summary of the recordal on record by the Regional Magistrate of the observations made during the inspection-in-loco is the following: the premises are enclosed with a palisade/electric fence; there are two remote controlled gates at the entrance to the premises, leading to a parking lot and a driveway up a ramp with a gate locked with padlocks at its top. The gate leads to a loading bay, a large area where 4 trucks were parked. Having passed through a second padlocked gate one gets to a loading dock which is accessed through a remote controlled roller door.

The defence version

[11] Both appellants admitted that they were on duty as security guards at the Goodyear premises during this particular weekend. Their duties included patrolling on foot the premises by one of them at fixed intervals, which was controlled by 'a machine', that had always been in good working order, while the other remained on duty at the main gate. They were adamant that one would not be able to observe the bottom gate from the main gate. They confirmed having been in possession of the keys of the bottom gate, and no one else. Neither of them observed a truck on the premises at any time or any other activity at any stage.

Discussion

[12] The issue on appeal is whether the State proved beyond reasonable doubt that the appellants were involved in the theft of the tyres and therefore guilty of theft. In the assessment of the evidence the court is enjoined to consider not each separate fact individually but the evidence as a whole (*R v De Villiers* 1944 AD 493 at 508/9; *S v Ntsele* 1998 (2) SACR 178 (SCA); *S v Musingadi and Others* [2004] All SA 274 (SCA) para [20]). In *R v Reddy and Others* 1996 (2) SACR 1 (A) 8C-D the then Appellate Division held:

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202-203, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the

proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn".'

[13] There are three uncontroverted incriminating pieces of circumstantial evidence against the appellants: first, they were the only ones present on the premises at the time of the incident, second, they had access to and were in control of the keys of the bottom gate which is exactly where entrance was gained by the intruder truck and third, as depicted on the video footage, an unidentified person was walking in the direction of the bottom gate at the same time the truck was entering the premises. The appellants alternating were on patrol duty along the electronic tags of blood-hound system, and the only reasonable inference is that they must have observed the activities at the bottom gate and warehouse in a time span of more than 2 hours, between 15h31 and 17h49 when the truck finally left the premises. It is in this regard that the evidence of the appellants was seemingly unsatisfactory: they clearly distanced themselves from providing the correct intervals at which the patrol rounds were done. Not only was their version on this aspect seemingly elusive but they were also unable to specify with any exactitude the intervals of the foot patrols, which, having regard to the monotonous 15 minutes machine dictated routine, on a daily basis, one would have expected must have become second nature. Their bare denial of any knowledge of the event, while they were on duty specifically to guard the premises against unlawful intruders, cannot stand against the totality of the circumstantial evidence I have referred to.

[14] Some reference was made in argument to the evidence that the keys of the blue gate outside the roller door had gone missing and were never found, allowing for the probability, so the argument went, that duplicate keys could have been made by unknown persons which enabled entry by the thieves. The argument overlooks the uncontroverted evidence I have referred to and in any event does not offer an explanation for how the truck entered the premises through the back gate and moreover, the appellants not noticing anything concerning the event. Du Preez testified that the blue gate must have been opened with a copied key and the warehouse roller door with a 'cloned' remote. This is not of any determinative value as it does not detract from the fact that the appellants must have opened the back gate for the truck to enter.

[15] In conclusion, the court a quo, in my view correctly held that the totality of circumstantial evidence was sufficient to prove that the appellants in fact let the truck into the premises. The only reasonable inference consistent with the proven facts (*R v Blom* 1939 AD 188 at 202/3) is that the appellants were intimately involved in and indeed enabled the theft of the tyres. The appeal against conviction must accordingly fail.

Sentence


[16] It is trite that a court will only interfere with a sentence if the trial court misdirected itself in passing the sentence. Moreover, a misdirection alone does not suffice for a court of appeal to interfere. A misdirection should be material (see *S v Pillay* 1977 (4) SA 531 (A) 535E-H; *S v Malgas* 2001 (1) SACR 469 (SCA) para 12).

[17] The trial court duly considered the personal circumstances of the appellants. First appellant was 53 years old and married with three dependants. Second appellant was 36 years old and married with one dependant. Both appellants were first offenders and had since found other employment. Aggravating features include the value of the tyres stolen and the breach of trust arising from their employment. The theft moreover was clearly well-planned and pre-meditated.

[18] There was no misdirection on the part of the trial court nor is there any reason for this court on appeal, to interfere with the sentence imposed.

Order

[19] In the result the appeal of both the appellants against both conviction and sentence is dismissed.


 FHD VAN OOSTEN
 JUDGE OF THE HIGH COURT

I agree.


 MV NOKO
 ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT

ADV AJ GREYLING

COUNSEL FOR RESPONDENT

ADV VT MUSHWANA

DATE OF HEARING

5 AUGUST 2019

DATE OF JUDGMENT

5 AUGUST 2019