IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
23/2/16 DATE — SIGNATURE

23/02/2016.

CASE NO: A937/2015

In the appeal between:

PAUL KHOZA — Appellant

and

THE STATE — Respondent

JUDGMENT

MOTHLE J

1. Paul Khoza, the Appellant, appeals against conviction and sentence of 5 years' imprisonment on one count of

housebreaking within intent to steal and theft, imposed by the magistrate's court Klerksdorp. He was granted leave to appeal against both conviction and sentence.

2. The facts of this case are briefly as follows:

2.1 During or about 18 October 2011, there was a break in at or near Klerksdorp Magisterial District, of a shop belonging to the complainant Mr E Mofokeng called Symbol Collection. Shirts to the value of R3, 300.00 were stolen.

2.2 The police were called onto the scene and they uplifted two prints of a finger, on the window pane that was broken to gain entry into the shop and access to the stolen shirts. This window pane was actually the display window behind which the shirts were placed for view by the general public.

2.3 When analysing these finger prints, one finger print was found to be Appellant's index finger and the other print was unidentified. It was on the basis of this finger print, which is the only evidence the State presented against Appellant, that he was convicted and sentenced.

2.4 Appellant's version, in explaining the finger print, stated that he lives in the area and has often stood on the display window admiring the shirts. He explains further that he pointed these shirts with his right index finger which touched the window pane. He, however, denies that he is the person responsible for the break in and theft of the t-shirts.

3. In his judgment, the Magistrate rejected Appellant's version, stating that it was improbable in that when Appellant pointed at the items on display behind the window-pane, he was alone. The Magistrate did not consider or deal with the unidentified finger print also found at the scene. The police officer, Constable Moremi, had testified that there were in fact two finger prints that were uplifted from the window pane. Exhibit B, which is the report filed by Constable Moremi also refers to finger print 1, being that of the right index finger of the Appellant lifted approximately 1.50 metre from the ground on the broken window pane. Finger print 2, also lifted from the top centre of the broken window pane, approximately 1.58 metres from the ground, was not identified.

4. Counsel for the Appellant contends that the Magistrate failed to correctly apply the test on the incidence of the burden of proof

applicable in a criminal case as regards the State on the one hand and the accused on the other. This question of the burden of proof was stated as follows in the matter of ***State v Shackell 2001 (4) SA 1 in paragraph 30, page 12 of the Judgment:***

> *"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the Court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. "*

5. I agree with counsel for the Appellant that the Magistrate erred in applying this test. His point of departure that a person cannot point at an object unless he does so for someone else, is not

necessarily correct. It is possible that a person talking to himself can point at something he/she admires. That is not outside the realm of impossibility and the Appellant's version is thus reasonably possibly true.

6. There is another matter. The fact that there were two finger prints and one is not being identified, throws doubt on this conviction. The duty lies on the State to present evidence that every possible means have been taken to identify the second finger print before even charging Appellant with this crime. It may well be that the person responsible for the second finger print is in fact the one who broke the window pane and stole the goods displayed there. There is therefore doubt and consequently, it cannot be said that the State has proved its case beyond reasonable doubt.

7. In the premises, I am accordingly of the view that this is one of those instances where a court on appeal should intervene. The conviction and sentence should be set aside. I therefore make the following order:

1. The appeal against conviction and sentence succeeds;
2. The conviction and sentence imposed by the Magistrate on the Appellant in the Klerksdorp Magistrates Court on 26 November 2012, is hereby set aside and substituted by a conclusion that:

   "The accused is found not guilty and is discharged."

S P MOTHLE
Judge of the High Court
Gauteng Division
PRETORIA

P KEKANA
Acting Judge of the High Court
Gauteng Division
PRETORIA

For the Appellant:

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For the Respondent:

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