Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. : A554/2010

In the appeal of:

SAM MAGHADI Appellant1

versus

THE STATE Respondent

JUDGMENT : 25 AUGUST 2011

MOSES, AJ:

Introduction.

[1] The appellant, who, according to the charge sheet, was 30 years old at the time of his arrest on 23 January 2009, was charged in the Somerset West Magistrate's Court with one count of house breaking with intent to steal and theft, allegedly committed on or about 23 January 2009 at 32 Mallbec Street, in the district of Somerset West, at the premises of one

Elizabeth Doyle. It is alleged in the charge sheet that the following items, belonging to Ms Doyle, were stolen in and during the aforesaid housebreaking.

1 x Laptop; 1 x handbag; 3 x wallets, ID and passport;

1 x Nokia Cell phone 6101, bank cards, R200 in cash and

1 x digital camera, listed as a total of eight (8) items.

[2] On 7 June 2010 the appellant pleaded not guilty to this charge. He also elected through his legal representative to make certain formal admissions to the following effect:

> That he admits that he was found in possession of certain of these items, by the police, which as the evidence subsequently demonstrated were the Nokia cell phone 6101, the laptop computer and a digital camera.
>
> That he bought it from two friends of his, who told him that they are in the business of buying and selling of goods. Their names are George and Martin, which names were duly furnished to the police officers who arrested him.

[3] Subsequently on 23 June 2010, after having heard the evidence of

three state witnesses on behalf of the state, and the appellant's evidence, in his defence, the magistrate convicted him along the following lines:

> "Even though the accused was found only in possession of the cell phone of the complainant, it is my view, under the circumstances of this matter, that the only reasonable inference from the proven facts, is that the accused was part of people who broke in the house of the complainant on the date as mentioned in the charge sheet and stole the items as mentioned in the charge sheet.
>
> I am satisfied that the state with the evidence it presented in this court, has discharged the onus of proof. The accused is therefore found GUILTY AS CHARGED FOR ALL THE ITEMS MENTIONED IN THE CHARGE SHEET."

[4] Thereafter, on the same date, after having heard submissions in mitigation of sentence, by the appellant's legal representative, and in aggravation of sentence, by the public prosecutor, who proved one previous conviction of indecent assault committed on 11 May 2007, and admitted by and on behalf of the appellant, he was sentenced as follows:

> Three (3) years imprisonment of which two (2) years were suspended for three (3) years on condition that the appellant is not convicted on

a charge of housebreaking with the intent to steal and theft committed during the period of suspension. (Record page 103).

[5] The appellant, through his legal representative, immediately thereafter, applied for leave to appeal the aforesaid conviction and sentence. After having heard submissions from both the state and appellant's legal representative, the magistrate granted leave to appeal the conviction only. (Record page 106).

The crux of the appeal.

[6] The crux of the appeal is whether the state has discharged the onus of proving beyond reasonable doubt that the appellant is guilty of housebreaking with intent to steal and theft in respect of the home of the complainant, Elizabeth Doyle, on 23 January 2009. It is common cause that the magistrate based his finding as afore stated and his conviction of the appellant on circumstantial evidence.

The evidence.

[7] The state called three witnesses, namely Sergeant Ivan Charles Reinier ("hereafter Sergeant Reinier"), Constable Desmond Mandlevu ("hereafter Constable Mandlevu") and Constable Xoxile Isaac Mhlawuli

("hereafter Constable Mhlawuli"), the investigating officer in the case. For reasons best known to the prosecutor in the case, he decided not to, and did not, call Mrs Elizabeth Doyle, the owner of the premises which was broken into and where the offence was allegedly committed, as a witness. The appellant was the only witness who testified in his own defence.

The state's case.

[8] The evidence of Sergeant Reinier can be summarized as follows:

He is/was at the time police officer, for almost 8 years, and on duty, busy patrolling the Somerset West area, where he is stationed. He was driving a police vehicle, and his passenger was one Constable Mandlevu. Around 02h30 in the morning, whilst patrolling the area, he observed a blue Toyota Corolla which was stationary and parked at the corners of Riesling Street and Steynrus Street, on the side of the road. He then "tested" this vehicle to determine whether or not it was a stolen vehicle. This presumably entailed him radioing the particulars of the vehicle through to the controlling office where the records of stolen vehicles are kept and getting the required information from them. As it turned out, the test was "negative", meaning that the car was not reported as stolen. They continued their patrolling duties in the Somerset West area, and whilst doing that,

they received a complaint over the police radio of a housebreaking and theft at 32 Malbec Street, Somerset West. They attended the scene where they ascertained that the owner was a Mrs Doyle who reported to them that her Nokia 6101 was stolen during the housebreaking. Around past four that morning they saw that same vehicle again, still parked there at the same place. They continued with their patrolling duties. Towards the end of their shift at 06h00, they were heading back towards their station, when, upon passing the local BP garage, they noticed this same blue Toyota Corolla, parked at the garage. They turned around, towards the garage, and then approached the vehicle. He found the appellant in the vehicle, in the driver's seat behind the steering wheel. He noticed that the appellant was busy changing his clothes. He then spoke to the appellant and noticed that the appellant was moving his body in such a way so as to block his view and prevent him from seeing what was lying next to him – the appellant. He then saw the items lying next to the appellant. It was four cell phones, a camera, and a laptop computer which was lying on the floor of the car. Upon examining these items he saw the same cellular phone that was stolen at the premises of Mrs Doyle – a Nokia 6101. He then switched it on and saw the photo of

Mrs Doyle on the screen of the cell phone, the complainant, whom he had spoken to at 32 Malbec Street. He then asked the appellant where he got these items from, whereupon the appellant told him that he bought it from an unknown man in Stellenbosch. He (appellant) could not furnish him with the particulars of this man. According to the appellant, he bought all these items from this man. He then searched the car and found a bolt cutter and a total of three screw drivers in the boot of the car. These are implements, according to the witness that are normally used to break into houses and/or premises. The appellant was then arrested. During cross examination it emerged that the car was still wet of the night dew when the appellant was arrested by the witness and his colleague. He conversed with the appellant in English. The appellant was stuttering (het hakkeling gepraat) when they were talking to each other, and he was busy putting on a blue jeans at the time when the witness approached him. When it was put to him that the appellant was changing into his work clothes, the witness conceded that if the blue jeans was his work outfit, he would not dispute that. When it was put to this witness that the appellant told him (and his colleague) that he bought these items from one George and Martin, the witness denied it. The witness

further conceded that it is/was possible that the appellant might not have known about the bolt cutter and/or screw drivers if the car indeed belonged to a friend of his, one Silas. He also stated, when it was put to him that the appellant denied having committed the offence of housebreaking and theft at those premises, that he never made that allegations. (page 27).

[9] Constable Mandlevu's evidence corroborated that of Sergeant Reinier in all material respects. During cross examination of this witness it emerged that the appellant spoke in English when he conversed with Sergeant Reinier, and he spoke in Xhosa to the appellant, but the appellant did not understand him, hence he also started to speak in English with the appellant. The appellant stated in English to them (the witness and Sergeant Reinier) that he did not know the person's name from whom he bought these items. The appellant understood English. His voice was also trembling.

[10] The investigating officer, Constable Mhlawuli testified that the appellant did not furnish him with the names, gender or even contact numbers of this person(s) from whom he allegedly bought these items. The

appellant told him that he knew these people as also having stayed in Dunoon, but that they subsequently moved to Stellenbosch where they presumably lived, but that he did not know where in Stellenbosch they were living at the time. When it was put to this witness, during cross examination that the appellant mentioned to him the names of Martin and George, it was emphatically denied by this witness. According to him, it was the first time that day in court, that he heard these names. That concluded the state's case.

The defence case.

[11] The appellant testified that he received a call from his friend at about 18h00 that day, informing him that he had a laptop for him which he could buy. It is his case that he was looking for a laptop computer for his sister, and that this friend knew about it. Both his friends, Martin and George are also in the business of buying and selling goods, just like himself. So when he received this information he enquired where he should meet up with this friend, who told him to meet him. He subsequently left his home, in Dunoon around 04h00 or past 4 in the next morning, with the blue Toyota Corolla, to collect the computer from his friend. He then collected the goods from his friends, and thereafter left for the garage to buy airtime, but there was none. He then opened the boot of his car to take out his jacket or

something ("iets") to put on, and thereafter got into his car ready to start it and drive on, when he saw the police approaching. The policeman then asked him where did he get the goods and he told them (the police) that he got it at the shop between Somerset West and Strand: "Ek het toe vir hulle gesê ek het daar by die winkel between Somerset en Strand gekry" (page 45). The police then inspected the goods and thereafter took him down to the police station. He was uncertain which day of the week it was but thought it was a Friday. He told the police that he bought the stuff and he gave the names of these people from whom he bought it. He also told the police that they work on a farm. He was asked during cross examination, when his friend phoned him. A simple question but which the appellant clearly found very difficult to answer. He became very argumentative during the course of his cross examination to the extent that the magistrate had to admonish him and also had to adjourn the court proceedings at one stage. According to the appellant, this friend phoned him around 18h00 "die namiddag", (page 50) for him to come and look at the laptop and cell phone, yet later he indicated that he received a call at 03h00 in the morning where after he left his house around 4 – 5 o'clock in the morning (page 54). The car that he was driving belonged to a friend of his, Silas, who was/is in Namibia and who told him to keep the car. In his evidence in chief he

testified that when he arrived at his friends and saw the laptop computer, the two cell phones and the camera, he asked them how much it would cost, and they told him R1800.00 he then bought the things from them. In cross examination he testified that he paid them R1500.00. He was asked where he was supposed to meet this friend, and he answered that this friend told him to meet him on the road (ek moet hom op die pad kry. (page 60)). He did not know whether it was in Stellenbosch or Somerset West. He was asked where he eventually met this friend, he answered: "ek het hom op die pad gekry staan. Dis soos by 'n kafee, so 'n plaas-affêre." The reason why he met this friend at that time of the night or early hours of the morning was that he still had to go to work. He conceded that he suspected that his friend was busy with something illegal, that it was "a shady deal" (page 62) but he could not walk out of the deal at that stage, since he was the person who was looking for a laptop and told them about it. He could also sell the other stuff. According to him he told the police he bought these goods from two males. He also gave the police the names of these two persons. It was put to him that since his friend called him on his cell phone, which would reflect and retain that number, he could have given that number to the police, but did not. His only response to this was "ek het my samewerking gegee vir die polisie." There was no re-examination by the defence and his case was

closed.

Evaluation.

[12] The magistrate correctly found the evidence of the state witnesses to be reliable. In fact this was conceded during argument by the defence (see page ___ of the record). He also quite correctly found the appellant to be "a very poor witness whose versions was often confused, was vague, sometimes contradictory." The magistrate furthermore, and again quite correctly so, identified and pointed out that the state's case against the appellant is based primarily on circumstantial evidence, inasmuch as "[t]he evidence linking the accused to the commission of the crime in question is circumstantial." (page 83). In this regard the magistrate referred to relevant and applicable case law and *dicta*, emphasizing *inter alia* the fact that the onus is on the state to prove an accused's guilt beyond reasonable doubt, as opposed to beyond a shadow of, or all doubt; that the court was relying on inferences in its findings, and as such, that the inference of guilt, must be established beyond reasonable doubt as the only inference, based on, and justified by the facts, to be drawn, in the circumstances, and that it must exclude all other possible inferences to be drawn from the same facts and circumstances, and to consider the evidence in its totality. After dealing

with the evidence of the appellant, the magistrate made the following finding:

> I am therefore satisfied that the version of the accused cannot be reasonably possibly true. I therefore do not accept that the accused received the cell phone honestly, (page 86) and, "that the accused's testimony as a whole was tainted. There is no part of his testimony that I can place reliance on (page 88 line 6-8).

Having made these findings, the magistrate correctly identified the crucial question, still to be answered, namely whether the proven facts and circumstances of this case, were sufficient to prove that the accused was involved in breaking in of the property of the complainant and whether it is the only reasonable inference which can be drawn form the proven facts, (page 88-89). In formulating this question the magistrate referred to the following:

"(a) The accused was found in possession of housebreaking implements;

(b) His motor vehicle was spotted at a place he denies he was at;

(c) He was in possession of a recently stolen phone from a housebreaking;

(d) Although he was not charged for contravention of Section 36

> regarding the other items which were also found in his possession at the time of the arrest, he could not give a reasonable explanation to the three state witnesses regarding where he got the camera, the laptop and the other phones."

[13] In short, the magistrate's question was, whether these "facts" if proven, justify an inference of guilt as the only reasonable inference to be drawn from them, that the appellant committed the crime of housebreaking with intent to steal and theft. As indicated before, that question was answered by the magistrate in the affirmative.

[14] In the course of his judgment the magistrate, correctly found it to be "common cause that the accused (the appellant) was only found in possession of one item of all the items stolen from the complainant's house." (page 89 line 8-10), namely the Nokia 6101 cell phone. In addition, he said the following (page 91 line 14-18):

> "It can definitely be excluded that people who broke in at the house of the complainant, sell (sic) the goods to the accused, it is not the only reasonable inference that the accused was also part of the people who broke in. No sorry, let's omit that one, it is not part of the

judgment."

[15] This, given the magistrate's eventual findings and conclusion, is very significant. I return to this aspect later. There are a few important aspects which the magistrate appeared to have overlooked and/or underemphasized. The first are the concessions by the first state witness, Sergeant Reinier that:

a) it is/was possible that the appellant was unaware of the bolt cutter (and by implication the screw drivers) since the car belonged to somebody else – his friend Silas, and

b) that he never alleged that the appellant broke into any premises (page 27). This explains why no finger prints evidence was obtained and/or led at the trial. The appellant was not considered a suspect in relation to this offence with which he was charged, namely housebreaking and theft in respect of the home of Elizabeth Doyle; and

c) that only one item out of all those found in the possession of the appellant, and those listed in the charge sheet, was linked to the crime scene and the complainant – the Nokia cell phone.

[16] Secondly, there appears/appeared to be no explanation, on the record,

in the state's case, or in the judgment of the magistrate, for the other items listed in the charge sheet, and how those items, are linked to the premises of Elizabeth Doyle, whose house has been broken into, and the appellant (except the cell phone found in his possession). The magistrate simply did not deal with this discrepancy in his judgment.

[17] Thirdly, Elizabeth Doyle, although available to testify as a state witness, was not called to testify, and hence there was no evidence from her linking those goods found in possession of the appellant with the offence committed at Ms Doyle's premises.

[18] Fourthly, and most importantly, the magistrate himself appeared to have considered and appreciated the existence of other possible and/or reasonable inferences which could also be drawn from the facts of this case as presented to and placed before him, namely the reasonable possibility that other people could have committed the offence at the complainant's premises, from whom the appellant could have bought the cell phone, amongst other things.

[19] On the facts of this case it is abundantly clear that the appellant, not

only appreciated, on his own version, that he was involved in a "shady deal" when he "bought" these items, but also that he appreciated that it could have been stolen goods, hence his inability to give a reasonable explanation about his possession of these items found in his car by the police. The "facts" referred to, and used by the magistrate to justify his conclusion, by way of inferential reasoning, that the appellant committed this offence, together with other unknown persons, do not, to my mind, exclude the other evenly possible and reasonable inference that the appellant could have bought these items from other person(s) who might have committed that offence. Even if the appellant's evidence were to be rejected as untruthful, as the magistrate has done, the question remains, what inferences, if any, can be drawn from such untruthfulness. It is true that an inference of guilt may in suitable circumstances be drawn from the fact that an accused gives false evidence, but this is not an invariable rule, as forcefully demonstrated in S v Mtsweni 1985 (1) SA 500 (A), where in its headnote it was said that :

> "Although the untruthful evidence or denial of an accused is of importance when it comes to the drawing of conclusions and the determination of guilt, caution must be exercised against attaching too much weight thereto. The conclusion that, because an accused is

untruthful, the therefore is probably guilty must especially be guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case. In considering false testimony by an accused, the following matters should, *inter alia*, be taken into account: (a) the nature, extent and materiality of the lies and whether they necessarily point to a realization of guilt; (b) the accused's age, level of development and cultural and social background and standing insofar as they might provide an explanation for his lies; (c) possible reasons why people might turn lying e.g. because, in a given case, a lie might sound more acceptable than the truth; (d) the tendency which might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an admission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth."

[20] The untruthful evidence of the appellant in this instance, similarly does not/did not justify the most extreme conclusion, namely that the

appellant committed the offence of housebreaking and theft. In this regard the magistrate misdirected himself to the extent that this court can interfere with its findings and conclusions as pointed out above. In the circumstances I am not persuaded that the state has proved the appellant's guilt in respect of the housebreaking and theft beyond reasonable doubt. What was proved beyond reasonable doubt was that the appellant was found to be in possession of certain items, the Nokia cell phone and three other cell phones, (page 10 line 4), the digital camera, and the laptop computer, which were reasonably suspected of being stolen property (and in respect of the cell phone having been confirmed as having been stolen from Ms Doyle) and in respect whereof the appellant was unable to furnish a reasonable explanation for such possession. On the evidence in its totality, it was clear that the appellant foresaw the possibility of these items having been stolen, yet recklessly proceeded to acquire it from these other persons, in circumstances which he himself described as a shady deal. Accordingly the appellant should have been convicted of theft in respect of the Nokia cell phone, three other cell phones, the digital camera and the laptop computer. This is a competent verdict on a charge of housebreaking and theft. See S v Small 2005 (2) SACR 300 (C) 303h. I would accordingly set aside the conviction of the appellant on the charge of housebreaking and

theft, as set out in the charge-sheet, and replace it as follows:

The accused is convicted of theft in respect of the Nokia cell phone, 3 cell phones, one digital camera and one laptop computer.

[21] Having come to this conclusion in respect of the conviction of the appellant, this court is also entitled to interfere with the sentence imposed upon the appellant by the magistrate. Taking into consideration the submissions made by counsel, and the facts and circumstances of the case, I am of the view that the following sentence is appropriate:

> Eighteen (18) months imprisonment of which six (6) months are suspended for a period of three (3) years on condition that the accused is not convicted of any offence of which dishonesty is an element, committed during the period of suspension.

[22] In the circumstances I would set aside the conviction and sentence in respect of the appellant dated 23 June 2010, and make the following order:

> The appeal against the conviction succeeds to the following extent:
>
> The conviction of the appellant, of housebreaking with intent to steal and theft dated 23 June 2010 in the Somerset West Magistrate's

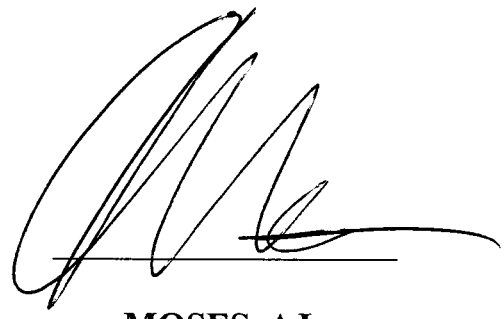
Court under case number A112/2009 is hereby set aside, and replaced with the following:

> The accused is found guilty of theft of the following items, four (4) cellular phones, one digital camera and one laptop computer.

The appeal against sentence succeeds to the following extent:

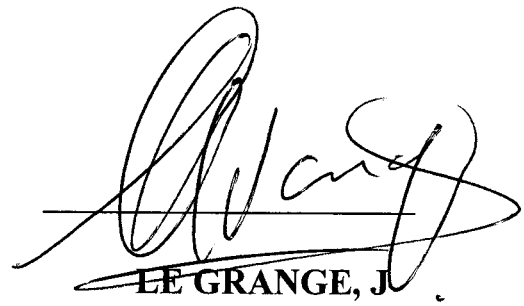
> The sentence imposed upon the appellant by the magistrate on 23 June 2010 is hereby set aside and replaced with the following sentence:

Eighteen (18) months imprisonment of which six (6) months are suspended for a period of three (3) years on condition that the accused is not convicted of any offence of which dishonesty is an element, committed during the period of suspension.



MOSES, AJ

I agree and it is so ordered.



LE GRANGE, J