



Republic of South Africa

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE No: A 848/2002

In the matter of

ANTOINETTE MBO
Appellant

First

PUMLA VERONICA NJOKWANA

Second Appellant

and

THE STATE

Respondent

JUDGMENT DELIVERED : 15 AUGUST 2003

MOOSA, J:

The Facts:

1. The two appellants were charged in the Magistrate's Court with one count of shoplifting. It was alleged that they had stolen six pairs of scissors from Woolworths to the value of R1140,00. Both appellants pleaded not guilty but were convicted at the conclusion of the trial. The appellants were sentenced to three years' imprisonment of which one year was suspended for five years on appropriate conditions. The appellants appeal against their conviction and sentence.

2. The facts of the matter are relatively simple. Both appellants were shopping in Woolworths at the Tygervalley Shopping Mall. The first appellant initially had a shopping basket into which she put a number of items including scissors. The suspicions of the security personnel were aroused and they watched the scene over closed circuit television. Later the first appellant put her shopping basket into a trolley and continued to shop. The second appellant was also shopping with a trolley. At a stage the pair moved into an aisle which was obscured from the view of the cameras and security guard, Arendse, was ordered to observe the pair.

3. They moved apart and the first appellant returned items to the shelves before abandoning her trolley and leaving the shop. She was stopped by the security

personnel and brought back into the shop. In the meanwhile the second appellant had joined the queue at the tills. When the first appellant was being escorted back into the shop she, second appellant, jettisoned the Edgars bag at the sweet counter from which it was later retrieved. The scissors were discovered in the bag. The appellants denied that they intended stealing the scissors.

4. There were certain discrepancies in the evidence of the State's case. Two of the witnesses, namely Booysen and Nel were recalled after the court, together with the witnesses and the appellants, watched the video recording of the incident. The witnesses adapted their evidence in line with what appeared on the video recording. The court recorded its impression of the video recording. The appellants were not satisfied with what was recorded.

The Issue:

5. The first issue that this court is required to decide in this appeal is whether the appellants had a fair trial. The appellants submitted in their Heads of Argument, that the presiding officer flouted the normal procedure of the trial, insulted them, passed uncalled for remarks and put wrong propositions to the appellants which they were called upon to deal with. The respondent submitted in its Heads of Argument that although the magistrate was at times brusque, he was merely attempting to clarify

some of the issues with the two appellants who had no proper defence to the charge and were cross-examining at cross purposes and trying to confuse the material issues. Both parties conceded that the alleged conduct of the appellants does not constitute theft but, at most, attempted theft.

6. A scrutiny of the record reflects that the presiding officer dominated the proceedings.

On a number of occasions, he led the State witnesses, he conducted the appellants' defence and constantly interrupted the witnesses and the appellants. He questioned the appellants during their cross examination of the witnesses. He was at times cynical towards the appellants and made sarcastic remarks. Certain statements and propositions were put by the presiding officer to witnesses and the appellants that were incorrect. Certain remarks and comments during the trial were indicative of his state of mind that the appellants were guilty. His questioning of the appellants had the effect of intimidating them and disconcerting them and influenced the quality and nature of their evidence. The following passages from the record serve as examples of such conduct:

- (a) During first appellant's cross-examination of the witness Booysen, the following verbal interchange takes place between the presiding officer and first appellant at page 10 of the record:

"BESKULDIGDE EEN: Ek is onskuldig, want ek het ...

(onduidelik)

HOF: Nou, jy hoor wat sê die getuie. Weet julle hoe julle gevang is? Weet julle?

BESKULDIGDE EEN: Ons weet.

HOF: Sy het vir julle gesien op die video, op die prentjie, sy het gesien wat gebeur het.

BESKULDIGDE EEN: Sy het gesien ek vat die skêre.

HOF: Ja.

BESKULDIGDE EEN: Maar ek het nie die skêre gesteel nie, ek wou dit nie steel nie.

HOF: Okay. Sy het gesien jy vat die skêre, stem jy daarmee saam, want dis wat sy sê?

BESKULDIGDE EEN: Ja, Edelaagbare.

HOF: En sy sê jy het die skêre vir nommer twee gegee?

BESKULDIGDE EEN: Sy lieg.

HOF: Nou maar okay, as jy ... wag, wag, wag, as jy dan nou die skêre gevat, wat het nou van die skêre geword? Raait, wag nou.

Wag nou, wag nou. Ek wil dan net eintlik help met die kruisondervraging. Ek ondervra haar nie nou nie, hoor, sy moet

nou verstaan, want ek wil nou nie h lang storie nie, want u sien, ek het nou al soveel keer gesien al dat die mense kom stry en dan gaan ons hiervandaan winkel toe, dan gaan kyk ons die video, dan sit hulle, dan is hulle in die moeilikheid. Dan is hulle die mense wat lieg en nie die getuie nie. Nou gaan ons weer hier so maak. Ons gaan nou weer video kyk en onthou julle het nou gesê die getuie lieg. Onthou dit.”

From the interchange the presiding officer, instead of assisting first appellant to cross-examine the witness, inhibited her from doing so.

(b) During second appellant’s cross-examination of the witness Booysen, the following verbal interchange takes place between the presiding officer and second appellant at page 14:

“HOF: So, jy ontken dan dat jy die sak, Edgars sak uitgehaal het uit die trollie uit en op die vloer gesit het?

BESKULDIGDE TWEE: Ek het dit nie uitgehaal nie, ek het dit in die ‘isle’ gesit.

HOF: Nou verstaan ek jou nie, want as jy dit in die ‘isle’ gesit het,

dan moes jy dit uitgehaal het. Wat bedoel jy jy het dit nie uitgehaal nie? Jy moet net jou stellings regmaak, jou vraag reg vra.

BESKULDIGDE TWEE: Ek het nie 'n plastieksakkie uit my handsak uitgehaal nie.

HOF: Nie plastieksak nie, 'n Edgars sak. Beskuldigde, asseblief, dit is so eenvoudig. Die getuie sê sy het gesien jy haal die Edgars sak, toe jy in die tou staan en hulle kom met nommer 1 aan, haal jy die sak uit, die Edgars sak en jy sit dit op die grond. Op die grond? --- Op die grond.

Stry met die getuie daaroor as dit nie reg is nie.

BESKULDIGDE TWEE: Ek het dit nie op die vloer gesit nie. --- Dit was op die vloer.

HOF: Goed. Wag nou. Sê jy jy het jou Edgars sak uit die trollie uitgehaal?

BESKULDIGDE TWEE: Ek het dit uitgehaal, ja.

HOF: En waar het jy dit neergesit, sê vir die getuie.

BESKULDIGDE TWEE: Op die 'isle', Edlagbare.

HOF: Nee, wat op die 'isle', wat op die 'isle', hoe kan jy dit op die 'isle' sit, op watter 'isle'?

BESKULDIGDE TWEE: *Ek het dit daar op die langs die lekkers ... (onduidelik), Edelagbare, bo-op die lekkers."*

From this interchange, the presiding officer interrupts second appellant from cross-examining the witness and gets involved in an argument with her.

- (c) During first appellant's cross-examination of the witness Arendse, the following interchange takes place between the presiding officer and first appellant at pages 36 and 37 of the record:

"BESKULDIGDE EEN: *Die oomblik toe beskuldigde nommer twee die Edgars plastieksak uit haar handsak uithaal en die skêre daar insit, hoekom het u nie na haar toe gegaan en vir haar arresteer nie?*

HOF: *Ekskuus, ek wil nie vir jou in die rede val nie, hoor, maar wat jou eintlik wil vra, is, hoekom doen jy die werk van nommer twee, deur te kruisverhoor? Hoekom los jy dit nie vir haar nie? Is jy nou haar prokureur of wat? Ek vra maar, want die getuie het nie gesê waar die skêre...,*

...het jy gesien waar kom die skêre vandaan? --- (geen

hoorbare antwoord nie)

Toe jy die eerste keer die skêre sien, waar is hulle? --- In die trollie.

In wie se trollie? --- Beskuldigde nommer twee.

Goed. Nommer een, dan wil ek weet hoekom vra jy die vrae?

BESKULDIGDE EEN: Ek het geen vrae nie, Edelaybare.

HOF: Ek keer jou nie om te kruisverhoor nie, want ons weet dat jy het die skêre gehad.”

First appellant was justified in putting the particular question to the witness. The interference by the presiding officer prevents her from putting the question. His remarks are intimidating and disconcerting, resulting in first appellant ceasing her cross-examination.

(d) During second appellant’s cross-examination of the witness Arendse, the following interchange takes place between the presiding officer and second appellant at page 38 of the record:

“HOF: Beskuldigde, kan ons net h oomblik gou stop hier. Wat betwis jy nou? Ons het gister die video gesien en ons het al’s gesien wat daar aangaan. Wat betwis jy nou? Stry jy dat jy die

Edgars sak in jou besit gehad het in jou trollie. Stry jy daaroor?

BESKULDIGDE TWEE: Ja, ek stry, Agbare.

HOF: Wat stry jy? Stry jy die Edgars sak was nie in jou trollie nie?

BESKULDIGDE TWEE: Ek wil weet hoekom het u nie gesien nie, toe die beskuldigde nommer een ... (onduidelik)

HOF: Die skêr. Goed. Stel die vraag aan die getuie. Onthou die getuie het nie nou daaroor getuig nie. So, stel dit aan hom, dan kan hy mos nou daarop antwoord. Nou kom u met allerhande snaakse vrae. --- Dis omdat ek met ete was.

HOF: Wag nou. Wat? --- Met ete was.

Nee, nee, sy sê, sy beweer beskuldigde een het vir haar die skêre, dis nie in geskil dat nommer een vir haar die skêre gegee het nie, hulle stry nie daaroor nie. Maar het jy dit gesien? --- Nee. Goed. Hy sê hy het nie daai stukkies gesien nie. Wat nog, nog vrae?"

In this interchange the presiding officer gets involved in an argument with second appellant. Instead of allowing her to put questions to the witness, he puts an incorrect proposition to the witness. This is highly prejudicial to her case.

(e) During the testimony of first appellant, the presiding officer made the following remark: *“Georganiseerde spulletjie hierdie”* (at p 43 of the record) and the following interchange took place between him and first appellant at pages 46 and 47 of the record:

“HOF: Vertel vir my hoe kom die skêre in besit van beskuldigde twee. --- ... (onduidelik)

Nee, ek vra vir jou, jy moet dit antwoord. --- Ek weet nie.

Jy weet nie? Sê jy nou dat jy het nie vir haar die skêre gegee nie? --- Ek het dit in my trollie gelos.

Sê jy jy het nie die skêre vir haar gegee nie? --- Ja, Edelagbare.

Met ander woorde, as sy dan aan die getuie gestel het, die laaste getuie, dat sy die skêre by jou gekry het, praat sy dan leuens? --- Ek verstaan nie die vraag nie.

Het u gehoor wat sê nommer twee vir die laaste getuie, vir meneer Arendse? Wat het sy vir meneer Arendse gesê, hoe kom sy in besit van die skêre? Sê vir my. Wat het sy gesê? --- Ek weet nie.

Het jy nie geluister nie? --- Ek het geluister.

Wat het sy gesê vir meneer Arendse, waar kry sy die skêre? ---- Ek weet nie.

Het jy nie geluister nie? --- Ek het geluister.

Wat het sy gesê vir meneer Arendse, waar kry sy die skêre? ---- Ek weet nie, ek het maar net geluister.

Sy het vir meneer Arendse gesê sy kry die skêre by jou.

Laat ek jou nou maar help, jou geheue verfris, dit het nou ongeveer vyf minute, tien minute gelede gebeur. As jy dit nie eers kan onthou nie, hoe onthou jy wat daardie dag by Woolworths gebeur het?”

Besides making a disparaging remark, the presiding officer cross-examines the first appellant while she testifies and attacks her credibility.

- (f) During the testimony of second appellant, the presiding officer cynically said:

“Interessant. Interessant.” (at p 49 of the record) and the following interchange takes place between the presiding officer and second appellant when the prosecutor decided to drop a certain line of questioning at pages 51 and 52 of the record:

HOF: Nee wag, ek dink nie jy verstaan die Aanklaer heeltemal reg nie.

AANKLAER: Goed. Ons los daardie aspek.

HOF: Ek dink dit is belangrik. Hoe het jy daar by Tygervallei gekom? --- ... (onduidelik)

So, jy het nie vir haar ontmoet in Woolworths eers nie, julle was saam in 'n kar? --- Ja, ons was saam by Woolworths.

Met watter doel is julle na Woolworths daar in Tygervallei toe? --- Kruideniersware gaan koop.

Is jy seker, om kruideniersware te gaan koop? --- Ja.

Goed, gaan voort.

AANKLAER: Goed. U het toe nou vir die Hof vertel u het die beskuldigde in Woolworths gesien en ...

HOF: Kan ek net gou, voor jy nou verder, ek dink terwyl ons nou daarmee besig is, anders gaan dit nou uit my kop uit. Werk jy? --- Nee, ek verkoop groente.

Verkoop groente. Waarmee sou jy die goed betaal het waarmee jy daar gaan koop het? --- Met my Woolworths kaart.

Waarmee betaal jy die Woolworths kaart? --- Die inkomste

wat ek kry by die groente.

Werk beskuldigde een? --- Nee, sy werk nie.

Is sy werkloos. Gaan voort.”

When the prosecutor decides to drop a certain line of questioning, the presiding officer decides to cross-examine second appellant on how and why they came to Woolworths and whether they were working and how they would have paid for the goods.

The Law:

7. It is a fundamental principle of our legal system that justice must not only be done, but be seen to be done. (**S v Rall** 1982 (1) SA 828 (A) at 831H.) **Milne, JA** in **S v Tyebela** 1989 (2) SA 22 (A) at 29G-H said: *“It is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial.”* This common law principle has been entrenched in Section 35(3) of our Constitution. A judicial officer as an administrator of justice controls the proceedings according to recognised rules of procedure. (**R v Hepworth** 1928 (A) 265.) There is a constant tension between judicial passivism and judicial activism in the administration of justice. (**S v Gerbers** 1997 (2) SACR 601 (A) at 607c.) There is a duty on a judicial officer to manage such tension. Nothing prevents a judicial officer from asking questions to clear up issues, even if such questions may be damaging to the

accused. However, the judicial officer should refrain from questioning in such a manner as to create the perception that he is biased or partial. (**S v Rall (supra)** at 831H.)

The Finding:

8. *In casu* the separate indiscretions and improprieties by the presiding officer may not amount to an irregularity, but the cumulative effect thereof, in my view, amounts to an irregularity, particularly in view of the fact that the appellants were unrepresented at the trial. This is, however, not the end of the matter. An irregularity *per se* does not result in an unfair trial. The test is whether the verdict has been tainted by such irregularity, resulting in actual and substantial prejudice to the accused and accordingly a failure of justice. To put it more simply, whether it can be said that the appellants would inevitably have been convicted had the magistrate not committed the irregularity. (**Hlantlalala & Others v Dyanti N O & Another** [1999] 4 All SA (A) 472 para 9 at p 476a-c.)

9. In the light of all the circumstances, I am of the view that the irregularities in this case have tainted the verdict. I am not convinced that, had the irregularities not occurred, the appellants would still have been convicted on a charge of theft or attempted theft. In the result, the appeal in respect of both appellants succeeds and

the convictions and sentences are set aside.

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WILLE, AJ: I agree.

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