



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

REPORTABLE/NOT REPORTABLE

Case No: CA&R 49/2021

In the matter between:

KEVIN KASCHULA

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

ELLIS AJ:

INTRODUCTION

[1] The appellant was charged with theft in that during the period 1994 to 2015 and at or near Nedbank, Oxford Street, East London, in the Regional Division of the Eastern Cape, the appellant unlawfully and intentionally stole about 480 gold Kruger coins, to the value of R7 200 000.00, the property of Mr E V Krull or in the lawful possession of Nedbank, Oxford Street, East London, and/or its employees.

[2] The appellant was convicted as charged¹ on 12 April 2019 and sentenced to eight years' imprisonment on 2 August 2019. The appellant was released on parole on 30 June 2020.

[3] This appeal lies against the appellant's conviction, the necessary leave having been granted to him on application to this court, after his application for leave to appeal was refused by the Regional Court.

GROUND OF APPEAL

[4] The grounds of appeal raised by the appellant in his amended notice of appeal are, in summary, that the magistrate misdirected himself in convicting the appellant of having stolen "about" 480 Kruger coins; that there were various material misdirections in the analysis and consideration of the evidence; the magistrate failed to apply the rules of evidence which apply to the assessment of circumstantial evidence; the magistrate failed to set out the proved facts from which it was inferred that the

¹ The magistrate made no specific finding with regard to the number of gold coins which the appellant stole, hence it is accepted that the appellant was convicted as charged.

appellant stole the Kruger coins in question; the magistrate erred by not finding that the evidence adduced by the State does not exclude the reasonable possibility that someone other than the appellant stole the Kruger coins; and that the only reasonable inference to be drawn from the proved facts was not that the appellant stole the coins, which the claimant claims were stolen.

THE STATE'S EVIDENCE AT TRIAL

[5] The State adduced the evidence of nine witnesses at the trial. None of the witnesses gave evidence directly incriminating the appellant in the theft. On appeal, Mr Jaftha on behalf of the State, conceded that the appellant was convicted on a "*strong suspicion*".

[6] I summarise the evidence having a bearing on the outcome of this appeal below.

[7] The complainant, Mr Elvin Victor Krull ("Krull Snr") was 82 years of age at the time of the trial. He testified that around 1994 he decided to invest in gold Kruger coins ("Kruger coins") and bought about 300 odd Kruger coins. He never counted his Kruger coins and the 300 odd coins were acquired over a period of time. He decided that there were too many coins to keep in his office strongroom and decided to rent a safety deposit box in the vault at Nedbank, Oxford Street, East London ("the bank"). He rented safety deposit box 9B from the bank on 30 March 1994. He approached the bank manager at the time, Mr Moeller ("Moeller"), who suggested that Nedbank can assist him in the further purchase of Kruger coins. Krull Snr instructed the bank to

purchase Kruger coins on his behalf and over the course of approximately one year Nedbank acquired 400 Kruger coins on his behalf. At the time, the appellant was employed by the bank in the forex department. Krull Snr did not collect the coins every month from Moeller to place in his safety deposit box and he let the coins accumulate. He used to go to the Nedbank vault to add to his collection of coins on random occasions and he owned a blackish/dark green steel first aid box with handles on either side ("the first aid box") that he utilised for storage of the Kruger coins within the safety deposit box 9B. He visited box 9B at the bank five or six times, the last time being some twenty years ago. He did not keep stock of the Kruger coins held in the safety deposit box and to his mind the total number of Kruger coins in box 9B was over 700.

[8] Krull Snr testified that the last time he recalled handling the first aid box was in 1995/1996 when he went there with a Mr Allan Kringlan and added six coins, which he had purchased from Mr Kringlan, in box 9B. The next time that he opened box 9B was on 19 May 2015, after his 80th birthday, when he wanted to show his children how many Kruger Rands he had accumulated over the years and where he kept them. As Krull Snr had, at some point, lost his key for box 9B he took a locksmith with him to assist with the opening thereof. On 19 May 2015 Krull Snr and his son, Frank Felix Krull ("Krull Jnr") went to the vault at the bank with the locksmith, together with two female employees of the bank. The locksmith opened box 9B on his instructions and Krull Snr discovered his first aid box was missing from inside the locker and had been replaced with a smaller, brown petty cash box ("the petty cash box"). The petty cash box was filled with Kruger coins to the top. He instructed Krull Jnr to count the coins, which he did. They found 320 coins in the petty cash box. According to Krull Snr there were between 300 to 400 coins missing. There was also a handwritten note, dated

and signed by his late wife in the petty cash box, reflecting “*current contents 320 Kruger Rands*” dated 17 July 1995. He recalled his wife writing the note inside the vault. He cannot recall whether the coins were in the first aid box or the petty cash box on 17 July 1995 but stated that the note must have reflected the amount of coins that they had in that particular box at the time. After discovery of the missing coins, he handed the matter over to his son, Krull Jnr, who contacted the appellant enquiring about the missing Kruger coins and various letters were exchanged between Krull Jnr and the appellant. A couple of days later, the appellant advised Krull Jnr that from previous emails he established that there is a second safety deposit box, box number 26 in the appellant’s name, that was utilised to hold coins on behalf of Krull Snr pending the handover. On 27 May 2015 the Krulls went back to the vault and safety deposit 26 was opened to reveal a further 80 Kruger coins in their original packaging. The appellant handed the 80 Kruger coins to Krull Snr and said that this now accounts for all Krull Snr’s coins purchased by the bank. Krull Snr could not recall whether the appellant ever informed him that he opened a second safety deposit box for purposes of holding coins pending the handover, in his name.

[9] Jonathan Michael Howe (“Howe”) a locksmith, testified that on 19 May 2015 he attended the bank at the request of the Krulls where he opened Krull Snr’s safety box 9B by drilling a hole in it and picking the lock. He noticed two pre-existing holes in box 9B which had been plugged with steel bolts, and further noticed other safety deposit boxes in the vault that were similarly drilled and plugged.

[10] Krull Jnr testified that on 19 May 2015 they went to the bank with a locksmith for purposes of opening safety deposit box 9B. Box 9B contained the petty cash box,

filled to the brim with Kruger coins and a handwritten note by his late mother, stating “*current contents 320 Kruger coins*” dated 17 July 1995. On 22 May 2015 the appellant emailed him and confirmed the existence of safety deposit box 26, in the appellant’s name, which the appellant alleges he held pending the handover of coins to Krull Snr. On 27 May 2015, safety deposit box 26 was opened and found to contain 80 Kruger coins in their original packaging, which was handed to Krull Snr by the appellant.

[11] The State also called Moeller, the branch manager of the bank in 1995, who testified that Krull Snr rented safety deposit box 9B from the bank and instructed him to purchase Kruger coins on an *ad hoc* basis on his behalf. Moeller never had insight into the content of Krull Snr’s box 9B and was not aware of excess coins other than the coins purchased by the bank. Moeller further testified that there ought to have been a record of every time a client accesses his safety deposit box and could not explain why the only two access files missing in respect of the safety deposit boxes are those of Krull Snr (in respect of box 9B) and the appellant (in respect of box 26). The safety deposit box rental contract is renewed automatically, and the holder debited annually. He further testified that it would be highly irregular for the coins to be deposited into a staff member’s personal safety deposit locker. He further denied that he ever gave an instruction that the coins be kept in the appellant’s name.

EVIDENCE BY DEFENCE

[12] The appellant testified in his own defence and called no further witnesses. The appellant testified that he did not steal the 480 coins referred to in the charge sheet. He was employed from 1994 by Nedbank and in that same year Nedbank started

purchasing Kruger Rands on behalf of Krull Snr. He was involved in the purchases of the coins in his capacity as supervisor in foreign exchange and he was initially instructed by Moeller to purchase coins on an *ad hoc* basis for Krull Snr. The appellant recollected that on occasions after he purchased coins on behalf of Krull Snr, he handed them over to Krull Snr in the vault. He was not involved in all handovers, but the handovers would have been channelled through his department. The Kruger coins were purchased in batches of twenties and forties, and he accounted to Krull Snr in writing regarding such purchases. The total number of Kruger coins purchased on behalf of Krull Snr was 400. When the bank started buying the Kruger coins for Krull Snr, the bank utilised a petty cash box to hold the coins in their undercounter safe in the appellant's department, pending handover of the coins to Krull Snr. The appellant was not aware that Krull Snr was in possession of other Kruger coins. He testified further that in all probability he would have taken the petty cash box from the undercounter safe in his department to Moeller's office, with another staff member, for handover. This practice ceased and subsequent handing overs were from an unallocated box in the vault, which was safety deposit box 26. Later, box number 26 was allocated to the appellant at the instance of the responsible official. Initially the appellant's account number was recorded on the contract in respect of box 26 but he requested the bank to change it to Krull Snr's account number, as the Kruger coins in box 26 did not belong to him. When the appellant signed the contract for box number 26 on 2 June 1995, the box was empty, and Krull Snr accumulated a further 80 coins after that. The appellant did not notice from his own account that his account was debited for annual fees in respect of box 26, as it was a nominal annual amount. Krull Snr closed his accounts with Nedbank at some stage and at the appellant's insistence

Krull Snr returned as a client of Nedbank in 2010, at which time the appellant was no longer working in the forex department.

[13] The appellant testified that Krull Snr called him in 2015 and informed him about the discovery of the missing Kruger coins. The appellant then made an enquiry as to a safety deposit box in his own name and it was confirmed that safety deposit box 26 was in fact in his name. He found the key to box 26 in his old briefcase, and he was unaware of the contents of box 26. Arrangements were made and box 26 was then opened in the presence of several people on 27 May 2015 and found to contain 80 Kruger coins in their original packaging, which were then handed over to Krull Snr. He testified that he probably did say to Krull Snr that he now has all his coins because the 320 in Krull Snr's box 9B plus the 80 from box 26 equalled the 400 Kruger coins which the bank had recorded to have purchased on behalf of Krull Snr.

EVALUATION OF THE EVIDENCE BY THE MAGISTRATE

[14] For all intents and purposes Krull Snr is to be considered a single witness in respect of the existence and quantity of Kruger coins acquired prior to instructing the bank to purchase Kruger coins on his behalf, and prior to opening safety deposit box 9B with the bank in March 1994. In this regard the cautionary principle applies.

[15] The evidence of the appellant was not without contradictions. A version was put to Krull Snr that it was Moeller who said a box should be opened. Once that version was refuted by Moeller, the appellant's story changed. He stated that it was not Moeller

but the controller of safe custody who gave the instruction. Although he was aware of the box in his name when it was opened, later in his evidence, he stated that:

“MR BENCE : And what did you do regarding that – the safe-the box that was in your name?

ACCUSED : I then made an inquiry if there was a locker in that – in there in my name and they came back to me to confirm that yes there was. I then searched and found the key in my old briefcase.”

[16] This evidence was contrary to the appellant’s evidence that he knew about the existence of the box in his name. Having said that those contradictions do not place a burden on the accused person to prove anything. It is the duty of the State to prove its case beyond reasonable doubt.

[17] The State adduced no direct evidence which proves that the appellant stole the coins and the State’s case against the appellant rested entirely on circumstantial evidence. The approach therefore which the court *a quo* needed to adopt in assessing circumstantial evidence was to be as follows.

[18] A conviction can be based on circumstantial evidence. Where the evidence against an accused is purely circumstantial, before a court a convict, it must apply the two rules of logic referred to in R v Blom²:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be

² 1939 AD 188 at 202 – 203.

drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”

[19] An inference of guilt can only be drawn from facts which have been objectively established and due allowance must be made for the reasons why the accused may have been a mendacious witness or dishonestly denied certain facts. In S v Mtsweni³ the court said:

“In the present case there is no direct evidence that links the accused with any attack on the deceased. His guilt or innocence must be determined in light of the circumstantial evidence and the inferences which are justified on the proved facts. Inference must be distinguished from speculation and must be based on properly proved objective facts. The comments of Lord Wright in Caswell v Powell Duffryn Associated Collieries Limited were quoted with approval in S v Essack and Another are apposite:

‘Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are not positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.’”

(Footnotes omitted)

³ [1985] 3 All SA 344 (A) at 345 – 346; 1985 (1) SA 590 A; 593 D – 594 G.

[20] Glaringly absent in the judgment of the court *a quo* is how the circumstantial evidence was assessed, and which objective facts were found to be proved to justify the inferences drawn. Also absent, is how the court *a quo* considered the proved facts to be such that every other reasonable inference can be excluded.

APPEALS AGAINST CONVICTIONS: APPLICABLE PRINCIPLES

[21] The question on appeal regarding the appellant's conviction is ultimately whether the evidence in the trial is sufficient to prove the guilt of the appellant beyond a reasonable doubt; this being the State's burden of proof. In this regard, Plasket J (as he then was) in S v T⁴ held that:

"The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. The high standard of proof – universally required in civilised systems of criminal justice – is a core component of the fundamental right that every person enjoys under the constitution, and under the common law prior to 1994 to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he/she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have a bitter experience of such a system and where it leads to."

⁴ 2005 (2) SACR 318 (E) at para 37.

[22] In S v Zuma⁵ the aforesaid principles were restated as follows:

“The presumption of innocence is infringed whenever the accused is liable to be convicted, despite the existence of a reasonable doubt.”

[23] In summary, S v Van der Meyden⁶ emphasizes that while the onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt, the corollary is that an accused is entitled to be acquitted if it is reasonably possible that the accused might be innocent.

[24] The question, otherwise cast, is therefore whether, at the end of the trial, the evidence presented at the trial is, as a whole, sufficient to ground the conviction of the appellant. As adopted and affirmed by the Supreme Court of Appeal in S v Van Aswegen⁷ the evidence in the trial as a whole must be considered. The overall picture is therefore of central importance. It is also critical to remember that an appeal court is not a trier of fact at first instance; that is the function of the trial court.

[25] The fundamental principle on the evaluation of evidence on appeal is that an appeal court will not be inclined to disturb the findings by the trial court on the evaluation of evidence. This is borne by the fact that it is difficult to surpass the advantage of seeing and hearing witnesses. The appeal court will only interfere if there was a clear misdirection, and the findings of the trial court are declared

⁵ [1995] ZACC 1; 1995 (1) SACR 568 (CC) at paras 25 and 33.

⁶ 1999 (1) SACR 447 (W) at 448 F – G.

⁷ 2001 (2) SACR 97 (SCA).

erroneous⁸. This was reiterated by the Supreme Court of Appeal in AM and Another v MEC Health, Western Cape⁹, where the court stated the following:

‘Such findings are only overturned if there is a clear misdirection or the trial court’s findings are clearly erroneous. That has constantly been the approach of this court and the Constitutional Court as reflected recently in the following passage from *ST v CT*:

“In *Makate v Vodacom (Pty) Ltd* the Constitutional Court, in reaffirming the trite principle outlined in *Dhlumayo*, quoted the following dictum of Lord Wright in *Powell & Wife v Streatham Nursing Home*:

Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or he has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case”.

DISCUSSION

[26] The question ultimately to be answered in this appeal is whether the evidence adduced at the trial as a whole was sufficient to prove the guilt of the appellant beyond a reasonable doubt or whether the conviction was based on suspicion. To draw the inference that the appellant stole 480 of Krull Snr’s Kruger coins from safety deposit box 26, it must be consistent with properly proved objective facts.

⁸ R v Dhlumayo 1948 (2) SA 677 (A)

⁹ (1258/2018) [2020] ZASCA 89

[27] The evidence by Krull Snr was unsatisfactory in various respects, not least of which was the uncertainty in respect of the initial quantity of Kruger coins; which holding box was in the vault when he attended the vault with his wife in July 1995 , namely, the first aid box or the petty cash box; and why his wife would write a note stating the total Kruger coins to be 320 if this was not the quantity contained therein on 17 July 1995. It remained unexplained why no records existed of access to safety deposit box 9B and safety deposit box 26, with not a hint of proved facts pointing to the appellant potentially tampering therewith. None of the other eight State witnesses were able to support Krull Snr's version with direct evidence, beyond reasonable doubt, that the appellant was the perpetrator of the crime in question. The appellant's exculpatory version at least raises reasonable doubt. This is exacerbated by the fact that the existence and quantity of Krull Snr's initial Kruger coins were not established and by convicting the appellant of theft of about 480 coins will bring the total Kruger coins then found to be owned by Krull Snr, in excess of 800, which was never his version to begin with.

[28] The magistrate did not apply the rules of evidence which apply to the assessment of circumstantial evidence with the result that there were no positive proved facts from which the inference can be made that the appellant was the perpetrator of the crime. All that is left, is speculation or conjecture, which the court in S v Mtsweni condemns. For reason of the foregoing, the conviction by the magistrate cannot stand and the appeal must succeed.

[29] As aforementioned this appeal relates to the conviction only. It is trite that once a conviction has been set aside the sentence which resulted therefrom cannot stand.

Accordingly, I make the following Order:

ORDER

1. The appeal against conviction is upheld.
2. The order of the Regional Magistrate is set aside and is replaced with the following order:

“The accused is found Not Guilty and discharged.”

L ELLIS

ACTING JUDGE OF THE HIGH COURT

NORMAN J: I agree.

TV NORMAN

JUDGE OF THE HIGH COURT

Appearances:

For the appellant:

Mr P Daubermann

For the respondent:

Adv JW Jaftha
Director of Public Prosecutions

Date heard:

26 July 2023

Date delivered:

07 September 2023