IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR NO: 42/22

In the matter between:

MZWANDILE REUBEN MATSHOBA **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: the Verulam Magistrates' Court:

The appeal against conviction and sentence is dismissed.

JUDGMENT

Delivered on: 18 November 2022

Marion AJ (Ploos Van Amstel J concurring)

[1] The appellant was convicted of theft and sentenced in the Verulam Magistrates' Court to pay a fine of R10 000 or ten months' imprisonment, wholly

suspended for five years on condition that he was not convicted of theft or attempted theft committed during the period of suspension.

[2] The appellant was granted leave to appeal against his conviction and sentence by the court a quo on the 29th of October 2021.

[3] It is trite that the trial court's evaluation of the evidence and acceptance thereof is presumed, in the absence of any material misdirection, to be correct. As such an appeal court will not lightly interfere with those factual findings, particularly where credibility findings have been made. The trial court has had the advantage of seeing the witnesses in person and has had the opportunity to observe their demeanour. An appeal court will only interfere with such findings when it is evident that there are demonstrable and material misdirection of the trial court or where it is satisfied that they are clearly wrong.

[4] The appellant was a regional court prosecutor with 20 years' experience. His rights to legal representation were explained to him and he elected to represent himself. The appellant was charged with one count of theft in that upon or about the period between the 22nd and 24th of September 2018 at De Charmoy Estate he did unlawfully and intentionally steal the following items: to wit one black vase with orchid, one glass Mellerware kettle, one Logic bar fridge and two side lamps valued at approximately R7 500, the property and in the lawful possession of Deborah May Mills. The appellant pleaded not guilty.

[5] At the outset of the matter the appellant brought an application in terms of s 106(1)(*h*) of the Criminal Procedure Act 51 of 1977 ('the CPA'), that the prosecutor had no title to prosecute. The appellant's application was based on averments regarding an abuse of process, in that certain documents requested by him were not given to him. The court a quo correctly found that the appellant had not made out a case to show that there was any actual abuse of process and that the prosecutor was duly authorized to prosecute in terms of the certificate by the Director of Public Prosecutions dated the 11th of November 2020. The application was dismissed and the matter proceeded to trial.

[6] The evidence of all the witnesses in the trial form part of the record and I do not intend repeating it in this judgment. I shall however deal with the salient features thereof.

[7] The first State witness who testified was Deborah May Mills ('Mills'), employed as the General Manager of De Charmoy Estate Guest House ('the estate'), at the time of the alleged incident. She testified that the appellant booked into the estate on the weekend of the 22nd to 24th September 2018 and was allocated the Papillion room. On the 23rd of September the appellant called reception and requested that his breakfast be left outside the room and he refused house- keeping to clean his room. He also came later that same day and requested to check out earlier. Mills advised him that he would not be entitled to a refund. The next day he again requested that breakfast be left on the table outside the room.

[8] On the 24th of September 2018 the appellant handed in his keys, paid the sum of R1 320 by credit card and checked out. At about 10h10, Mills was approached by the cleaning staff namely one, Thandeka Magwaza ('Magwaza') who advised her that there was no fridge in the Papillion room which was the room the appellant had occupied. She then went to inspect the room and established that the white bar fridge, two side lamps, a kettle and a black vase with orchids was missing from the room.

[9] Mills telephoned the private security company and the South African Police Services. She thereafter telephoned the appellant to advise him about the missing items. The appellant asked her "how this was possible" but that he was driving and would call back. The appellant did return her call and advised her that he would pay for the missing items. The next morning Mills emailed a list and the values of the items to the appellant. Mills was aware that the appellant did pay the owner of the estate, one Lauren, but she had no details regarding the date and amount paid. Mills testified that the items stolen were under her control and that the policy of the estate is that no guest is allowed to remove any of these items.

[10] Mills stated that an hour after the appellant had checked out Magwaza informed her about the missing items. Magwaza was the only other person aside from the appellant who had access to that room after having taken the keys from reception to clean the room.

[11] Under cross-examination by the appellant Mills confirmed that the bar fridge and tea station in the appellant's room was inside the cupboard unlike some of the other rooms. She was also shown an email by the appellant confirming that the

actual value of the items was R4 214 and not R7 500 as claimed by the State. The State thereafter made an application in terms of s 88 of the CPA to amend the actual loss to reflect as R4 214 on the charge sheet which application was granted.

[12] The appellant put to Mills that that upon his departure from the estate he was stopped by the security guards at the exit who searched his car. Mills testified that this was not the usual protocol. The duties of the security guards were only to sign guests in and out of the estate. The appellant showed Mills the control register form and alleged that his vehicle was searched however she denied this and said it was not the company policy. There was no CCTV footage as the cameras were not working. The security guard on that day was no longer employed by the estate. Under cross-examination Mills also testified that it could not have been the cleaners who took the items as Magwaza only accessed the room after the appellant's departure and she also stated that the appellant's vehicle was parked right outside the room.

[13] The second State witness who testified was Thandeka Biyase (referred to as Magwaza by Mills) a house keeper employed at the estate. She was on duty on the weekend of 22nd to 24th September 2018 and positively identified the appellant as the person booked into the Papillion room. She testified that she cleaned the appellant's room and ensured that the fridge was stocked with water and she checked that the kettle was in working order and the tea station was stocked with tea and sugar. Magwaza confirmed that when she cleaned the room, prior to the appellant's check-in, the fridge, lamps, kettle and vase with orchids were there. It is her duty to inform the manager on duty (Mills) if they were not there. On the 23rd of September she knocked on the appellant's room door to gain access to clean. He refused her access and passed her the towels. When she returned with new towels she saw two mugs on the table outside the room and knocked on the door. She enquired from the appellant if the mugs were from his room, and whether she could wash them, to which he agreed. She returned with the mugs, knocked on the appellant's room door and left the cups on the table inside the room. She did not open the cupboards where the fridge or tea station was kept. The appellant was in the company of a woman.

[14] On the 24th of September 2018 she was instructed to clean the room. Upon attending on the appellant's room, she established that the bar fridge and kettle were not there. She called Mills and advised her of the situation. Mills immediately

attended at the room and discovered that the fridge, kettle, two lamps and the vase with orchids were missing. Magwaza testified that Pinkie from reception was also called and they both confirmed that the missing items were nowhere to be found in the appellant's room.

[15] Thandeka testified that she was employed at the estate for a period of six years and had never seen guests' motor vehicles being searched when they departed from the estate. She was adamant that it was not possible for anyone else to have access to the room as one key was with the appellant and the other at reception for the cleaner to access the room when she was cleaning. She did not need to use the keys that weekend as the appellant did not allow her to clean his room. She confirmed that the appellant's vehicle was parked close to the room and he would have been able to take the items without anyone seeing. She also confirmed that none of the cleaners own a vehicle and it would not be possible for them to leave with the stolen items without being seen. She further testified that the duty of the check-in manager, who was Pinkie at the time, would be to take the appellant to his room and to show him all the amenities including the fridge, kettle and tea station. Under cross-examination she maintained that it was standard procedure for the manager to show the guests to their rooms and explain where the amenities were situated. This witness agreed with the appellant that none of the goods were found in his possession but reiterated that the reason for same was that his vehicle was not searched. She also confirmed that the guests attending a wedding at the estate would not have had access to the appellant's room.

[16] Pinkie Ngcongo ('Pinkie') testified on behalf of the State. She was employed at the estate and was on duty on the 22nd to 24th September 2018. She works at the main reception and signs in guests and thereafter takes them to their rooms and shows them where the fridge, kettle, tea station, remotes etc are kept. She confirmed checking in the appellant and taking him to his room and showing him where all the amenities were in his room. The appellant denied this and put it to Pinkie that she had been coached.

[17] The appellant then applied for a discharge in terms of s 174 of the CPA. The application was refused by the court a quo which found that there was a prima facie case for the appellant to answer.

[18] The appellant testified in his defence. He testified that he booked into the estate from the 22nd to 24th September 2018 and was given the Papillion room. No one showed him to his room or the amenities. He got the keys and went looking for the room. He was telephoned by his tiler Bongani who was doing some work for him at his home in Verulam and he left the estate and went home to sort out some issues. When he got home he realized that he did not have the keys to his room. He returned to the estate at 19h00. When he returned he realized that there were many guests and that a wedding was to take place. He returned to his room after walking around the estate.

[19] The following day, which was a Saturday, he woke up and had an English breakfast at reception. After breakfast he approached the receptionist and told her that he wished to check out early as there were too many wedding guests and he was feeling sick and uncomfortable. On the Sunday after he ate breakfast, paid and checked out of the estate. At the exit he was stopped by security guards who searched his vehicle and told him this was standard procedure. He thereafter left the estate. As he drove off he received a call from a lady who told him about the missing items and he told her he could not understand how they went missing. He advised her that he would call her back as he was driving to Cape Town. The lady also informed him that she would call the police and he told her to go ahead and allow the police to investigate. The lady also advised him that he must pay R7 500 for the missing items. The appellant responded by informing her that this was a lot of money and he would wait for the police to investigate. He was subsequently interviewed by a few police officers. The summons to appear in court was served on him in 2019 and as he had promised the estate he would call them after the investigation he decided to call them.

[20] He subsequently went personally to the estate and spoke to one Lauren who showed him correspondence from the chief prosecutor as well as the insurance company. After reading the documents he presented his card to Lauren to swipe for the actual loss which was R4 214. He subsequently received a WhatsApp message from the estate with regards to the additional excess amount of R1 000 which was paid by the estate to the insurance company. He returned to the estate and made payment of the additional amount.

[21] Under cross-examination he testified that he made payment for the items, which he did not steal, because his name was on the line. He made the payment

freely and voluntarily and did not inform Lauren that the payment was made without prejudice. It was clear from his cross-examination that various aspects of his evidence were never put to the State witnesses. The appellant also testified that he made the payment because at some stage he left the room unattended. He had no answer as to how he would have boiled the water to make a drink if there was no kettle in the room. This version was also not put to the witness Magwaza. He also testified that he could not recall the items being in the room as it was a long time ago. He also had no response as to why he did not put his version about leaving the estate and going back to Verulam to the State witnesses. The appellant stated that he went to reception and ordered his breakfast to be brought to his room. This was in contradiction to his evidence in chief and was also not put to the witnesses.

[22] In assessing the evidence the court a quo found that the following was common cause namely; the appellant booked into the estate on the weekend of the 22nd to 24th September 2018; he was given keys to the room, he spent two nights in the room, he was called by a lady after his departure from the estate regarding certain stolen items and without hesitation offered to pay what was due for the loss of the items; he paid freely and voluntarily the total amount of R5 214 to the estate; the list of stolen items as per the charge sheet; and that the items belonged to the estate.

[23] The court a quo found that the State witnesses were credible and that there were no material contradictions in their evidence. Their evidence corroborated each other’s evidence in material aspects. The appellant on the other hand gave different versions whilst testifying and under cross-examination. His versions were never put to the State witnesses. One clear aspect of his contradictory version was that he put it to Magwaza that her colleagues may have stolen the items and that the wedding guests had access to his room and may have stolen the items. Both these versions were disputed by her. Magwaza confirmed that only the guests had access to their own rooms and on the appellant’s own admission his room was not cleaned by the cleaners. The court a quo in evaluating the appellant’s evidence found numerous inconsistencies and contradictions. The appellant did not dispute that his vehicle was parked close to his room. The probability that he would have been able to take the items and put them in the boot of the vehicle without anyone seeing him is more than likely.

[24] Our courts have articulated in many judgments that once a critical and detailed examination of the evidence has been done of all the components, a court should step back and observe the evidence in totality. The court a quo properly evaluated all the evidence before it and analysed the contradictions, discrepancies and improbabilities.

[25] It is trite that the onus rests on the State to prove the appellant's guilt beyond a reasonable doubt. Theft has been defined as the unlawful and intentional appropriation of another's property with the intention to permanently deprive the person entitled to possession of the property. The appellant's version cannot be rejected only on the basis that it is improbable but only once the trial court has found on credible evidence that his explanation is false beyond a reasonable doubt. If the appellant's version is reasonably possibly true he is entitled to an acquittal.

[26] The State relied on circumstantial evidence to prove its case against the appellant. The two cardinal rules in reasoning by inference are that the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.[1] This court is cognisant of the fact that the appellant was willing to pay for the items immediately after receiving the first call from Mills. Further, pursuant to receiving the summons he went to the estate and settled payment for the items and returned to pay the excess for the insurance. The trial court found that this action by the appellant is clearly not indicative of a reasonable and innocent person.

[27] The court found that the appellant's version could not reasonably possibly be true. It did not misdirect itself in any material way, nor am I satisfied that its findings are clearly wrong. There is therefore no basis for interfering with them. The appeal against the conviction can therefore not succeed.

[28] It is trite that an appeal court may only interfere with a sentence if it is of the view that such sentence is vitiated by an irregularity, misdirection or where there is a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court.[2] The trial court took into account the factors as

[1] *R v Blom* 1939 AD 188 at 202-203.
[2] *S v Sadler* 2000 (1) SACR 331 (SCA).

set out in *S v Zinn*[3] namely; the crime, the offender and the interests of society. The court gave due attention to the appellant's personal circumstances. The appellant's conduct was contrary to what was expected of a prosecutor employed by the National Prosecuting Authority and the court correctly viewed this as an aggravating factor. The court considered that the appellant was a first-time offender and that he had paid for the stolen items thus mitigating the loss to the complainant. I am inclined to agree with the State that the sentence imposed on the appellant erred on the side of leniency. There is no appeal by the state against the sentence, and I see no basis for interfering with it.

Order

[29] In the result, I propose the following order:

The appeal against conviction and sentence is dismissed.

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Marion AJ

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Ploos Van Amstel J

[3] *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

Appearances:

For the Appellant	:	Mr Mzwandile Reuben Matshoba
Instructed by	:	Appeared in person
	:	Durban
For the Respondent	:	Mr Moolman
Instructed by	:	Director of Public Prosecutions
	:	Durban
Date of Judgment	:	18 November 2022