

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION
JOHANNESBURG

Case Number: A88/2021

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

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3/13/2022
DATE

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Denise Fisher
SIGNATURE

In the matter between:

KHULU SAMAUl NKABINDE

Appellant

And,

THE STATE

Respondent

JUDGMENT

FISHER J:

Introduction

[1] This is an appeal against a judgment of the Meyerton Magistrates Court in terms of which the appellant, Mr Nkabinde was convicted of theft and sentenced to three years imprisonment. The appeal is brought with leave of this Court. The appellant is currently on bail but he did spend some time in prison after conviction and pending the award of bail.

[2] It is contended on behalf the appellant that the Magistrate misdirected himself in that he failed to take account of the fact that the witnesses called by the State were not able to incriminate the appellant. Specifically, it is argued that although it was foundational to the State's version that, in perpetrating the alleged offence the appellant acted in conspiracy with two employees of the complainant, this was never proved. A technical defence is also raised to the effect that, even if the version of the State is accepted, the offence of theft is not disclosed.

I now move to examine the evidence adduced with these contentions in mind.

Facts

[3] On the evening of 12 November 2019 at about 18H00, Mr Nkabinde drove his delivery truck into the premises of the complainant, Heineken Breweries ("Heineken") in Sedibeng, Midvaal. He was to collect a consignment of beer on behalf of his employer, Sumtas Logistics. The delivery truck was loaded with pallets of beer by two employees of Heineken having the designations at Heineken of 'checker' and 'forklift driver'. These employees were the only individuals who were allowed access to the warehouse where the pallets of beer were stored. They were not charged and not even named.

[4] On the morning of 13 November 2019 and in accordance with the procedure which was in place at Heineken's depot, Mr Nkabinde and Heineken's employees co-signed a document, known as a 'route pack'. The purpose of the signatures of the employees of Heineken was to record and confirm the quantity of stock in the form of pallets of beer which had been loaded onto the truck. The documents so signed confirmed that sixteen pallets had been loaded. I will come later to the purpose of the co-signature of the driver as understood by Mr Nkabinde

[5] After the loading procedure, Mr Nkabinde drove to the exit of Heineken's premises. He had the tarpaulin covers to the truck's load rolled up thereby exposing the consignment of beer loaded. This was so that the load could be checked again at

the exit by the security personnel contracted by the complainant and stationed at the exit for that purpose. This was also part of the procedure.

[6] On performing this check the security personnel discovered that two extra pallets of Windhoek Lager had been loaded on the truck.

[7] Mr Nkabinde disputes none of this. His version is that he had been in the cabin of the truck sleeping when the truck was loaded and that he signed the route pack without checking the load. He was adamant that it was not his function to check that the load and the invoice corresponded.

[8] The State's case was based on a conspiracy theory which goes as follows: Mr Nkabinde, the checker and the forklift driver acted in cahoots to load the extra two pallets with the intention that they be removed from the premises and thus stolen. Accordingly, the case stood or fell on evidence proving the common purpose between the two employees of the complainant and Mr Nkabinde.

[9] The state called Mr Johan van de Venter. He testified that he was employed as a load verification checker for the purpose of verifying all product leaving the premises. He began his shift at 18h00 and worked the nightshift. At around 05h00 Mr Nkabinde came to the exit with his load. Sumtas Logistics, the company that Mr Nkabinde was working for had about 17 trucks collecting goods a day. There were many trucks coming and going. It was a busy depot.

[10] Mr van de Venter testified as to the procedure to be followed as to the loading and checking of the trucks. He explained that when a truck enters the premises it proceeds to the dispatch area. The load is then checked by a checker and a forklift driver will load the goods onto the truck. Mr van de Venter testified that it was protocol for the driver to stand outside the truck and monitor the number of pallets loaded. He said that once the goods are loaded the driver receives the signed route pack which comprises a record of the quantity of the pallets which have been loaded and the brand of beer, and an invoice for the purchase of the goods. The driver co- signs the route pack to verify that the goods reflected on the invoice are loaded. The route pack is left with the Heineken personnel at the exit and the invoice is handed to the driver. When

the truck reaches the gate, the security personnel on duty collect the invoice from the driver and check that the quantity and type of goods on board accord with the invoice.

[11] Mr van de Venter testified that on the morning in question, when the load was checked it was found that two extra pallets of beer had been loaded – i.e the invoice accounted for 16 pallets of beer and there were 18 pallets. The value of the pallets was R 34 800.

[12] Most significantly, Mr van de Venter conceded under cross examination that the loading of the extra pallets could have been the mistake of the forklift driver. He conceded also that mistakes happened from time to time. The State then closed its case.

[13] The appellant brought an application for discharge after the close of the State's case, which was refused.

[14] Mr Nkabinde testified in his own defence. He disputed that it was protocol for drivers to stand next to their trucks during loading. He said he got back into the truck's cabin and slept while the loading process was completed. This is consistent with what he told Mr van de Venter at the time he was stopped at the gate. He stated that the checker and the forklift driver then knocked on the truck and woke him up to sign the route pack. He signed without checking the load. He testified that he had no knowledge of the amount of pallets he was collecting. The procedure as to him getting the route pack documents was that they were handed to him at the gate upon entry. He would then hand the route pack to a person who tells him where to park in the loading zone. He did not check what was loaded because that was not his function. The checking he said is done at the gate by the security personnel.

[15] It was only in cross examination of Mr Nkabinde that the spectre of the conspiracy was raised for the first time.

[16] Mr Nkabinde was adamant that in the induction training which it was common cause all drivers had to attend, the drivers were told that they could not be near the truck when loading took place. He said this was for safety reasons.

[17] The Magistrate then called a witness – Mr Johannes Koen. The purpose of the Magistrate calling Mr Koen was to verify the function of the driver in the load verification process and specifically how the induction process dealt with this aspect. Mr Koen is a warehouse security manager employed by Heineken. He confirmed that the drivers had to go through the induction process once per year. If a driver was not induction certified, he would not be allowed on the premises. He confirmed the evidence of Mr Nkabinde to the effect that the drivers were not allowed to be inside or beside the truck when loading took place. There was, he confirmed, a specific designated area in front of the truck where it was safe for the drivers to stand. This he said was about five meters away from the truck. He agreed that the drivers had to be out of the way of the forklifts during loading for safety purposes.

[18] Mr Koen testified further that he believed that, once the truck was loaded, the driver had the duty to check the load. Importantly, however, Mr Koen made it clear that the signature process by the driver fell outside the induction process. He testified that the induction course is a ten-minute DVD which is purely about safety and has nothing to do with the signature protocols between the customers and Heineken.

[19] A further vital aspect of the testimony of Mr van de Venter was that the requirement that a signature of the driver be obtained was something new which he had introduced. He could not confirm that it was common knowledge among the drivers that their signature was appended to the route pack documents as an indication that the load had been checked by the driver. As I have said, Mr Nkabinde was adamant that such verification was not part of his job.

[20] Mr van de Venter testified further that the procedure of the claimant, Heineken was that, if extra pallets were found on the security check at the gate, the SAP were routinely informed so that the incident could be criminally investigated. He confirmed also that it happened on occasion that when the load was checked against the invoice at the gate there were less pallets than there should have been.

[21] A further important fact is that there was an amendment reflected in manuscript on the route pack. Before being amended by Heineken's employees, the route pack had indicated that an amount of 18 pallets would be loaded, while the invoice reflected

an amount of 16 pallets. The 18 pallets thus coincided with the quantity that were reflected on the pre-amended route pack.

[22] Significantly, the uncontroverted evidence is that Mr Nkabinde was not involved in either the amendment of the route pack or the loading of the truck. Counsel for the appellant argues that it is feasible in the circumstances that an error could have crept into the system and that the forklift driver and the checker could have either mistakenly loaded the extra pallets or forgotten to off-load them.

Discussion

[23] The appellant was convicted on purely circumstantial evidence. Whilst a person may be convicted of an offence based on circumstantial evidence, reliance on such evidence has to satisfy two requirements: First, the inference drawn must be consistent with all the proved facts and second the proved facts should be such that they exclude every reasonable inference except for the one sought to be drawn.¹

[24] It is clear that the evaluation of the evidence fell dismally short of fitting this test. The systems in place at the premises were far from infallible. The evidence on the Stares own version was that mistakes as to the loading of stock were not an unusual occurrence. It was not shown that the appellant had any duty to check that the correct amount of pallets were loaded. In fact the probabilities supported that this was not his function. He was a driver and there were security checks in place to ensure that the goods loaded were as per the invoice. He knew that such checks were part of the process. That is why he presented the load for checking in the usual way on exiting. It is improbable that he would have done this if he was committing theft.

¹ *Rex v Blom* 1939AD 188 202 —203.

Order

[25] In the circumstances I order as follows:

1. The appeal succeeds.
2. The conviction and sentence are set aside.

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FISHER J

HIGH COURT JUDGE

GAUTENG DIVISION, JOHANNESBURG

I Concur,

PP _____

MUDAU J

HIGH COURT JUDGE

GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 15 February 2022.

Judgment Delivered: March 2022.

APPEARANCES:

For the Appellant : Adv C Nkosi.

Instructed by : Khanyile MB Attorneys.

For the Respondent : Adv MM Maleleka

Instructed by : DPP.