IN THE HIGH COURT OF KWAZULU-NATAL, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

REPORTABLE

Case no:AR387/12

In the matter between:

SICELO THWALA APPELLANT

And

THE STATE RESPONDENT

APPEAL JUDGMENT

MADONDO J

[1] This is an appeal against the conviction of the Appellant on the charges of robbery with aggravating circumstances and murder by Van Zÿl J on the evidence which was largely circumstantial. The counts of robbery and murder against the Appellant had arisen from the robbery and murder incident which occurred on 19 March 2011.

[2] Rasel was operating a shop from a converted garage attached to the home of Soneni Buthelezi at Ekuvukeni area, Ladysmith. On 19 March 2011 Rasel and Soneni Buthelezi , the complainant in the robbery count, were robbed of cash, a DVD player, decoder and cell phone by a gang of five young men, and during the course of such robbery Rasel, the deceased, was shot and killed.

[3] On 1 May 2011 acting on the information given to them by the complainant, Captain Buthelezi and Constable Mntambo, both stationed at Ekuvukeni Police Station, arrested Linda Home Thwala who was accused 1 in the court a *quo.*

[4] Following the information the police officials had received after the arrest of the said Linda Thwala, they proceeded to the homestead of one Zama Thwala. On their arrival there Captain Buthelezi and Constable Mntambo did not find Zama at home. However, inside the room they found the Appellant and a young child. On enquiring about the whereabouts of Zama ThwalaAppellant told them that Zama had left shortly before their arrival.

[5] Captain Buthelezi then rushed outside to see if he could locate and apprehend Zama. At that juncture the Appellant attempted to escape but Constable Mntambo grabbed him. Whilst outside, Captain Buthelezi heard the noise of a scuffle inside the room. The Appellant and Constable Mntambo wrestled until they came outside the room. Captain Buthelezi came to the assistance of Constable Mntambo and they both managed to subdue and handcuff the appellant. On searching the Appellant Captain Buthelezi found a .38 special revolver from the back pocket of his pair of trousers, containing one live round of ammunition. The firearm had its serial number filed off.

[6] During the scuffle three cellular phones fell from the person of the Appellant. One of those cellphones, a Samsung, was subsequently identified by the complainant as her property. The firearm was ballistically linked to the murder of the deceased. The Appellant did not offer any explanation as to how he came in possession of both the firearm and the cellphone or either of them.

[7] Subsequently, the Appellant was together with Linda Home Thwala arraigned before the Circuit High Court sitting at Madadeni on the charges of robbery with aggravating circumstances, murder, and unlawful possession of a firearm and ammunition. Linda Thwala was accused 1 and the Appellant accused 2.

[8] Only accused 1 was directly identified by the complainant as having participated in the commission of the crimes of robbery and murder. The Appellant was convicted of the crimes of robbery with aggravating circumstances and murder on the basis of circumstantial evidence and sentenced to effective twenty (20) years' imprisonment. In addition, he was also convicted of unlawful possession of a firearm and ammunition and sentenced to fifteen (15) years' imprisonment which was ordered to run concurrently with the sentence in the robbery count. However, the latter conviction is not the subject of this appeal and, therefore, nothing turns on it.

[9] From the fact that the Appellant had been found in possession of a firearm, the murder weapon, and the cell phone (Samsung) which was removed from the possession of the complainant during the course of robbery coupled with the combination that both those items had a connection with the robbery and murder, the learned Judge inferred that the Appellant participated in the commission of the crimes of robbery and murder.

[10] Ms Khuzwayo for the Appellant has argued that the nature of the items involved in this case should be considered. These days both cellphones and firearms change hands easily and she accordingly submitted that in itself possession of such items could not mean that the Appellant participated in the commission of the crimes of robbery and murder.

[11] She argued, further, that the fact that the Appellant was found in possession of the firearm and cell phone a month and half after the robbery and murder incident could not provide sufficient proof of the Appellant's participation in the commission of robbery and murder, and hence that it could not be the only inference which could be drawn in the circumstances to the exclusion of any other reasonable inference. In support of her

submissions she referred us to the cases of Madonsela v The State 2012(2) SACR 456 and S v Blom 1939 AD188.

[12] In addition, Ms Khuzwayo argued that the identification of the cell phone by the complainant was not satisfactory to such an extent that it could point to the Applicant as the culprit in the crimes of robbery and murder. The complainant failed to give identifying features of the cell phone, as there was no serial number, she only identified it by its model and by wear and that it had scratches. This, in Ms Khuzwayo submission, could not provide sufficient proof of identity.

[13] The Appellant was convicted of armed robbery and murder on the basis that he had been found in possession of a firearm, the murder weapon and the cell phone removed during the course of robbery. This court is now asked to decide whether such conviction was in accordance with justice. However, before addressing such a question one has to deal with the contention that the cellphone was not sufficiently identified as the property of the complainant. In addition to the description of the cellphone which the complainant had earlier on given in the trial court (Samsung, wear and scratches) she also stated that her cellphone did not have a battery cover, and that the battery cover was at her home. Such evidence was not challenged, and there was nothing to show that the cell phone which was then before court had a battery cover on it. Without much ado, in my view, the complainant sufficiently identified the cellphone in question as her property.

[14] Circumstantial evidence may furnish proof both of the commission of the crime and of the person who committed it. See Wills on Circumstantial Evidence, 7th Edition at p343. The conduct of the accused in relation to the property cannot be disregarded. See R v Burton (1854) 6 Cox C.C 293. In R v Tshabalala and others 1942 TPD 27 at p. 30, the court

held that when the property is proven to have been stolen, the accused's conduct and the absence of explanation or the giving of a false explanation in relation to such property are relevant to the question whether his possession was innocent or guilty – they constitute circumstantial evidence from which an inference of guilt may be drawn.

[15] In cases of this nature inferential reasoning method, commonly described as the "doctrine" of recent possession of stolen goods applies. The doctrine of recent possession, evolved from decided cases under common law, is simply a common sense observation on the proof of facts by reference. See South African Criminal Law and Procedure, vol 2, by Hunt at p611.

[16] On the application of the doctrine of recent possession in *S v Parrow 1973(1) SA 603(A) 604 B-C* Holmes JA said the following:

> "On proof of possession by the accused of recently stolen property, the court may (not must) convict him of theft in the absence of an innocent explanation which must reasonably be true. This is an epigrammatic way of saying that the court should think its way through the totality of the facts of each particular case and must acquit the accused unless it can infer, as the only inference, that he stole the property."

See also S v Letoba 1993(2) SACR 615(O).

[17] It is a requirement that the goods must have been recently stolen. The nature of the stolen article is an important element in the determination of what is recent. See R v Mandele 1929 CPD 96 at 98; R v Morgan 1961(2) SA 377(T) at 378B-D.

[18] In R v Maseko reported in Justice Summary 5 of 1943, Broome J said:

> "…. Whether in any particular case the possession may be said to be recent depends upon the nature of the property stolen and upon all the circumstances of the case. If the property is such that it would ordinarily change hands rapidly, a very short period only would suffice. If the property is not of a negotiable character, the period would be longer. Furthermore, the class of person to which the possessor belongs must also be taken into account. It is impossible to lay down precise rules, and even the giving of examples may be dangerous. Suffice it to say that the important point is not the number of hours or days that have

> elapsed between the theft and possession, but the gravity of the suspicion which the possession, in the circumstances, raises against the possessor."

[19] Whether property can be regarded as "recently" stolen or not is a question of fact and the court in S v Rama 1966(2) SA 395 (A) at 400 said that:

> "The court has accordingly to ask itself, is the article one which could easily pass from hand to hand, and the lapse of time so short as to the probability that this particular article has not yet passed out of the hands of the original thief."

[20] In S v Rama, *supra*, two cases containing 189 watches were stolen. Within 14 days thereafter the appellant was found in possession of two of the stolen watches. In concluding that the trial court could not be faulted for finding that the theft of the two cases of watches was sufficiently recent, Rumpff JA placed emphasis on the fact that:

> "The watch is an unusual and expensive watch and the learned trial judge found that it would not pass readily from person to person."

[21] In S v Samson 1969(4) SA 158 (RA) at 159C-D Beadle CJ said:

> "It appears from these cases that where, fairly shortly after a housebreaking, the accused is found in possession of some of the articles which were stolen at the time and does not find the explanation that he received the stolen goods from a third party who may have stolen them, the court is perfectly justified in finding him guilty not only of the housebreaking but also of the theft of all the articles stolen at the time when the housebreaking occurred."

[22] A mere caretaker cannot be regarded, for the purposes of the presumption arising from the doctrine of recent possession, to be in possession of the goods which he temporarily has in his care. See S v Letoba 1993(2) SACR 615(O).

[23] In *Skweyiya 1984(4) SA 708(A)* where the accused had been found in possession of a portion of goods which had been burgled 15 days earlier, the court held that the conclusion was not justified that it was the accused who had broken into the premises and stolen the goods where such goods were of the type which usually could easily and rapidly be disposed of.

[24] In *S v Shabalala[1999] 4 All SA 583(N) at 587-588* possession of the stolen vehicle on the day of the robbery or the day thereafter, was accepted as sufficient for the doctrine of recent possession to apply. In *S v Mavinini 2009(1) SACR 523 (SCA)* the Appellant's possession of the stolen vehicle less than 24 hours after the robbery, taken together with his elusive conduct, overwhelmingly suggested his criminal involvement in the robbery.

[25] In the present case it has been argued on behalf of the Appellant that since he had been found in possession of a firearm, the murder weapon, and the cell phone, the robbed items, one and half months after the robbery and murder incident, he could not be said to have been in recent possession of same. In support of the argument that the Appellant had been wrongly convicted of robbery and murder on the basis of such possession reference had been made to S v Madonsela 2012(2) SACR 456 (GSJ). In that case the Appellant's conviction of robbery in the Regional Court had been based on his possession of the robbed motor vehicle, eight days after the robbery. The vehicle was fitted with false plates and he gave a false explanation for his possession.

[26] In S v Matola 1997(1) SACR 321(BPD)at 324d-f possession of the stolen vehicle a month after the theft, together with the further facts; that the stolen vehicle had been registered in the Appellant's name, with false registration numbers, and that the original number plates of the stolen vehicle had been found on the Appellant's property, were held to sufficiently prove that the Appellant had played a role in the theft.

[27] In the present case the Appellant was found in possession of a firearm and a cellphone both of which had connection with robbery and murder incident which occurred on 19 March 2011. This, according to the court a *quo*, constituted an irresistible inference

that the Appellant participated in the commission of robbery with aggravating circumstances and murder.

[28] This court is asked to decide whether the court a *quo* misdirected itself in reaching such a conclusion. In S v Mavinini, *supra*, the Appellant had been seen driving the green Audi A4 right after the robbery with false number plates and when the police confronted him he fled. The Supreme Court of Appeal held that such conduct, unexplained, together with the evidence linking the Appellant with the place where the stolen goods were recovered, resulted in the overwhelming conclusion that he was himself involved in the robbery.

[29] In the present case the Appellant had been found in possession of a firearm, which had been proved to be a murder weapon, and the cell phone which was removed during the course of the robbery on 19 March 2011 without any explanation as to how he came in possession of same. It is really hard to believe that it was a sheer coincidence that the Appellant was in innocent possession of both items which had strong connections with the robbery and murder incident. As the learned Judge pointed out, quite correctly, that had the Appellant been found in a possession of one of the items in question, taking into account the period elapsed after the robbery and murder, the possibility could have existed that the Appellant innocently received and possessed same. In the urban areas a firearm and the cellphone can change hands quite quickly since people who need them are financially able to purchase them. In such a lengthy period of time they could have easily changed hands. However, the same cannot be said for the rural areas, like Ekuvukeni, where the majority of the population is poor and unemployed. One is failing to imagine the circumstances under which the Appellant could have innocently received and possessed both items in question.

Had there been such circumstances, surely, the Appellant would have reasonably beenexpected to disclose.

[30] The following factors militate against the Appellant's innocent receipt and possession of the firearm, the murder weapon, and the robbed cellphone. Whilst Captain Buthelezi was trying to locate and apprehend Zama Thwalaoutside the room, a suspect in the commission of the crimes of robbery and murder, the Appellant tempted to bolt out of the room wherein he was with Constable Mntambo. This, in my view, is demonstrative of a guilty conscience on his part. Secondly, the Appellant was found in possession of the firearm, a murder weapon, with its serial number filed off and possession of a Samsung cellphone which had been removed from the possession of the complainant during the course of the robbery and murder, and he proffered no explanation for such possession. The combined possession of items which had connection with the incident of robbery and murder dispel the inference that the Appellant could have innocently received the same from a third party, who might have used the firearm and received the cellphone during the course of robbery. Finally, the Appellant was mendacious in that he claimed to have been subjected to a severe assault by the police with the intention to elicit a confession that he had been in unlawful possession of the firearm and ammunition, and that during such an assault he sustained serious injuries. Such allegations were not supported by the J88, and nor had any confession statement been obtained from the Appellant. The conduct of the Appellant is unlike that of an innocent person.

[31] The Appellant had been found in possession of the firearm which was used to kill the deceased as well as the cellphone which had been removed during the course of the robbery without explanation of such possession. The principles that should not be ignored in evaluating circumstantial evidence are two cardinal rules of logic referred by Water

Meyer JA in *R v Blom 1939 AD 188 at 202 – 203*. The first rule, the inference sought to be drawn must be consistent with all the proved facts. If it is not, then an inference cannot be drawn. The second rule, the proved facts should be such that they exclude every reasonable inference from them save the one 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.

[32] In order to justify the inference of guilt, the exculpatory factors must be incompatible with the innocence of the accused, and incapable of explanation upon other reasonable hypothesis than that of his guilt. See Wills, Principles of Circumstantial Evidence 7ed (1936) edited by VRN Gattie and M Krishnamachieriat at 320. In *casu*, the Appellant was one and half months after the robbery and murder incident, found in possession of a firearm, the murder weapon, and the cellphone. Possession of these items which had strong connection with the robbery and murder incident, after such a long time, constitutes an irresistible inference and provided an overwhelming evidence of the Appellant's participation in the commission of the crimes of robbery and murder.

[33] The present case is distinguishable from that of Madonsela where other than the vehicle, none of the robbed items were found. The Appellant had been found in an unexplained possession of the firearm, a murder weapon and a cellphone which was removed from the complainant's possession during the course of the robbery. This strengthens the gravity of suspicion that the Appellant participated in the robbery and murder. In my view, the court a *quo* cannot be faulted in making such a finding.

[34] It could reasonably be inferred from the Appellant's possession of the murder weapon and the robbed cellphone after one and half months from the day of robbery and

murder incident that he had been in such possession since the day of robbery and murder. This makes it more improbable than not that the Appellant had received such items from a third party who might have been present during the commission of the crimes of robbery and murder. Had the Appellant innocently received these items, he could, surely, have said so.

[35] All the circumstances of the present case attract as the only reasonable inference the conclusion that the Appellant was one of the participants in the robbery and murder on 19 March 2011.The appeal against the conviction on both counts must therefore fail.

[36] In the result the appeal against a conviction on both robbery and murder counts fails.

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KRUGER J I agree, it is so ordered.

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SEEGOBIN J

Judgment reserved on:	31 July2013
Judgment handed down:	5 September 2013
Appellants counsel:	Ms Y.N Khuzwayo
Respondents counsel:	Mr D MacDonald