IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A642/2014

28/11/2016

In the matter between:

SIMON SERANTE MOLAPISI First Appellant

JOHANNES DOCKY MOSHODI Second Appellant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

28/11/16 Pretoria
DATE SIGNATURE

and

THE STATE Respondent

JUDGMENT

DAVIS, AJ:

[1] **INTRODUCTION AND JURISDICTION**:

The appellants were as co-accused convicted of theft and sentenced to 3 years imprisonment each. The District Court in Vereeniging, as court *a quo*, granted leave to appeal to each of the appellants to appeal their respective convictions and sentences. The appellants have been granted bail pending their appeals.

[2] **THE COMMON CAUSE FACTS**:

On a *conspectus* of the uncontested evidence of the State and those portions of the versions of the appellants which are not in dispute, the following facts are then common cause:

2.1 The second appellant was, at the day in question, being 29 April 2013, an employee at the Game store in Three Rivers Mall. He was at the time employed as a salesperson responsible for the selling of bicycles.

2.2 The bicycles sold were packed into sealed boxes and labelled accordingly.

2.3 The purchase of bicycles took place by taking the relevant box to the cashier and paying for it there and then leaving the store. This is contrary to the position when a customer wishes to purchase a flat screen television set. In such an instance the customer has to pay for the purchase at the television section/electronics section of the store, then take the till slip to the salesperson who had assisted him who would then fetch the requisite television set from the storeroom and accompany the customer to the cashier/check-out point.

2.4 The first appellant, then working at Checkers, entered the Game store on the day in question and went to the bicycle section. He was

there attended to by the second appellant. Hereafter the first appellant proceeded to the cashier with a box labelled for a specified bicycle in a supermarket trolley. He paid the purchase price of the bicycle depicted and labelled on the box in an amount of R1 199,00 and proceeded to exit.

2.5 At the exit, the first appellant was stopped by a female security guard (the first State witness) and the box was opened. Inside the box two flat screen television sets were discovered priced at R5 499,00 and R6 999,00 respectively.

2.6 It is common cause that the television sets belonged to the Game store and were not paid for either at all or in the fashion described above for the purchases of television sets.

2.7 It is common cause that the first appellant could not have had access to the storeroom where the television sets were kept.

2.8 The first appellant was taken by the said security guard to the senior manager on duty at the time (the second State witness).

2.9 The first appellant after some time made an oral statement to the senior manager (and possibly also another manager who was present) and then later (apparently in the presence of his own employer and branch manager who had been called) gave a written statement written out in manuscript in two parts on a Game stores

"*STATEMENT FORM*" which he signed and dated and which read as follows:

> "*I was on my way from Musica using my lunch time. Then a guy came to me and if I culd (sic) pay there for him then I said no problem only to find out there is his stuff in that box of bicycles, so apparently the security asked me to wait for searching only to find out there is two plasma in the box of bicycles. That is where we found the problem there so there is nothing to do up to so far ... Then the guy give me money round about 1200 to pay for him for that box automatically he knows what is inside there for he said I'll find you outside my store that's what he said to me. The guy's name is (docky).*"

2.10 The senior manager thereafter inspected the storeroom only to find five empty boxes in which television sets were customarily kept in the ceiling of the storeroom.

[3] It is clear from the above facts that someone had acted unlawfully by extracting two flat screen television sets from the boxes in which they were kept in the storeroom and placed them into a box in which a bicycle is normally packed and thereafter again sealed the box. The witnesses confirmed that this could not have happened by accident as the television sets and the bicycles are sourced from different suppliers. The only plausible inference to be drawn is that the television sets were placed in a "*bicycle box*" to thereby conceal a theft or unlawful removal of the boxes from the storeroom and ultimately from the Game store without paying the full purchase price for them. The only question is whether it had been

proven beyond reasonable doubt as to whether either or both of the appellants were part of this scheme.

[4] **THE APPELLANTS' VERSIONS**:

4.1 The first appellant maintained that his version in his written statement quoted above was the correct one. He sought to corroborate this by suggesting that if he had wanted to purchase a bicycle, he would not have purchased the specific ladies' model depicted on the box but would have purchased a smaller male model for a family member of his. He further elaborated that R1 200,00 was given to him by the second appellant in the store in R100,00 notes.

4.2 The second appellant on the other hand denied the first appellant's version and denied any complicity in the crime. He conceded that he met the first appellant at the bicycle section in the store on the day but left the first appellant there whilst he attended another lady customer and escorted her to the toy section as she was looking for a bicycle of such a smaller size that it was not stocked in the section where the second appellant was stationed. He says another casual employee was with him in the bicycle section at all relevant times. He later saw the first appellant being escorted by security staff. He was later called by the management and found the first appellant in their presence together with two police officers. The first appellant

was asked whether the second appellant was "*Docki*" which the first appellant confirmed.

[5] **THE FINDING OF THE COURT *A QUO***:

The finding of the court *a quo* is that "*... the court is of the opinion that ... the version the accused* [1] *gave that he was approached in the ... mall, asked to assist somebody is rejected as false. It could not be reasonably possibly true. That he and accused no. 2 worked together. He knew that there were two TVs in that box. One for him and one for accused no. 2. As the court has already stated the way they got it out of the storeroom is still under investigation but they have the means and the ways to get into that storeroom accused no. 2 and to get those items out of the storeroom. The court is of the opinion that the version that both the accused gave is rejected as false and that it is not reasonably possibly true. The court is of the opinion that the State has proved its case beyond a reasonable doubt and that both the two accused are found guilty as charged.*"

[6] **EVALUATION**:

6.1 Much was made in argument, particularly on behalf of the second appellant that, if the learned magistrate rejected the version of the first appellant, then his version cannot at the same time be used to link the second appellant to the crime or at least not to such an extent that his complicity has been proven beyond reasonable doubt. The argument was that, absent the version of the first appellant, the

version of the second appellant should be accepted as being reasonably possibly true.

6.2 It is trite that the evidence of co-accused are admissible against each other. See **S v Radloff** 1978 (4) SA 66 (A) at 74A and **R v Zawels** 1937 AD 342 at 348 quoted with approval in **S v Mahlangu** 1995 (2) SACR 425 (T) at 433I-J. Such evidence is however subject to the cautionary rule relating to the acceptance thereof and weight to be attached thereto. In the present instance both the appellants want their versions to be accepted as being reasonably possibly true whilst the State wants the common cause facts and the absence of a reasonably possibly true version on behalf of the first appellant to lead to his conviction and to also lead to proof beyond reasonable doubt of the second appellant's complicity along the lines found by the court *a quo*.

6.3 Neither the two tests, namely proof beyond reasonable doubt on the one hand and the reasonable possibility that the accused might be innocent on the other hand nor the dissection of the evidence, be it that of the State or the co-accused should be utilised or conducted as independent and unrelated enquiries. The position has, with the necessary respect, succinctly been summarised by Nugent J (as he then was) in **S v Van der Meyden** 1999 (2) SA 79 (WLD) as follows:

"*The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example* ***R v Difford*** *1937 AD 370 especially at 373, 383). These are not separate and independent tests but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.*" (at 80H-81B)

and

"*Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused and evidence which exculpates him cannot both be true – there is not even a possibility that both might be true – the one is possibly true only if there is an equivalent possibility that the*

other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation." (at 81E-G)

6.4 In evaluating the first appellant's exculpatory version, namely that of being an innocent participant, the reasonable possibility must be adjudicated in view of the common cause facts and general human nature. In my view, the learned magistrate raised and debated the following aspects extensively in the judgment in the court *a quo*, to which the first appellant had not given any satisfactory answer or explanation:

6.4.1 Why would an innocent person, which is what the first appellant wants the Court to believe him to be, readily and without any question accede to the extraordinary request from the second appellant, being a person whom he barely knew, to purchase a bicycle on his behalf?

6.4.2 Why would the second appellant, working at the Game store where bicycles are sold, not purchase the bicycle himself but require the first appellant to do so?

6.4.3 Why was the basis of the strange transaction, namely the advance of the R1 200,00 to the first appellant to enable him

to pay for the bicycle at the Game cashier not questioned by him?

6.4.4 Why would the first appellant, without question or quibble agree to take the purchased bicycle box through security and out of the Game store only with the purpose to then meet up with the second appellant as suggested by the latter? There is also an absence of detail as to where or when this alleged meeting would have taken place.

6.4.5 Why, if the first appellant was as innocent as he maintained, did he not express shock and surprise when the security guard opened the box and found, not a bicycle, but two flat screen TV's?

6.4.6 Why did the first appellant not there and then immediately and vehemently protest his innocence and tender the version which he later produced and wants a court to accept as being reasonably possibly true?

6.4.7 Why did the first appellant not immediately upon being accosted, indicate that he was acting on instructions of the person standing at the bicycle section being the second appellant?

6.4.8 Why, even after having been taken from the security check-point to the manager's office, did he not immediately tender his version and why did it take interrogation and/or coercion and/or a length of time to extract it from him?

[7] The first appellant's position was not dissimilar from an accused caught in possession of stolen goods and called upon to give a satisfactory account of his possession. Even though the test in those circumstances or in the cases dealing with contravention of Section 36 of the General Law Amendment Act, No. 62 of 1955, is more subjective in nature (see **S v Aube** 2007 (1) SACR 655 (WLD)) the lack of answers or any reasonable explanation for the questions referred to above leads one to the conclusion that the first appellant's explanation was *"unsatisfactory"* to the point that it should be rejected as being false and therefore not reasonably possibly true. To all intents and purposes the first appellant was knowingly an accessory to the stealing of the television sets from Game by assisting in removing the items concealed in a bicycle box in an attempt to get past security. To my mind he was rightly convicted.

[8] Once the first appellant's exculpatory version is rejected (as it should be) then there is nothing left to link the second appellant to the crime. The only evidence placing the second appellant at the scene were those facts summarised above at paragraphs 2.1 and 2.4. These facts, namely the presence of the second appellant at the date and time in question in the

bicycle section, were common cause but beyond that, there was no evidence controverting the second appellant's version of events as summarised in paragraph 4.2 above which corresponds with these common cause facts. Neither the security staff nor the management of Game nor any state witness contributed any evidence which placed the second appellant's version in doubt. Moreover, the casual worker who also worked at the bicycle section was not called as a witness nor was he apparently questioned by the security staff or management. No evidence was tendered as to the video footage (the existence of security cameras had been conceded by the state witnesses). There is also nothing inherently improbable or palpably false in the second appellant's version (contrary to that of the first appellant as already illustrated above).

[9] Accordingly, applying the tests referred to in paragraphs 6.2 and 6.3 above, the second appellant's exculpatory version is reasonably possibly true and accordingly there exists reasonable doubt as to his complicity in the crime.

[10] **SENTENCE**:

In respect of the sentence of the first appellant, on the one hand the learned Magistrate correctly took into account that the first appellant assisted employees of the Game store to steal from their employer. He did so not alone but clearly in concert with others and after some prior planning. On the other hand, the goods of which the first appellant were accused of stealing in the resent instance had been recovered, he was a first offender

and was at the time 29 years old. He was employed at Checkers working for at least 7 years earning R645,00 per week. His high school qualification is Grade 11 and he has a 4 year old child who stays with the mother and in respect of which he pays R500,00 maintenance per month. The learned Magistrate quoted **S v Kriegling and Another** 1993(2) SACR 495 (AD) in his judgment but, to my mind, paid insufficient regard to the statements regarding the direct imprisonment of first offenders. One should also not over-emphasise the fact that the first appellant was the only one of a group of co-perpetrators who got caught but it does offend against one's sense of fairness and justice if an overly harsh sentence is imposed on one while others go scot free. Having said that, to completely suspend the sentence would also strike an equally improper imbalance. In my view, the length of the imprisonment imposed does not in itself impose a sense of shock but the lack of giving a first offender a second chance or imposing a proverbial sword hanging over his head requires that a substantial portion thereof be suspended.

[11] **ORDER**:

Taking all the above into account I am of the view that the result of the appeal should be the following:

10.1 The first appellant's appeal against conviction is dismissed.

10.2 The first appellant's appeal against sentence is upheld to the effect that the sentence is altered to read as follows:

"The first accused is sentenced to 3 years imprisonment of which 2 years are suspended for a period of 5 years on condition that the first accused not be found guilty of theft committed within the period of suspension."

10.3 The second appellant's appeal against his conviction and sentence is upheld and his conviction and sentence are set aside.

N DAVIS
ACTING JUDGE OF THE
HIGH COURT

I agree and it is so ordered.

JUDGE C PRETORIUS

Case no:	A642/2014
Matter heard on:	3 November 2016
For First Appellant:	Adv F van As
Instructed by:	Pretoria Justice Centre
For Second Appellant:	Adv J de Beer
Instructed by:	BMH Incorporated Attorneys
For Respondent:	Adv Maritz
Instructed by:	The National Director of Public Prosecutions
Date of judgment:	28 November 2016