IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 2008-05-16

UNREPORTABLE

Case Number: A1790/2002

In the matter between:

ELIAS MORUTI TSHOANE Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] On 19 June 2002 the appellant and his two co-accused, Lesodi Dolphy Mapulane (accused no 2) and Mosupetjane Frans Rameetse (accused no 3) were found guilty of robbery with aggravating circumstances and each sentenced to 15 years imprisonment in accordance with section 51 of Act 105 of 1997. In addition the second accused was found guilty of contravening section 2 of Act 75 of 1969 (unlawful possession of a 9

mm Norinco pistol) and contravening section 36 of Act 75 of 1969 (unlawful possession of three rounds of 9 mm ammunition). The second accused was sentenced to three years imprisonment for the contraventions of sections 2 and 36 of Act 75 of 1969, both counts being taken together for purposes of sentence. The appellant and accused no 3 appealed against their convictions and sentences. On 23 June 2003 accused no 3's appeal was dismissed. On 13 November 2006 the full bench (Legodi and Molopa JJ) referred the appellant's appeal to the full court.

[2] On appeal, the appellant's counsel contends that the appellant was wrongly convicted because there was no evidence that indicates that he robbed the complainant, that the complainant could not identify the attackers because it was dark and that the appellant gave an explanation for the paraffin stove found at his house: i.e. he purchased it from his co-accused for R30. The appellant's counsel submits that the regional magistrate should have convicted the appellant of receiving stolen property knowing it to be stolen and that this court should now do so and impose an appropriate sentence.

[3] The robbery and the use of the firearm were not in dispute. The complainant, David Sebotuma, testified that in the early hours of 23 March 2002 he arrived home from Johannesburg. He got off the bus

and started walking home. He was wearing a jacket and had money in his pockets and was carrying three bags. One of the bags contained washing powder, one of the bags contained clothes and shoes for his children and the third bag contained a new paraffin stove and plates. The complainant was also carrying the Sowetan newspaper which he had bought in Johannesburg and meat which was wrapped in plastic as well as some bars of soap. He had bought these at the Score supermarket. The soap still had the Score labels on it. The complainant was walking in the darkness when he became aware of people following him. When he looked around a shot was fired. The complainant started to run and a second shot was fired. The complainant tripped and fell and a third shot was fired. Four men surrounded him and demanded money. They searched him and took R220 from his shirt pocket and R10 from his trouser pocket. They also took his identity document, his jacket and the three bags and made off. It was too dark to see their faces or recognise them. There was nothing the complainant could do and he went home to sleep.

[4] The evidence linking the appellant to the robbery is also not in dispute. According to the complainant he woke at 5 am and he and his wife went back to the scene of the robbery. They found the complainant's jacket and the bag containing the washing powder. They also found tracks made by soccer boots. They followed the tracks to the house of

the appellant where they found him cleaning the yard. They asked him whether there was anyone at the house who wore soccer boots. The appellant said no. They wanted to search the appellant's house but he would not allow this without the police. The complainant telephoned the police and when they arrived the appellant had left the house and gone to his grandmother's house. The complainant and the police followed him there. The police confronted the appellant about the soccer boots and he took them to another house where the police were handed boots. The police compared the soccer boots with the tracks but they did not match. The police then insisted on searching the appellant's house where he lived alone. In one bedroom they found a soccer boot under a mattress and in another bedroom the other boot also under a mattress. The soles of these soccer boots matched the tracks leading to the house. The police then wanted to search a cupboard but it was locked and the appellant could not or would not provide the key. A key was found and the cupboard opened. Inside the cupboard the police found a brand new paraffin stove and soap which the complainant identified as his property. The complainant identified the stove because of its colour and because it was new. He identified the soap by the label of the Score supermarket where he had purchased it.

[5] The appellant then took the police and the complainant to accused no

2's house where they searched his bedroom. Underneath the mattress of his bed the police found a Sowetan newspaper, meat wrapped in plastic and a firearm. The complainant identified both the Sowetan newspaper and the meat as his property. In the kitchen the policemen found soap which the complainant identified as his property. The appellant then took them to a second house but the person they were looking for was not home. The police searched the bedroom but found nothing. The appellant then took the police to a third house where accused no 3 lives. The police searched his bedroom but did not find any of the complainant's property. Later, accused no 3 took the police to the football stadium where he pointed out the bag containing the clothes and shoes bought by the complainant for his wife and children.

[6] The appellant's cross-examination confirmed what happened at his house as testified by the complainant. He confirmed the discovery of the soccer boots and the complainant's property in the cupboard. He professed to be surprised that they found the items in his house.

[7] The evidence of the two policemen, Inspector Matlou and Inspector Matlala, confirmed that the appellant's house was searched, the goods found and that the complainant identified the goods as his property. They also confirmed finding the other stolen property in the possession of accused no 2 and at the stadium after it was pointed out by accused

no 3.

[8] There was no direct evidence that the appellant committed the robbery. To prove the appellant's guilt the state relied on inferences to be drawn from the circumstantial evidence. This evidence consisted of the facts relating to how the complainant and the police were led to the houses of the appellant and his co-accused and the fact that the property of the complainant was found there and at the football stadium. In ***S v Mtsweni*** **1985 (1) SA 590 (A)** at 593E-G the court emphasised that inferences must be distinguished from speculation and must be based on properly proved objective facts. At 593F-G the court referred with approval to the following passage from the judgment in ***Caswell v Powell Duffryn Associated Collieries Ltd*** **[1939] 3 All ER 722** at 733 –

> '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 no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

The court also emphasised at 593H-I that for the purposes of determining guilt in a criminal case inferences must be drawn in accordance with the logical instructions in ***R v Blom*** **1939 AD 188** at 202-3:

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

[9] In the present case the state relies on the fact that shortly after the robbery, some 6 hours afterwards, the appellant was found in possession of some of the stolen property. Unless satisfactorily explained the recent possession of stolen property will usually be decisive in establishing the guilt of the accused – see ***R v Mandele*** **1929 CPD 96** at 98; ***S v Rama*** **1966 (2) SA 395 (A)** at 400; ***S v Parrow*** **1973 (1) SA 603 (A)** at 604B-E.

[10] In the present case the complainant was robbed by four men at about 1h30 on 23 March 2002. A few hours later the complainant returned to the scene of the crime and found tracks made by soccer boots. He

followed the tracks to the appellant's house where soccer boots were found which matched the tracks at the scene of the crime and which led to the appellant's house. At the house where the appellant lived alone the stolen paraffin stove and soap were found. The appellant was not able to explain satisfactorily, or at all, how the boots and stolen items came to be in his house.

[11] The appellant's explanation that he purchased the stolen items from his co-accused was rightly rejected by the regional magistrate. It is so inherently improbable that it simply cannot be believed. Insofar as it suggests that the appellant was innocent the regional magistrate rightly did not accept this. The appellant's behaviour showed that he knew about the crime and who had committed it. The appellant clearly was not innocent. He had the soccer boots which matched the tracks hidden under the mattresses but did not immediately disclose them to the police. He was uncooperative about assisting the police to open the cupboard where the stolen items were. When they were found all he could do was express surprise. He was then able to take the police to the houses of three other young men, including accused no 2 and accused no 3, after warning the police that they should be careful about accused no 2 because he had a firearm. At the house of accused no 2 the police found other items of stolen property as well as the firearm. Accused no 3 later pointed out the rest of the stolen

property. The only reasonable explanation for the appellant's knowledge of the other young men and their possession of the firearm and the stolen property is that he was part of the group which attacked and robbed the complainant.

[12] The appeal against conviction therefore cannot succeed.

[13] It is not contended that the regional magistrate erred in imposing the minimum sentence of 15 years imprisonment because there were substantial and compelling circumstances present which justified the imposition of a lesser sentence. The appeal against sentence also cannot succeed.

[14] The appeal against conviction and sentence is dismissed.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

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M.W. MSIMEKI

JUDGE OF THE HIGH COURT

I agree

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T.M. MAKGOKA

ACTING JUDGE OF THE HIGH COURT

CASE NO: A1790/2002

HEARD ON: 14 May 2008

FOR THE APPELLANT: ADV. N.W. SEABI

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. C. PRUIS

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 16 May 2008