IN ~~THE NORTH GAUTENG HIGH~~ COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE : YES/NO
(2) OF INTEREST TO OTHER JUDGES : ~~YES/NO~~
(3) REVISED

DATE 22-2-12 SIGNATURE

Date: 2012-02-22

Case Number: A75/12

In the matter between:

MATTHEW TSHEPO MOSEHLA Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] On 21 May 2010 the appellant was found guilty of housebreaking with intent to steal and theft (of 31 chairs belonging to the International Pentacostal Church) in the Nebo magistrates' court and on the same day was sentenced to 3 years imprisonment. In addition, a suspended sentence of 2 years imprisonment was put into operation which means that the appellant is presently serving a sentence of 5 years imprisonment. With the leave of the court, granted on petition, the appellant appeals against both his conviction and sentence.

[2] The appellant was not represented in the court *a quo* and acts in person in this appeal. Despite arrangements having been made to bring the appellant to court he did not appear. Nevertheless the court decided to dispose of the matter in the exercise of its review powers in terms of section 304(4) of Act 51 of 1977.

[3] There was no evidence that the appellant broke into the church of the International Pentacostal Church and stole the chairs. The state obviously relied on the appellant's recent possession of the chairs (although this was not referred to in the judgment). It is clear that a court must exercise caution in applying the so-called doctrine of recent possession where the stolen property could easily change hands – 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 and ***S v Skweyiya* 1984 (4) SA 712 (A)** at 175C-G.

[4] The presiding magistrate was obliged to ensure that the appellant received a fair trial. Where an accused is unrepresented this places an additional burden on the presiding judicial officer. In ***S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO* 1989 (3) SA 368 (E)** the full court dealt comprehensively with the role of a judicial officer at the trial of an undefended accused and the manner in which he must act to ensure that justice is done. For present purposes the following rules are relevant:

(1) 'Before the accused is called upon to plead the presiding judicial officer is obliged to examine the charge-sheet, ascertain whether the essential elements of the alleged offence(s) have been averred with reasonable clarity and certainty and then give the accused an adequate and readily intelligible exposition of the charge(s) against him. (377E-F);

(2) 'Again, where it is competent for a court to convict an accused of an offence other than the one alleged in the charge-sheet a judicial officer may be obliged to inform an undefended accused of the competent verdict – e.g. where an undefended accused is charged with theft or with housebreaking with intent to steal and theft the presiding judicial officer should explain to the accused the competent verdicts, viz that he may convicted of contravening s 36 or s 37 of Act 62 of 1955 or of contravening s 1 of Act 50 of 1956 unless the contravention is an alternative charge or the prosecutor indicates that the state's case is restricted to the offence/s alleged in the charge sheet.' (377H-J);

(3) 'At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights – the right to cross-examination, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of sentence – and in comprehensible language to explain to him the purpose and significance of his rights.' (378A-B);

(4) 'During the state case a presiding judicial officer is at times obliged to assist a floundering undefended accused in his defence. Where an undefended accused

experiences difficulty in cross-examination the presiding judicial officer is required to assist him in (a) formulating his question, (b) clarifying the issues and (c) properly putting his defence to the state witnesses.' (378C-D);

(5) 'The judicial officer should assist an undefended accused whenever he needs assistance in the presentation of his case and should protect him from being cross-examined unfairly.' (378J-379A).

[5] As pointed out in ***S v Raphatle*** **1995 (2) SACR 452 (T)** at 456-457 it is of the utmost importance that the presiding magistrate explain to the accused his right to cross-examine and how this should be done. The failure to do so will be a gross departure from the established rules of procedure and result in a failure of justice (457c-d). In ***S v Tyebela*** **1989 (2) SA 22 (A)** at 32A the court explained how this should be done:

> 'Furthermore, when the first state witness had finished his evidence-in-chief, there should have been an explanation to the appellant and his co-accused as to their right to cross-examine and some indication as to how they should conduct a cross-examination and that it was their duty to put to the state witnesses any points on which they did not agree with the state witnesses, and to put their version to the state witnesses. This was not done until a later stage and then only in a rough and summary manner as appears from what follows.'

This must appear from the record – see ***S v Daniels en 'n Ander*** **1983 (3) SA 275 (A)** at 299G-H.

[6] It is clear from the record that the presiding magistrate did not explain to the appellant the purpose of cross-examination or how he should conduct a cross-examination. The appellant is obviously not conversant with the rules of procedure and did not question the witnesses in any manner resembling cross-examination. Apart from this failure, the presiding magistrate failed to assist the appellant in regard to other procedural rights. He did not properly explain the competent verdicts. He did not ensure that any inadmissible evidence was excluded. A great deal of hearsay evidence and evidence of statements made by the accused (which included evidence of admissions and even a confession by the appellant) was allowed and clearly must have influenced the court's view of the case. All of this evidence was extremely prejudicial to the appellant. The presiding magistrate also did not ascertain the basis of the appellant's defence and was therefore not able to assist the appellant in presenting his defence.

[7] In granting the appellant's petition for leave to appeal this court observed that there was no direct evidence linking the appellant to the housebreaking and theft, that although the appellant's possession of the stolen property was recent this was not referred to and that another court may find that the appellant was wrongly convicted and should have been convicted on another competent count. As already pointed out the court *a quo* did not properly explain the competent verdicts.

This meant that the appellant stood trial without knowing what charges he was facing. Apart from that the court *a quo* did not consider what inference should be drawn from the appellant's possession of the chairs and it cannot be found that the chairs are not items which would easily and quickly change hands.

[7] Whether or not the appellant was found in possession of stolen property the appellant did not receive a fair trial and his conviction and sentence must be set aside.

[8] As already mentioned the presiding magistrate also brought into operation a suspended sentence of two years imprisonment (apparently imposed on 7 August 2007 in case number 150/2006). The presiding magistrate appears to have done this *mero motu* as the record (apart from the J15) is silent in this regard. The state's advocate correctly observes that the manner in which the court *a quo* put the suspended sentence into operation was highly irregular and flawed. ***Hiemstra's Criminal Procedure*** **by A Kruger** states (at 28-28) that the procedure of putting into effect a suspended sentence is a fully-fledged judicial process and an unrepresented accused has to be fully informed about its nature, his rights during the proceedings, and the orders which are competent. It is a mandatory prerequisite that the accused be given an opportunity to make representations against the putting into operation of the suspended sentence – see ***S v Van Straaten*** **1971 (4) SA 487 (N)** at 488B and ***S v Payachee*** **1973 (4) SA**

534 (MC) at 536A. There is no doubt that the procedure is not a mere formality and requires as much consideration and judicial discretion as the imposition of sentence. Clearly this did not happen in the present case.

[10] The difficulty which arises in the present case is that the appellant has been in prison since 21 May 2010 and has served one year and nine months and should receive the benefit of that time served. If the putting into effect of the sentence is reviewed and set aside, as it should be, the appellant will not receive this benefit. The state advocate has pointed out that when exercising its review powers in terms of section 304(4) this court is empowered by section 304(2)(c)(vi) to make any order as to the court seems likely to promote the ends of justice and that the court should direct that the period of one year and nine months imprisonment served by the appellant between 21 May 2010 and 22 February 2012 (when this judgment is handed down) is one year and nine months of the sentence imposed on 7 August 2007 in case number 150/2006 but which was suspended. When sentencing the appellant the court *a quo* could have ordered in accordance with section 280(2) of Act 51 of 1977 that the suspended sentence which it (wrongly) put into operation be served first. This suggestion accords with the reasoning behind section 282 of Act 51 of 1977 and I am in agreement that the order would promote the ends of justice.

[11] The following order is made:

I In the exercise of the court's review powers in terms of section 304(4) read with section 304(2)(c)(vi) of Act 51 of 1977:

(i) the conviction and sentence for housebreaking with intent to steal and theft on 21 May 2010 are reviewed and set aside;

(ii) the putting into operation of the suspended sentence of two years imprisonment imposed on 7 August 2007 in case number 150/2006 by the Nebo magistrates' court on 21 May 2010 is reviewed and set aside;

(iii) it is directed in terms of section 304(2)(c)(vi) of Act 51 of 1977 that the period of one year and nine months imprisonment served by the appellant, Matthew Tshepo Mosehla, from 21 May 2010 to 22 February 2012, was partial service of the sentence of two years imprisonment wrongly brought into operation by the Nebo magistrates' court on 21 May 2010;

II The registrar is requested and directed to send a copy of this judgment with the order to Major General T.J.V. Khunou, Head of the SAPS Criminal Record and Crime Scene Management, Private BagX308, Pretoria, 0001, so that the criminal record of

Matthew Tshepo Mosehla is amended in accordance with the judgment and order to reflect that he has served one year and nine months of the suspended sentence.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

S.A.M. BAQWA
ACTING JUDGE OF THE HIGH COURT

CASE NO: A75/12

HEARD ON: 20 February 2012

FOR THE APPELLANT: NO APPEARANCE

FOR THE RESPONDENT: ADV. J.J. KOTZE

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 22 February 2012