



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. ✓

23/2/2016

DATE

SIGNATURE

23/2/2016

Case Number: A476/2014

In the matter between:

JOHN EUNESH

Appellant

and

THE STATE

Respondent

JUDGMENT

POTTERILL J

- [1] The appellant is appealing against his conviction of theft of one mini Ryobi grinder pursuant to a petition granting leave to appeal against his conviction.
- [2] The grounds of appeal centre around inconsistencies in the state's case which the Magistrate ignored and thus erred. The court *a quo* also misdirected itself in that the circumstantial evidence presented was open to more than one inference consistent with the proven facts.
- [3] The appellant in terms of section 220 admitted that on 15 December 2011 he was at Heidelberg in the hardware store of the complainant. It was common cause that he had a Ryobi mini-grinder, a sanding machine and a plainer in his possession at the shop as well as in the parking lot of Checkers when confronted by the complainant after leaving the shop. The appellant was a regular customer of the shop and on 15 December 2011 the shop, being a Saturday, was busy.
- [4] The state offered circumstantial evidence that the appellant stole the grinder, the property of the complainant from the shop. The appellant pleaded and testified that he had bought the items from a male in his late twenties at a taxi rank and he took the items to the shop to compare prices.

- [5] The first question to be answered is whether the court's credibility finding of the state witnesses were a misdirection due to the contradictions between the witnesses. Much is made of the contradiction between Mr. Jobe who gave evidence that Ms. De Cruz told him that the empty grinder box was on the top floor of the store whereas Ms. Karelse testified that the empty box was behind the full grinder boxes. Ms. Karelse testified that the grinder was on the top floor not the empty box. Ms. De Cruz testified that the empty box was behind all the other full grinder boxes. Mr. Jobe testified that the empty box was with all the grinders, which he testified was on the top floor. The inconsistency thus is not as to where the empty box was, but as to where the grinders were kept. This inconsistency is most certainly not a consistency that can affect the credibility of the witnesses.
- [6] Ms. De Cruz testified that she saw that the appellant, while with his back turned to her, was busy doing something to his front. When he turned she could see that in his baggy overall there was an indentation and his top was now tight fitting. Mr. Jobe demonstrated in court that a mini-grinder can fit in one's pants and top. It was argued that Mr. Jobe never testified that he saw something in the appellant's overall and should have seen him removing it from under his clothing to the appellant's top bag. I cannot find that the court *a quo* erred in finding this proposition to be an inconsistency as Mr. Jobe was never in evidence in chief or in cross-examination asked whether he saw something in the appellant's overall. There is accordingly no

contradiction. Furthermore he was following Mr Jobe: i.e. mostly seeing the appellant's back.

- [7] It was also submitted that the Magistrate erred in not considering the contradiction between the evidence of Mr. Jobe and Ms. Karelse as to the marking of the grinder; identification of the grinder as belonging to the complainant. It was submitted that Ms. Karelse testified that a sticker is placed on the box and the item itself. The price is written with the marker pen on the box. Mr. Jobe testified that prices are written in a koki pen and there is a sticker of the company, but that the item itself is not marked. He testified that he and BUILD IT are the only agents for Ryobi in town (page 8 of the record of the evidence of Ms. Karelse). Ms. Karelse's evidence is certainly confusing but does not conform to the submission that there is a mark on the grinder itself:

"... Maar nou waar presies word hierdie sticker met die naam geheg? Waar word dit geheg? -- Op die grinder self.

Op die grinder self? -- Ja.

Op die boks? -- Op die boks. Dit is die boks sit ons dit op die boks en in die, op die elektriese ware.

Is die sticker op beide die boks en die voorraad self? -- Ja.

Behalwe daardie hoe word dit gemerk as die ding miskien te oud raak? --

Hoe word dit gemerk?

Behalwe die sticker? -- Ons skryf gewoonlik die pryse met 'n marking pen.

Op die? -- Op die bokse.

Op die item self of op die elektriese ware self -- Nee."

This last question most definitely does not confirm that the price is written on the grinder and on the box.

- [8] The identification of the item as the property of the complainant is the essence of the appeal. I cannot find that the Magistrate erred in finding that the grinder found in possession of the appellant is indeed the property of the complainant. A grinder was missing from a box lying in an unusual place in the shop. The appellant was seen on the top floor where this grinder was lying out of its usual place. He was seen with a bulge under his jacket and the grinder was missing. The appellant was stopped minutes after he left the store and the grinder was found in his possession. The complainant persisted that the grinder was his property. The only other inference argued on the papers was that the grinder belonged to BUILD IT, as the sander did, with Mr. Jobe returning the sander to BUILD IT. This inference effectively confirms that the appellant stole the grinder because it was never the appellant's version that the sander belonged to BUILD IT but that it belonged to a male from which the appellant bought the sander. The mere fact that the appellant had three items in his bag does not support an inference that he did not steal the grinder from the complainant.

[9] The court correctly rejected the appellant's version as not being reasonably possibly true. If he wanted to compare prices why go to the complainant's store when he in fact had a **BUILD IT** sticker on the sander; it would be reasonable to compare the price then at **BUILD IT**. The Magistrate is correct to find the appellant's version improbable as it would make sense if one went to check prices before one decided to buy and not to acquaint yourself with the prices after you had already bought items. It was never put to Mr. Jobe that the appellant had not run away after he was confronted by Mr. Jobe. The accused later inflated his version by stating that he wanted to compare prices not to see whether he had bought a bargain but for reselling the items. This version was never put to any of the state witnesses.

[10] I am satisfied that the state witnesses were credible witnesses and were correctly found to be so by the court *a quo*. I am also satisfied that the state proved its case against the appellant beyond a reasonable doubt.

[11] I accordingly make the following order:

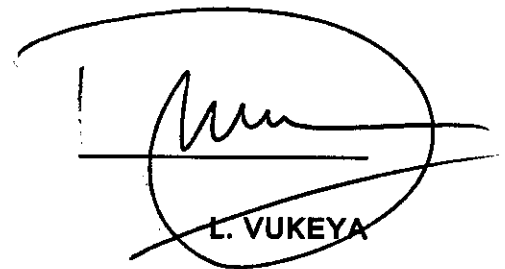
The appeal against conviction is dismissed.



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree



L. VUKEYA

ACTING JUDGE OF THE HIGH COURT

CASE NO: A476/2014

HEARD ON: 18 February 2016

FOR THE APPELLANT: ADV. F.J. VAN DER MERWE

INSTRUCTED BY: CJ Liebenberg Attorneys

FOR THE RESPONDENT: ADV. S. SCHEEPERS

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 23 February 2016