



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 74/2009
No precedential significance

HARRY NKWANE RIBA

Appellant

and

THE STATE

Respondent

Neutral citation: *Riba v State* (74/2009)[2009] ZASCA 111 (23 September 2009)

Coram: Mthiyane, Mhlantla JJA and Wallis AJA

Heard: 11 September 2009

Delivered: 23 September 2009

Summary: Theft — a policeman and his colleague allegedly retained suspected stolen goods — failed to enter them in SAP 13 register and to keep in a store — goods entered in the register two days later after complaint by suspect — whether intention to steal established.

Appeal against sentence dismissed but 4 years imprisonment imposed by High Court antedated to 1 November 2008, to take into account the appellant's earlier incarceration of ten and a half months prior to hearing of appeal before High Court.

ORDER

On appeal from: Transvaal Provincial Division (Du Plessis J & Davel AJ sitting as court of appeal.)

- 1 The appeal against conviction and sentence is dismissed.
- 2 The sentence of 4 years imprisonment is antedated to 1 November 2008.

JUDGMENT

MTHIYANE JA (MHLANTLA JA and WALLIS AJA concurring):

[1] The appellant, a police inspector and his colleague, a reserve constable, were arraigned in a regional court in Mamelodi on charges of corruption, in contravention of s 1(b)(ii) of the now repealed Corruption Act 94 of 1992, and theft. They were convicted as charged and sentenced to 15 years' imprisonment, both counts taken as one for purposes of sentence.

[2] Their appeal to the High Court (Du Plessis J and Davel AJ concurring) succeeded in part. Consequently the conviction and sentence on the charge of corruption was set aside but the conviction for the theft was confirmed and a sentence of 4 years' imprisonment was imposed on both the appellant and his colleague. The appellant, was granted leave by the High Court (Botha J and Du Plessis J) to appeal to this court against both conviction and sentence. No appeal was lodged by the appellant's co-accused.

[3] The facts relevant to the theft charge are the following. On 8 September 2001 the appellant and his colleague were on patrol duty in Mamelodi. In the course of that morning they went to the residence of the complainant, Mr Johannes Mapoba, who was renting a room in Mamelodi. After the complainant had given them permission to do so, they searched his room and found a mini hi-fi set and 80 CD's (compact audio discs). The police asked the complainant for receipts for the above goods but he was unable to produce them. The CD's did not belong to him but to a Mr Neville Shirinda and receipts for the hi-fi set, which was the only item that belonged to him, had been lost as he had bought it a long time ago.

[4] The goods were then seized by the police allegedly on the suspicion that they had been stolen and the complainant was asked to accompany them. His evidence was that he understood that he was being arrested, but the evidence of the appellant and his co-accused was that they found a firearm in his possession and no licence was produced so that they decided to arrest him for possession of an unlicensed firearm. Be that as it may the complainant produced his firearm licence whilst in the police van so any detention for that reason fell away. What happened immediately thereafter is relevant to the charge of corruption and is referred to herein solely for the sake of completeness. While the complainant was in the police van an amount of R400 was allegedly demanded from him. He testified that he had no money on him but indicated that his uncle, Mr Frank Maleka, might be able to help. He was then taken to his uncle in Groenkloof who provided the required cash. Upon their return the police dropped him off at a certain suburb in Pretoria, without being charged. The evidence of the appellant and his co-accused was that they took the complainant with them because he said

that he would take them to his uncle who owned the goods, but the uncle was not at the place where they were taken so they left the complainant there and gave the person they found there their contact details with a message for the uncle to contact them. The goods seized from the complainant were then taken to a satellite police station in Mamelodi where the appellant and his colleague handed them over to Inspector Tlobatla, who kept them in a locker where police officers kept their personal belongings.

[5] On the following day, 9 September 2001, the complainant went to Mamelodi police station to lay a complaint concerning the seized items. A docket was duly opened and the case was assigned to Captain Nwamati Phillenion Morudi (then an Inspector). His first port of call was the appellant and his colleague, as his initial investigation revealed that they were the officers who had taken the complainant's goods and they had failed to enter them in the SAP 13 register and keep them in the store. Goods seized from suspects were, as a standard police procedure, entered in the SAP 13 register and kept in a store at the main police station in Mamelodi. The satellite station did not keep an SAP 13 register and had no store for that purpose.

[6] On the morning of 10 September Captain Morudi tried to contact the appellant and his colleague, but found that they were doing night duty. Morudi then left a message at the station that he was looking for them. They received the captain's message at 20h00 and went to his house at 22h00. After they left his house and in the early hours of 11 September they fetched the goods from the satellite station and took them to the main station in Mamelodi. They handed them to Inspector Nkombi who was in charge of the SAP 13 register and the store. Nkombi entered

the goods in the register and recorded that they had been found abandoned in the street. Thereafter, according to Nkombi, the appellant appended his signature to the note in two places separated by Nkombi's own notes. It bears mention, however, that while the entry in the Occurrence Book (OB) shows that the goods were booked in the early hours (04h50) on 11 September the entry in the SAP 13 register reflects the date as 10 September. This apparent conflict does not, however, detract from the fact that the goods were only booked two days after they were taken from the complainant.

[7] The issue for decision in this appeal is whether the appellant (and his colleague) intended to steal the goods in question. The answer to that question depends upon the assessment of the evidence as a whole, the drawing of inferences from the proven facts and the subsequent conduct of the appellant and his colleague and, more importantly, what was said by the appellant and his colleague to Inspector Tlobatla, Captain Morudi and Inspector Nkombi at the relevant times.

[8] There are strong indications in the evidence, which point irrefutably to the conclusion that when the appellant and his colleague took the complainant's goods to the satellite station and left them there, they intended to appropriate them.

[9] First, there is a complete absence of any convincing explanation why the goods were taken to the satellite station and not to the Mamelodi Police Station, where they would have been entered in the SAP 13 register and kept in a store with the other exhibits and goods seized from suspects. The appellant and his colleague, who were both experienced members of the police, must have known that no SAP 13 register was

kept at the satellite station and that there was no store there to keep such goods. When they left them at the satellite station they knew they had not been booked or placed in an authorised store.

[10] Second, when the goods were handed to Inspector Tlobatla he was told by the appellant and his colleague that they belonged to them. No mention was made of the fact that the goods were seized from a suspect. In his evidence Tlobatla was adamant that if he had known that the goods had been seized from a suspect he would not have agreed to keep them, but would have asked the appellant and his colleague to take them to the main station in Mamelodi. There, they would have been entered in the SAP 13 register and kept in a store, normally reserved for exhibits and goods seized from suspects. It is significant the Tlobatla was called as a witness for the defence and yet when he said this no attempt was made to challenge the evidence or his recollection.

[11] The explanation given by the appellant and his colleague for not taking the goods to Mamelodi Police station is far from convincing, as I have already indicated. They advance two reasons for their failure to take the goods to the main police station. The first is that they were extremely busy on both the 8th and the 9th and could not find time to have the goods entered in the SAP 13. As they were in a hurry to attend to another complaint they dropped the goods off at the satellite station. Their intention throughout was to fetch the goods subsequently and to have them properly entered into the SAP 13 register. This sudden spate of complaints, which the appellant and his colleague found themselves embroiled in, is not backed up by any proof. The bald allegation not supported by any note of such complaints in the occurrence book carries very little weight, if any. The appellant and his colleague were using a

police van on that day. There is no reason why they could not have driven quickly to the police station to drop off the goods at the main station. The second excuse, that they were looking for the owner of the goods whom they failed to trace at Waterkloof, where the complainant had directed them, is a weak point. It is not surprising that it was not pressed by counsel during argument.

[12] The appellant said that when they received Captain Morudi's message on 10 September they were not told why they had to contact him. They went to his home but he did not tell them why he was looking for them. Instead, Morudi asked them to meet him at the office the next morning. The appellant said it is only after they had seen Morudi that they, for the first time, found time to fetch the goods from the satellite station and to take them to the main station. Again, while they were there, the appellant and his colleague received an urgent complaint and could not wait for Nkombi to complete the SAP 13 register. Accordingly, the appellant says he signed the register in blank and left it to Nkombi to complete the entry. The appellant and his colleague said that they told Nkombi that they had seized the goods and were waiting for the owner to identify them.

[13] The appellant and his colleague's version raises more questions than answers. It is not clear why Nkombi would not record on the SAP 13 where or from whom the goods were seized, if he had been told this. There is also no explanation why he would record that the goods had been found abandoned in the street if he was told otherwise and given the name of the person from whom they had been seized. Nkombi was adamant that what he recorded is what he was told by the appellant and his colleague.

[14] Third, and finally, there is the question of the night visit to Captain Morudi's house. Morudi testified that he left a message that he was looking for the appellant and his colleague in connection with the goods they had seized. So, when they came to his home during the night of 10 September they knew why he was looking for them and Morudi further said they told him that they had registered the goods in the SAP 13 register and that the goods were in the store.

[15] Having regard to the above salient facts it is difficult to come to any conclusion other than that the appellant and his colleague had not intended to enter the goods in the SAP 13 register. The reason why the goods were ultimately booked in and registered in the SAP 13, is probably because the word had spread to the appellant and his colleague that Captain Morudi was now investigating the matter. The game was up. The goods were eventually booked some two days later to cover up their failed attempt to appropriate them. When their scheme went awry they resorted to concocting a story that the goods had been found abandoned in the street. The appellant endeavoured to explain away the entry and to refute Nkombi's version by saying that he had left a piece of paper with Nkombi in which he gave him the name and address of the complainant. This was an equally poor effort to sustain an inherently improbable tale.

[16] There is, however, one further aspect the appellant is not able to explain. How did his signature come to be appended in the SAP 13 register below a note to the effect that the goods were found abandoned in the street? The appellant tried to meet this hurdle by saying that he had signed the SAP 13 in blank and left it to Nkombi to complete. This, coming from a policeman of many years standing has only to be stated to be rejected. He was in other words giving Nkombi a *carte blanche* to

write whatever he liked. In addition he was unable to explain how he managed to sign his name twice and leave exactly the right amount of space between the two for Nkombi to insert whatever he was going to invent for that purpose. This story, to my mind, is so bereft of any truth that it can safely be rejected as false beyond reasonable doubt.

[17] In my view the conclusion is inescapable that Nkombi recorded what he was told by the appellant and his colleague, namely that the goods were found abandoned on the side of the road. That story is undoubtedly false and inconsistent with the appellant and his co-accused acting honestly in relation to these goods.

[18] The above factors taken together point unavoidably to one conclusion, namely that the appellant and his colleague intended to appropriate the goods and that they left them at the satellite police station with the intention permanently to deprive the complainant of his rights therein. This court has held that:

‘[t]heft, in substance, consists of the unlawful and intentional appropriation of the property of another (*S v Visagie* 1991 (1) SA 177 (A) at 181I). The intent to steal (*animus furandi*) is present where a person (1) intentionally effects an appropriation (2) intending to deprive the owner permanently of his property or control over his property, (3) knowing that the property is capable of being stolen, (4) knowing that he is acting unlawfully in taking it (*Milton South African Criminal Law and Procedure* vol II 3rd ed at 616).’ (*S v Boesak* 2000 (1) SACR 633 (SCA) at para 97.)

Having regard to the above principles, I am satisfied that on the evidence, when the appellant and his colleague heard that Morudi was looking for them in connection with the goods they had seized, they attempted to cover their tracks by entering them in the SAP 13 at the main police station and furnishing Nkombi with a false explanation for the possession of the goods. Accordingly the intention to steal was clearly established

and the appellant was correctly convicted of the theft of the goods seized from the complainant.

[19] The appeal against sentence is without merit. The only point advanced in argument in this regard is that the court below misdirected itself by failing to have regard to the fact that the appellant would lose his job if a custodial sentence were imposed. The argument is misconceived. This aspect was fully considered by Du Plessis J. In the course of his judgment the learned judge says:

‘He [referring to the appellant] had served in the police force for a substantial period and it is important to have regard thereto that, if he is sentenced to direct imprisonment he will probably lose his job.’

It surely cannot be clearer than that.

[20] It is however proper to have regard to the fact that this matter has been outstanding for a long time and that the appellant was at some point in custody for some ten and a half months (30/11/06 – 19/10/07) before he was released on bail pending the appeal in the High Court. Through its sentencing discretion a court is empowered to ameliorate any possible sentencing anomalies that may arise in the imposition of punishment. On appeal this court is empowered under s 282 of the Criminal Procedure Act 51 of 1977, to ameliorate the negative effect of the delay in finalising the matter and the severity of the ultimate punishment which might occur, if the appellant’s earlier incarceration of ten and a half months prior to his appeal in the High Court, were not taken into account.

[21] Having regard to all of the above factors a sentence of 4 years imprisonment antedated to 1 November 2008 would, in my view, be appropriate.

[22] In the result the following order is made.

1. The appeal against conviction and sentence is dismissed.
2. The sentence of 4 years imprisonment is antedated to 1 November 2008.

KK MTHIYANE
JUDGE OF APPEAL

Appearances:

For Appellant: L Kok

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