

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOAN BUCHALTER

Appellant

and

THE STATE

Respondent

Coram: RUMPF, C.J., KOTZÉ et TRENGOVE, JJ.A.

Heard: 17 November 1980

Delivered: 27 November 1980

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J U D G M E N T

KOTZÉ, J.A.:

The appellant in this somewhat unusual case is fifty years of age. She is married to a prominent professional man. She practices radiotherapy and radiography. She is well known for her charitable work. She was tried and convicted in the magistrates court of East London (of) the theft of three trivial articles...../2

articles - a tin of shoe polish; a slab of chocolate; a container of chewing gum - valued at 90 cents from Checker's supermarket at Naloon on 17 July 1979. The magistrate imposed a fine of R50,00 with an alternative of 100 days imprisonment. An appeal to the Eastern Cape Division (KANNEMEYER, J. and SOLOMON, A.J.) failed. The appellant now appeals to this Court against the conviction, having obtained leave from the Eastern Cape Division.

In the court of the magistrate, after having tendered a plea of not guilty, the appellant's attorney indicated the basis of her defence in terms of section 115(1) of Act No. 51, 1977 in the following terms:

"Your worship, the accused will admit that the articles mentioned were found in her possession. The accused will say that she had no intention at all to steal. Her failure to pay for these articles is due merely to forgetfulness. She placed them in her pocket and handbag and forgot to pay for them."

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The State called two witnesses - Giwu and Cooney.

The appellant testified in her defence and called three other witnesses who testified that she was a lady of character and integrity. I shall commence by setting out, as briefly as I can, the evidence given by Giwu, Cooney and the appellant during examination-in-chief. Thereafter I will discuss the significant portions of their evidence during cross-examination.

Giwu, a security officer employed by Checkers, testified that he saw the appellant, clothed in the uniform of a nurse, moving about inside the supermarket. She had a handbag and a shopping basket of the type supplied by supermarkets to their customers in which to gather their purchases and carry it to the tills at the point of payment. (In the case of the Checkers supermarket at Nahoon a supply of these baskets is kept next to the point of payment where customers enter and leave the shopping area). The appellant lifted a few articles from the shelves and placed these in the shopping basket. He then saw

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the appellant remove a tin of shoe polish (value 19 cents) from the shopping basket and place it in her handbag. Thereafter she removed a slab of chocolate (value 43 cents) from the basket and placed it in the right hand pocket of her uniform. Finally she removed a container of chewing gum (value 28 cents) from the basket and placed it in the left hand pocket of her uniform. The appellant then went to the till, paid for the articles which were still in the shopping basket and proceeded towards the door of the supermarket. He (Giwu) alerted Cooney, the assistant manager, who called the appellant who was then on her way to the parking area. The appellant thereupon placed her hand in her pocket, produced the slab of chocolate and, in the words of Giwu, "before he had asked her anything she said that she had bought the slab of chocolate from Pick 'n Pay". He took the slab of chocolate and noticed a Checkers price ticket on it. They then proceeded to the office where, in Cooney's presence, he asked the appellant to take the shoe

polish.....5/5

polish out of her handbag. She did so. Thereupon he requested her to remove the chewing gum from her left pocket. She took a piece of tissue paper out of the pocket and remarked "it's tissue paper which is in my pocket". He once again requested her to produce the chewing gum whereupon she took it out of her pocket. The appellant's particulars were taken and the police were summoned.

Gooney confirmed Giwu's evidence that outside the building he followed the appellant who was on the way to her car. He confronted her and asked her to produce any goods which she had not paid for. The appellant "brought out" a bar of chocolate and said she had paid for it at Pick 'n Pay. He noticed a Checkers sticker on it. He requested the appellant to accompany him to the office. She did so. At the office he asked her whether there were any further goods in her possession, which she had not paid for. She then opened her handbag and took out the tin of polish. Giwu then intimated that she also

had.....15/6

had chewing gum in her possession which she had not paid for.

The appellant then produced it from her pocket. He continued:

"The accused then offered to pay for the goods which, I said, we couldn't do and she accepted that she stole the goods and she wasn't in the habit of doing this, she said."

He then called in Deysel, the administration manager, to proceed with the matter.

The appellant testified that she went to Checkers at Nahoon on the afternoon of 17 July 1979 to fetch what is referred to in the evidence as an "airpot" in replacement of a defective one which she had bought there previously. Earlier that day she had been to Pick 'n Pay where she bought groceries. Upon her arrival at Checkers she spoke to the supervisor, Mrs. Van Zyl, who accompanied her to the back of the shop - near the delicatessen counter - to look for the airpot. She could not find it and approached an employee, Priscilla. The ensuing

events...../7

events were testified to by the appellant as follows:

"What did Mrs. Van Zyl asked Priscilla to do?

-- She asked me to wait in that area and she would go and ask Priscilla where she had put them.

While you were waiting for Priscilla and Mrs. Van Zyl to come back, what did you decide to do? -- I saw some pears in the fruit department which I thought I would buy for my daughter who was going to Cape Town the next day and I just took them in my hand and waited for Mrs. Van Zyl to return.

Had you any intention of making any purchases from Checker's when you went into the store? -- No, because I had already done my purchasing at Pick 'n Pay.

Actually those purchases were pointed out by you when you went to the car with the security man? -- Yes, they were on the back seat.

So, your sole purpose, you say, in going to Checker's was merely to collect the airport which was going to be replaced?

-- That's right.

Did you have a basket with you? -- No.

You are quite definite about that? -- Quite definite.

If you had intended to make any purchases, would you have taken a basket with you? -- Yes, I always do.

Is it correct that these baskets are kept on the outside, in other words, before

you...../8

you get it? -- As you enter the shop?

Before you pass, the pay-counter? --  
Yes.

You take your basket and then you go past there and you collect whatever goods you require? -- That's correct.

You say you took the pears and while you were waiting did you notice anything else on display that you decided to purchase?

-- Not right at the moment. But when Mrs. Van Zyl came back with the airport for me from the back which hadn't been put out on the shelf and I said to her, would she take it to the front because I couldn't walk through the pay-till with this and they would want me to pay for it again, and it was just a replacement.

You asked her to leave it on the other side? -- She said she would leave it at the cigarette-counter for me.

And did you, besides the pears, did you decide to purchase anything else? -- Yes.

What were these? -- Rolls and cheese.

And how did you carry these things? --  
In my arm.

For what reason? -- Because I did not have a basket.

Then as you walked between the shelves, is it correct that you took a slab of chocolate?

-- Yes.

Where did you put it? -- In my pocket because I had no hands.

And did you take a little packet of chewing gum? -- Yes.

Where...../9



Where did you put that? -- In my pocket.

Is that of your uniform you were wearing?

-- That's right.

Is it correct that you took a tin of shoe polish? -- Yes.

And where did you put that? -- In my handbag.

Will you tell His Worship, first of all, in regard to the uniform, what sort of uniform is that? -- It is the hospital issue uniform, white with two pockets and a pen-pocket at the top.

Is that the uniform you wear in your work as radiographer and radiotherapist? -- Yes.

Are these pockets large pockets or not?

-- Flat pockets.

And the slab of chocolate, how did that fit into the pocket? -- It would come to the top of the pocket.

You could see the silver paper on it? -- Yes.

... the top. In other words the pocket wasn't zipped or anything? -- Not closed at all.

And this handbag that you had, what sort of handbag was it? -- It was a shoulder handbag.

Was that open or closed? -- Open.

When you took these things, did you do it openly or did you do it secretly? -- No, openly because I had no hands to hold it.

Were there any people about at the time?

-- A few shoppers.

Was it done in the view of the people around you? -- Yes.

And this security man, did you see him there? -- Yes, I noticed that he was a well-dressed man.

Do you remember how he was dressed? -- Yes.

How? -- He had on black slacks and a black and red open-neck shirt.

On her way to the tills she met a friend, Mrs. McCrosbie, and stood chatting to her for quite a time. She thereafter moved to the tills, placed the pears, rolls and cheese on the counter and directed certain enquiries about Bic razors to the cashier. She paid for the pears, rolls and cheese, received them in a plastic bag then went to the cigarette counter and received the airport. The reason why she did not pay for the chocolate, chewing gum and shoe polish was because she was "distracted by the lady at the till and Mrs. McCrosbie". But for that she would "most definitely" have paid for these articles. -- Giwu

stopped.....P/11

stopped her and asked her to produce any goods she had not paid for. She was "flabbergasted and shocked" when Giwu told her he was a security man. However she produced the chocolate and in her shocked state told an untruth viz. that she had purchased it at Pick 'n Pay. She was asked to accompany Giwu and Cooney to the manager's office. She did so but only after she placed her parcels, including the airport, in her car. In the office she was asked if she had anything else. She produced everything, including the chewing gum and polish, which she had in her handbag and pockets. Deyzel took her name and address. The police were summoned. She specifically denied that she told Cooney that she accepted that she stole the articles and that she was not in the habit of stealing.

Giwu was subjected to a thorough cross-examination during the course of which he:

(a) ~~steadfastly persisted that the appellant spontaneously~~  
produced the slab of chocolate when confronted by him

and...../12

and Cooney and that she was not asked for it or prompted to produce it;

- (b) adhered to the picture which he presented during examination-in-chief viz. that the appellant's production of the chewing gum (in the presence of Cooney and Deyssel) was reluctant and that she initially tried to create the impression that her pocket only contained a tissue;
- (c) said that he did not see the appellant take up a shopping basket but only noticed one in her possession whilst she was doing her shopping;
- (d) on two occasions stated that he could not recall the appellant denying in the office of the manager that she ever had a shopping basket in her possession;
- (e) admitted seeing the appellant speaking to Mrs. Van Zyl;
- (f) agreed that the appellant went to the cigarette counter after she left the till where she collected a parcel;
- (g) conceded that the appellant might have purchased pears,

rolls.....14/13

rolls and cheese but denied that she carried it in her hands and not in a basket;

(h) agreed that the appellant appeared to be shocked and stunned after the confrontation.

It became clear during Cooney's cross-examination that he disagreed with Giwu's evidence that he (Cooney) did not question the appellant outside the building and inside the office. Asked whether the appellant appeared shocked and stunned when she took the chocolate out of her pocket, he said: "I would say she kept rather cool about it, in my opinion. She was rather bright about it." In regard to the chewing gum he did not corroborate Giwu's version that she first only took out a tissue from her pocket but said that, when asked for it, she produced it directly. Asked whether the appellant stated in the office that she had no basket with her, Cooney replied "It is possible that she did, and it is possible that she didn't. I don't recall it, so I can't dispute it."

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Police and one of the officers that was ordered to do this

in the morning and the afternoon.

( ) and the fact that the defendant was not to be released

until after the conviction.

It would be a very serious matter if the defendant was

he also was a witness to the evidence that he (Mooney) did not

location the defendant outside the building and inside the office.

When the defendant was placed in the car, he turned around

and took the chocolate out of his pocket, and said "I would

say the defendant could shoot it, in my opinion. And was

when the defendant was in the car, in regard to the shooting, he did

not correspond with the defendant. The defendant only took out a

the defendant was in the car, in regard to the shooting, he did

when it occurred. The defendant was in the car, in regard to the shooting, he did

of the defendant was in the car, in regard to the shooting, he did

the defendant was in the car, in regard to the shooting, he did

"I am not a doctor, but I can tell you that."

.....

In the course of her evidence during cross-examination the appellant admitted that there was a supply of baskets "in the middle of the shop" near the point where the rolls were kept. Asked why she did not take a basket, she replied "I never thought about a basket. I had no intention of purchasing anything and just thought I didn't need a basket at that stage." She put the chocolate in her right pocket, the chewing gum in her left pocket and the tin of polish in her handbag because "my pockets were full." Asked to explain why she did not take out the polish when she paid for the pears and other articles she answered "I did not look in my bag. I only put my hand in for my purse. It is a large purse, I can feel it." Towards the end of the cross-examination, the magistrate raised a matter of some importance. I quote the question and answer:

"You made a mistake about the chocolate, telling him that you paid for it at Pick 'n Pay. Why didn't you take out the chocolate and tell him? 'Well, man, I took the chocolate and I realise now that I've got Nugget and

chewing...../15





chewing gum, but I forgot it in my pocket'?  
-- I don't think I had a chance. They  
just said: 'Come to the office!'

The material portion of the magistrate's judgment reads  
as follows:

"The defence called three witnesses to testify  
about the accused's good character.

From the evidence it is clear that  
Solomon Giwu is a single witness for the  
State as far as the actual theft is concerned.  
Mr. Cooney can only testify to what happened  
outside the shop, and thereafter in the office.  
It will be convenient to take his evidence  
first at this stage. He admitted under  
cross-examination that he had a lot of duties  
to attend to every day, and regarding this  
case, he did not make a statement to the  
police, or anybody. He did not expect to  
give evidence but received a 'phone call  
the previous day to come and testify. If,  
under these circumstances, there is any  
conflict in the evidence with that of  
Solomon Giwu, the court gives preference  
to that of Solomon.

Solomon is a security guard. It is  
his duty to observe the customers. He saw  
the incident. He was thoroughly cross-  
examined by Mr. Kaplan saw the accused  
enter the shop. He did not see her collect-  
ing a basket but when she selected the items

and put it in her basket he was also between the shelves pushing a trolley with things he intended to buy. The accused admits seeing him there. He saw her taking the items out of the basket and putting it in her pocket and handbag and not paying for it. This is all admitted by the accused, except for the fact that she had a basket.

Although thoroughly cross-examined by Mr. Kaplan, Solomon is adamant that the accused had a basket. He admits truthfully that he did not see her taking the basket. He could not be shaken under cross-examination and the court has no hesitation in accepting his evidence.

It is true that the court cannot fault the accused's demeanour in the witness box but she admits to telling an untruth on producing the chocolate from her pocket, for which she can give no other explanation except to say that she was in a state of shock. She can advance no reason why she did not take out the other items at the same time except that she was shocked.

It is highly improbable that a person can only take six items in a shop, pay for three and forget about the other three. The court is fully aware that the State must prove the guilt of the accused beyond a reasonable doubt and it is not necessary for the accused to prove her innocence. Furthermore, if the accused's story could be reasonably true, she is entitled to a

discharge. . . . . / 17

discharge. But the accused has three available witnesses, to wit: Mrs. Van Zyl, Priscilla and the friend she spoke to, to call to substantiate her in the fact that she did not have a basket with her, but she failed to call them.

The court rejects the accused's version, accepts the evidence of the State and FINDS THE ACCUSED GUILTY AS CHARGED."

In a careful and meticulous argument on behalf of the appellant, counsel criticised the magistrates reliance on Giwu's evidence and drew attention to certain flaws therein, to contradictions between his evidence and that of Cooney and to aspects of his evidence which, so it was contended, is "self-contradictory and wrong." It is true that Giwu's evidence is subject to legitimate criticism in several respects. Thus his statement that the chocolate was produced spontaneously and without any prompting is not only to a high degree improbable but in conflict with Cooney's version that the appellant was specifically asked to produce articles which she had not paid for. Likewise both Cooney and the appellant contradict Giwu's version

of the reluctant and hesitant manner in which the chewing gum was produced. If Giwu's evidence in this regard falls to be rejected, which the magistrate does not appear to have done, it does reveal a disturbing tendency to exaggerate the appellant's suspicious or foolish conduct beyond the limits of truth. But be that as it may, these are matters of relatively minor importance. The questions of central importance are whether the appellant admitted to Cooney that she stole the articles and whether the appellant had a shopping basket when she removed the allegedly stolen articles from the shelves. In the light of the magistrate's finding that Giwu's evidence should be preferred to that of Cooney and regard being had to Giwu's failure to corroborate Cooney in this respect, I consider it was not proved beyond reasonable doubt that she did make the admission referred to be Cooney. If the appellant did have a shopping basket, there was no need whatsoever to place any article in her pocket or handbag and such conduct

would.....5/19

would be an end of the enquiry and would constitute conclusive proof of animus furandi on her part. On the other hand, in the absence of proof beyond reasonable doubt that she had a shopping basket in her possession, her explanation might well be reasonably true. Giwu's confirmation that the appellant went to the cigarette counter after she left the till and up-lifted a parcel there, warrants a finding that the appellant's main purpose in going to Checkers was to fetch an airpot and that she had every reason to enter the shopping area without a shopping basket. But that is not an end of the matter because, once inside the shopping area, she did decide to do some shopping. In the ordinary course of events the formation of that decision would move her to take up a shopping basket - a supply of which was in her immediate vicinity. There is no room for a finding, as was contended in support of the appeal, that Giwu may bona fide have been mistaken in believing that the appellant had a shopping basket. His evidence was emphatic that on three

separate occasions an article was lifted from the shopping basket and secreted elsewhere. The positive nature of Giwu's evidence rules out any possibility of mistake: it was either true or false. The magistrate, as the trier of fact, found Giwu's evidence to be truthful. For reasons, repeatedly stated by this Court, that finding will not lightly be disturbed. Indeed the reasoning of the magistrate has not been shown to be open to serious criticism and circumstances which indicate that the magistrate erred do not lie at hand. There is no sound basis for holding that Giwu, who impressed the magistrate, lied in order to secure a conviction. The flaws in Giwu's evidence, to which I have drawn attention, are in my view overshadowed by the appellant's extraordinary conduct when, as Cooney testified, she was asked to produce any goods not paid for. She gave an untrue explanation of her possession of the slab of chocolate which can only be described as astonishing viz. that she had bought it from Pick 'n Pay. If Giwu's evidence that the appellant's explanation was entirely spontaneous be accepted, the appellant's conduct was the more remarkable.

If indeed the conversation with Mrs. McCrosbie and the cashier distracted the appellant's mind from the fact that she had taken the articles and had failed to pay the purchase price and if her failure to pay was a genuine oversight, one would have expected a person of her standing immediately to say so, to offer the true and innocent explanation and to express her regret. Indeed she compounded her foolish conduct by not forthwith disclosing her possession of the remaining two articles. It is often said that "generally speaking, the falsity of an explanation to the police, especially if given on the spur of the moment, should weigh but little in the scales against an accused." (See e.g. S. v. Letsoko and Others, 1964(4) S.A. 768 (A) at 776). But that does not apply to a case like the present where the appellant is not an ignorant person but a cultured, worldly-wise, mature and professionally qualified person. The appellant's strange conduct, outlined above, serves to strengthen Giwu's evidence and reinforces the magistrate's conclusion.

Closely.....5/22

Closely related to the appellant's abovementioned conduct is her failure, despite it having been foreshadowed twice during Giwu's cross-examination and once during that of Cooney, to testify that she told the manager (Deysel) that she never had a basket. Counsel endeavoured to explain this omission by suggesting that it may have been due to an oversight. If this is indeed the explanation, the oversight was a very serious one. For, it will be recalled, it was no part of the State case that there was any reference to a basket during the discussions after the appellant's temporary detention. If neither Giwu, Cooney nor Deysel mentioned the removal of articles from a basket (and it was not suggested during cross-examination that they did), the question arises how the appellant, unless she knew the detailed allegations against her, came to appreciate the importance of the fact that she did not possess a basket and why she would have mentioned it at all. The absence of an explanation detracts from the reliability of her testimony.



The judgment of the magistrate was subjected to the further criticism that:

- (a) he erred in criticising the appellant for failing to call Mrs. Van Zyl, Priscilla and Mrs. McCrosbie;
- (b) he failed to appreciate the relevance of the evidence of the three witnesses who testified in regard to the appellant's integrity and character.

There is no substance in (b) as it is clear from the magistrate's judgment that he did not overlook the character evidence. In regard to (a) I am of the view that the magistrate's criticism was unjustified. The identity of the persons concerned was disclosed at an early stage and they were presumably equally available to both the State and the defence. Be that as it may, I am of the view that, despite the magistrate's faulty approach, the remaining circumstances relied upon by him in convicting the appellant are sufficient to justify his conclusion.

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and of the evidence as to the fact that the defendant was not present at the time of the shooting.

It is also noted that the defendant was not present at the time of the shooting.

(c) It is also noted that the defendant was not present at the time of the shooting.

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(d) It is also noted that the defendant was not present at the time of the shooting.

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The appeal is dismissed.

*C. P. O. W. S.*

JUDGE OF APPEAL

*27. xi. 1980.*

RUMBLE, C.J.)  
TRINGOVIC, J.A.)

concur



JOAN BUCHALTER

Appellant

and

THE STATE

Respondent