THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number: 497/04

In the matter between:

ELIZABETH CHABEDI **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **BRAND, NUGENT, CLOETE JJA**

HEARD: **16 FEBRUARY 2005**

DELIVERED: **3 MARCH 2005**

Criminal appeal – based on defects in record of proceedings in trial court. Defects in record – not of such a nature as to prevent the proper consideration of the appeal – appeal against conviction on this ground accordingly dismissed. Sentence of R600 fine for shoplifting found to be excessive in circumstances – substituted with fine of R300 suspended for three years.

JUDGMENT

BRAND JA/

BRAND JA:

[1] This appeal has its origin in the Magistrates' Court for the district of Roodepoort. The appellant was charged with a form of theft colloquially known as shoplifting in that she allegedly stole two roll-on deodorants with a joint value of R15,78 from the Highgate Pick 'n Pay. Despite her plea of not guilty, she was convicted as charged and sentenced to a fine of R600 with an alternative of three months imprisonment.

[2] Her appeal to the Johannesburg High Court against both conviction and sentence was dismissed by Fleming DJP (Satchwell J concurring). The further appeal to this court, again directed against both conviction and sentence, is with the leave of the court *a quo* (Satchwell J and Shakenovsky AJ).

[3] At the hearing of the matter in this court there was no appearance for the State, though heads of argument were duly filed on its behalf. The reason for this rather unusual state of affairs, so we were told, was that the advocate in the office of the Johannesburg Director of Public Prosecutions who had been instructed to represent the State, did not receive any notice of the date on which the appeal would be heard. It appears, however,

that a registered letter containing such notice had been sent to the office of the Director of Public Prosecutions in Johannesburg by the registrar of this court in accordance with the provisions of rule 13 and it was not returned. In addition, we were informed that the appellant, who is unemployed, had travelled from Johannesburg at her own expense to attend the hearing of her appeal and that she was anxious that the matter should be finalised. In these circumstances we held that the State's request for a postponement, conveyed to us by telephone, should be refused.

[4] Though the appellant conducted her own defence before the magistrate, she was represented by counsel both in this court and in the court *a quo.* Whilst different counsel appeared for her in this court, he essentially adopted the same line of attack as his predecessor in the court *a quo.* This line of attack was concerned more with the condition of the record of the proceedings in the trial court than with the merits of the appellant's conviction by that court.

[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to

the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see eg *S v Collier* 1976 (2) SA 378 (C) 379A-D and *S v S* 1995 (2) SACR 420 (T) 423b-f).

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia,* on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.

[7] As to the defects in the record under consideration, it appears that, though the proceedings were recorded mechanically, the magistrate's microphone was not in proper working order. In consequence, questions and comments by the magistrate during the course of the hearing were on occasion transcribed as 'inaudible'. As can be expected, the 'inaudibles' became more prevalent in the transcript of the trial court's judgments, both on conviction and sentence, with the result that significant parts of

these judgments are simply incomprehensible. However, because the other microphones in the court appear to have been operational, the content of the few 'inaudibles' in the transcript of the evidence – as opposed to the judgments – can without difficulty be ascertained by inference.

[8] The next enquiry relates to the nature of the issues to be decided on appeal. For purposes of this enquiry, I revert to the facts. The State rested its case on the testimony of a single witness, Ms Louisa Pretorius. She is a store detective who was on duty on the Friday in question at the High Gate Pick 'n Pay. According to her evidence she saw the appellant who was pushing her trolley between the aisles in the supermarket. Pretorius found the appellant's behaviour suspicious because she kept looking around. She therefore observed the appellant more closely. She saw the appellant taking the two deodorants involved from the shelf. At first she put them in her trolley, but then, as she kept moving between the aisles, she took them out of the trolley and slipped them into her handbag. Thereafter, Pretorius testified, the appellant carried on with her shopping. Eventually she went to the check-out counter where she paid for the items in her trolley, but not for the two deodorants in her handbag. Pretorius therefore

confronted her as she was leaving the supermarket. When Pretorius asked the appellant's permission to search her handbag, she became aggressive. Consequently, Pretorius took her to the security office inside the supermarket where the handbag was searched and the two deodorants found. Thereafter, Pretorius testified, the appellant said she was sorry and offered to pay for them.

[9] Save for admitting that the two deodorants involved were found in her handbag and that they originated from the supermarket in question, Pretorius's version was denied by the appellant in all material aspects. More particularly, the appellant denied that she took the two deodorants from the supermarket on the Friday. She bought them, she said, in that same store on the preceding Thursday. As to how these two unused deodorants happened to be in her handbag on the Friday, the appellant's explanation, in short, was the following. After she came home on the Thursday, the appellant said, she placed one of the deodorants in her handbag because she always kept a deodorant with her. Later on her daughter asked for a deodorant and the appellant gave her the other one. Unfortunately the daughter left that one on a dressing table in the appellant's bedroom. The appellant then,

according to her, must inadvertently have put the deodorant that she gave to her daughter in her handbag as well. The appellant's daughter was called as a witness for the defence to corroborate her mother's version insofar as it fell within her knowledge.

[10] Despite the appellant being represented by counsel a document styled 'supplementary heads of argument' was filed in this court, which had obviously been prepared by the appellant herself. Parts of the document amounted to no more than an elaboration on the arguments raised by counsel. Other parts of the document, however, were clearly aimed at the introduction of new factual allegations which had not been raised either in the trial court or in the court *a quo*. These allegations fall into one of two broad categories. The first category comprised allegations that the record of the proceedings had been falsified by interposing stammering and the repetition of words into the transcript of the appellant's own evidence so as to create the impression that she was unintelligent or did not have a proper command of the English language. The second category consisted of allegations that the employees of the supermarket in question, including Pretorius, were part of some conspiracy or vendetta against the appellant.

[11] On Pretorius's version the appellant was undoubtedly guilty of theft. The crux of the enquiry is therefore whether the appellant's denial of Pretorius's version could reasonably possibly be true. In the circumstances, the outcome of that enquiry is in turn dependent on the question whether, in the light of all the evidence, the appellant's explanation as to how the two deodorants came to be in her handbag at the time when it was searched, could reasonably possibly be true.

[12] If the appellant's explanation were true, it would necessarily need to follow that on that particular day when the appellant fortuitously happened to be in possession of two deodorants which she had bought in the same shop on the previous day, the shop detective chose her from amongst all the numerous customers in the shop as the target for a trumped-up charge of the theft of two deodorants from that store. Even on the acceptance of the appellant's vague and unsubstantiated speculation of victimisation by the employees of the supermarket against her, the question remains how the shop detective could be favoured with such good fortune that she fortuitously brought a trumped-up charge on the very day that the appellant coincidentally happened to be in possession of two items originating from that very supermarket.

The appellant's explanation is so improbable that it cannot reasonably possibly be true.

[13] The contention on behalf of appellant that the shortcomings in the record rendered a proper consideration of the appeal impossible, was based on the submission that we are dependent on the magistrate's judgment on conviction to assess his evaluation of the evidence. I do not agree with this submission. As indicated the matter can, in my view, be decided on the inherent probabilities which can in turn be determined on the record as it stands. If the magistrate based any credibility findings on the demeanour of the respective witnesses, those findings could, in the circumstances, only have been adverse to the appellant. Logic therefore dictates that the appellant could suffer no prejudice through this court's lack of knowledge whether demeanour findings were indeed made by the trial court.

[14] The same can be said about the allegations in the appellant's supplementary heads of argument, to the effect that the record had been falsified to make her look unintelligent or unable to speak proper English. Even if these untested and highly improbable allegations about the falsification of the record were to be accepted at face value, the outcome would be the same. The

appellant's version falls to be rejected not because she appears unintelligent or because of any deficiencies in her use of English. Her explanation is rejected because it is so inherently improbable that it cannot reasonably possibly be true. In these circumstances the appeal against the conviction cannot succeed.

[15] That brings me to the appeal against the sentence of the R600 fine which was imposed by the magistrate. It appears that, at the time of the trial, the appellant was 47 years of age and a first offender; that she was unemployed and that, although she held a university degree in psychology, she had difficulty in finding a job, particularly, so she said, because of the conviction for theft which now appeared on her record. It also appears that, although the appellant had no income, she accepted responsibility for members of her extended family. In these circumstances, a fine of R600 was, in my view, so inappropriate that it should be set aside and a more appropriate sentence substituted on appeal.

[16] For these reasons:

(a) The appeal against conviction is dismissed.

(b) The appeal against sentence is upheld.

(c) The sentence imposed by the magistrate is set aside and substituted with the following:

'The accused is sentenced to a fine of R300 or in default of payment to one month imprisonment, all suspended for a period of three years on condition that she is not convicted of the crime of theft committed during the period of suspension.'

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F D J BRAND
JUDGE OF APPEAL

Concur:

NUGENT JA
CLOETE JA