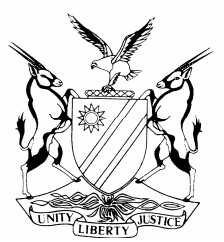

CASE NO. CA 201/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHRISLY MPAHLENI **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **DAMASEB JP** *et* **MANYARARA AJ**

Heard on: 02 June 2008
Delivered on: 18 June 2008

APPEAL JUDGMENT

DAMASEB JP: [1] The appellant (who is out on bail pending appeal) was accused 2 in the Court *a quo* where he was charged with the crime of theft from Nampost - together with one Anna Louw who was an employee

of Nampost at the time the alleged offence was committed. Louw was accused 1 in the court below. The duo was charged together with a third person who was accused 3. The appellant conducted his own defence in the court below. Anna Louw was accused of faking a robbery by two persons who, she reported to her superior (Rosa Beukes) and to the police, surprised her and made off with a substantial amount of cash (N$9000), prepaid MTC cell phone cards (tango cards), telecards and flexi call cards - valued at N$15 000. The State alleged and led evidence to the effect that, having first sent off the security guard on duty on an errand, Anna Louw took the items aforesaid from Nampost and gave them to the appellant and thereafter reported a robbery.

[2] That the property of Nampost was stolen is not in doubt. After hearing the evidence, the learned magistrate came to the conclusion that the appellant and Louw colluded to steal from Nampost. The learned magistrate, after evaluating the prosecution case and the evidence of the accused persons, concluded that the only reasonable inference the Court could draw was "that this incident was a planned action between accused 1 and accused 2".

[3] It is that conclusion which is at the heart of the appeal on the conviction. The appellant had pleaded not guilty when the charge was put to him and in his plea explanation said he did not steal from

Nampost. The first witness for the State was Rosa Beukes who at the time was the Post Master at Swakopmund in the employ of Nampost. It was she that Louw called and reported the robbery to. Beukes later had some of the stolen property returned to her by the police: the only cash retrieved (N$ 3210) was paid into the bank and the call- cards were sold by Nampost.

[4] The second witness was Clarence Ndinda, a police officer. Ndinda recovered the stolen property from the home of one Sheteekela in Mondesa after he received information from one Smith. When Ndinda went to that place he went with Sheteekela and Smith. The appellant was not present when the stolen property was recovered at Sheetekela's home. Ndinda there found a Woerman Brock plastic shopping back wherein was found the stolen Nampost property. The party then returned to the police station and during interrogation the appellant offered to Ndinda to call accused 3 who was also charged but discharged at the end of the State's case. The appellant then called accused 3 in Ndinda's presence. At this point Ndinda's evidence is recorded as follows:

> "So when Accused no. 2 called Accused no. 3. I was listening to his conversation, whereby Accused no 3 said the cash must be three thousand (N$3 000-00) something. He didn't give a specific amount. He just said, three thousand (N$3 000- something and that Accused no. 2 must deposit his share into his bank account."

[5] When the appellant cross-examined Ndinda the following exchange took place (at record p64 – p65):

> "Q. Now, Sergeant Ndinda, you have stated that you collected these items from Shitekela's house. When you left the Police Station in order to collect these items, who accompanied you?
> A. --- Smith and Shitekela.
> Q. And where was I at that stage?
> A. --- We left you at the Police Station.
> Q. And the other question, did you say that I argued with Accused no. 1 regarding the amount of money that was involved?
> A --- No, I didn't say you argue. I said Accused no. 1 said that's not all of the cash which was supposed to be there.
> Q. When she said that, when she said it's not all the money that was given or handed over, did I argue against that?
> A. --- No, all what you say was, "Let me phone Accused no. 3 to verify.
> Q. I can't phone Accused No. 3 if he wasn't there.
> Q. How do he know how much money was (inaudible)
> COURT: Do you have any other questions?
> ACCUSED NO. 2: No further questions, Your Worship."

[6] No assistance was given to the appellant by the magistrate to elicit more information by way of cross-examination and to clarify to clarify his last statement.

[7] The main link between Louw and the appellant was the evidence of one Stephanus David Smith. Smith's evidence was that accused 3 (since discharged in terms of s 174 of the CPA) gave the number of the appellant to Louw before he (accused 3) left Swakopmund for Windhoek. On the day of the theft Smith was in the company of the appellant in the city of Swakopmund. According to Smith, on appellant's suggestion they

went to Nandos' food store for a meal. While they were there, he testified, appellant was "called" by Louw. It is not clear how he was called.

The record records:

> "Accused no. 1 called Accused no. 2 and said, "Come, just give me five minutes and then you can come and pick up this package and hold it for me until I close the shop. I will call you and come and pick it up." Then Chrisley said, "I am busy eating." Then the lady said, "Now who is that with you?" Then Chrisley said, "It's my friend from Windhoek." And the lady said, "Okay, give him the phone." Then she told me, "Come over the street and come and take this plastic bag and give it to Chrisley." Then I asked her, "Which shop?" Then she was waving like this.
> Q. Now where did you get the plastic bag?
> A. When I came across the road she came back to the car and then I gave it to Chrisley.
> Q. Which shop?
> A. There at Woerman and Brock, next to Woerman & Brock."

[8] Clearly, the appellant was lying when he said he was not at the scene. But it should be borne in mind that false evidence by an accused is not decisive of guilt (as to which see *S v Engelbrecht* 1993 Nr 154; S v M 2006 (1) SACR 135). The critical question in my view is whether the State proved that the appellant was aware that what he received from Louw, via Smith, was the stolen property of Nampost or that he had planned with Louw to steal from her employer Smith made clear he had no idea what was the content of the bag he carried. He said that when he received the bag from Louw it was "closed, wrapped up …it was closed, it was big." According to Smith, after he handed the bag to the appellant

they went to the location and left the bag on a wardrobe in Sheetekela's house and went to Walvis Bay to watch football.

[9] The following evidence of Smith (at record p 79) is very crucial in my view:

> "Q. Now at the time when you went to collect this parcel where was Accused no. 3?
> A. He was not present, he was in Windhoek.
> Q. On that specific day?
> A.Yes, on that Sunday.
> Q.Now what did he tell Accused no. 2 before he left?
> A. That he should pick, he should help the lady to collect the parcel and that if he get something from the lady, he must like let him know to give him also something, if there is something.
> Q.Could you please just clarify that? What did he tell Accused no. 2 concerning this parcel?
> A. **No, he didn't, I don't, he didn't tell him anything of what's the parcel actually about or so."**

He continued (at record p 80):

> "Q. When you went to collect the parcel?
> A. Oh, Accused no. 3 and called Accused no. 2 and said, "Did you went to collect the parcel?" Then he said, "Yes."
> Q. No, I am asking, now while you were at the scene who phoned for you to go and collect the parcel?
> A. Accused no. 1 called Accused no. 2 to say, "Come and collect." Then Accused no. 2 said, "No, bring it to the car." Then Accused no. 1 said, "No, the security" or something like that. Then Accused no. 2 said, "No, I'm waiting here." Then the Accused no. 1 asked, "Who is that that is with you?" Then he said, "It's my friend, he's from Windhoek, he's appearing on Monday here." Then she said, "Give him the phone." Then she told me, "Come, please come. My name is Anna, please come and come and collect this package and come and give it to Chrisley."

[10] Smith testified that he was able to hear the conversation because accused 2's cellphone was malfunctioning and had to be put on

loudspeaker. Under cross examination on behalf of Louw, Smith said the following about this event (at record p 98):

> "Q.Would you say that there was reluctance from the second Accused to go and collect that parcel?
> A. reluctance?
> Q. Do you know what the word means?
> A. No.
> Q. Was he afraid? Was he a bit reserved to go and collect the parcel?
> A. Ja, because he said that if he goes, he is going to Court on Monday and if he has been seen around there by those securities, they will think again he want to grab somebody's thing or ATM card or something like that, because the people know him there.
> Q. So, he actually said to you, "Listen, I am not very popular with the security fraternity. Go and collect that parcel please." That's more or less what he told you?
> A. Yes."

[11] In my view this does not show that the appellant knew or suspected what was contained in the parcel received from Louw. All it shows is that he did not want to be seen by the security officers because they might suspect he was there to rob people in view of an earlier brush with the law.

[12] When asked about the appellant's reaction when he met up with Louw at the police station Smith said (at record p104):

> "Q.What did Accused 2 say about this whole events? What did he say?
> A. Come again?
> Q. Accused 2, what did he say about these events hat has taken place now? — No, he was just asking Accused no. 1, '' What were you thinking what were you doing?" Then Accused no. 1 was just in tears."

[13] The appellant cross-examined Smith as follows (pp108-109):

> "Q. Now Mr Smith, actually I just want to ask you, at the time that you went to go and pick up the package did I tell you to hide it or something like that?
> A. No
> Q. And during the time that I had telephone calls with my co-Accused persons, did I talk about stealing anything or was there any sort of thing, any sort of theft?
> A. No, negative."

[14] I have set out the passages from the evidence to show lack of proof of the appellant's knowledge of the contents of the parcel received from Louw by smith, or lack of proof of the appellant's prior arrangement with Louw to steal from her employer.

[15] Significantly, when accused 3 was given the opportunity to cross-examine Smith, he said he agreed with everything Smith said (record p 109). (We should remember that accused 3 is the person who was discharged in terms of s 174, yet Smith's evidence points to accused 3 having had knowledge about Louw's intended nefarious activities.) It is incomprehensible in view of Smith's evidence and his acceptance of that evidence, that accused 3 was discharged at the end of the State's case.

[16] The appellant testified on his own behalf. He testified that he was asked by accused 3 to help Louw, and his number was given to Louw by accused 3. He testified that he was asked by Louw to come and fetch

something from her but he told her that the arrangement was for her to bring it. On cross examination he denied receiving the bag from Smith and said the latter took it to Sheetekela's home. He denied knowledge of the contents of the bag. When asked if he suspected there was money and cards in the bag, he said that if he knew what was in the bag he would have stolen it. The appellant testified that he was in the central business district at the time to deal in drugs with foreigners. He also said that Louw had said to him that she would send the security away so that he could come and fetch the plastic bag from her. He testified thatfrom that he got the impression that he must hide himself. That suggests that the appellant must have come to the realisation that Louw was engaged in something untoward. The appellant's admission that he would readily have stolen the contents of the bag if he knew what it was, and his admission that he was engaged in criminal activities at the time, show him to be a man with no compunction to commit crime. I do not think, however, that the only inference that can be drawn from the above is that he had, as found by the Court below, colluded with Louw to steal from her employer - if regard is had to the fact that he refused to go and fetch the bag from Louw and denied in his evidence that he ever handled the bag after Smith had received it from Louw. In any event, the appellant had no obligation to prove his innocence and the State bore the *onus* to prove his guilt beyond reasonable doubt.

[17] The appellant testified that the first time that he saw what was in the bag was when the police opened it at the police station. Smith corroborates the appellant in that regard. Smith's version was that he received the plastic bag from Louw and handed it over to the appellant. He then accompanied the appellant to the home of Sheteekela where they left the bag and went to Walvis Bay to watch football. When Sheteekela testified, he stated that it was Smith who brought the plastic bag to his home. That corroborates the appellant.

[18] It is clear from the record that the magistrate in the Court below did not warn the appellant of his right to remain silent and not to testify in his own defence at the end of the State's case. As it happens, the evidence which suggests that the appellant might have known something was amiss came from his own mouth when he testified. Had he been informed of his right not to testify and been informed of the flaws in the State's case before he could testify, he may very well have decided not to testify and I cannot see as the State's case stood at the time, how any reasonable court, properly directing itself, could have convicted the appellant of colluding with Louw to steal from Nampost.

[19] I entertain more than a reasonable doubt that the prosecution proved the case against the appellant beyond reasonable doubt. I do not share the magistrate's view that the only reasonable inference that could

be drawn on the proven facts (see *R v Blom* 1939 AD 188 at 202-2-3) is that the appellant had colluded with Louw to steal from Nampost. He is therefore entitled to his acquittal.

[20] In the result:

The appeal succeeds and both the conviction and sentence are set aside.

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DAMASEB, JP

I agree

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MANYARARA, AJ

ON BEHALF OF THE APPELLANTS:	**Ms M Jankie-Shakwa**
Instructed By:	Sisa Namandje & Co
ON BEHALF OF THE RESPONDENT:	**Ms H F Jacobs**
Instructed By:	Office of the Prosecutor-General