IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A713/2014

DATE OF HEARING: 25 MAY 2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

LAMARK DLAMINI **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

AVVAKOUMIDES, AJ

1. On 22 August 2013 the appellant (second accused in the trial) was charged with, and convicted of, one count of robbery with aggravating circumstances, one count of possession of an unlicensed firearm and one count of unlawful possession of ammunition in contravention of the Firearms Control Act 2000, Act No. 60 of 2000. He was represented throughout the trial and was informed of the minimum sentences applicable and the competent verdicts, if convicted.

2. On 22 August 2013 he was sentenced to 15 years imprisonment on count one, fifteen years imprisonment on count two and 5 years imprisonment on count three. In terms of section 280 of the Criminal Procedure Act 1977, Act N. 51 of 1977 the trial court ordered that ten years sentence imposed for count two would run concurrently with the sentence in respect of count one and the sentence on count three is to run concurrently with count one as well. The cumulative effect is that the appellant will serve a total of 20 years. He was also declared unfit to possess a firearm.

3. The complainant testified that the third accused worked for her. On 28 April 2010 she returned home after visiting friends and she was apprehended by two unknown armed men. The third accused fell to the ground screaming while one of the men pushed a firearm in the

complainant's mouth. She was forced to open the safe where money and a firearm were taken. The men left and the complainant went looking for the third accused. The third accused could not be found and never returned to work. She did not answer any telephone calls. The complainant could only describe the two men as dark skinned and the one was shorter than the other. The shorter one was approximately 40 years old and the other was taller but very young. Aside from the description the complainant was unable to shed any further light on the identity of the robbers.

4. Warrant Officer Edward le Grange testified that he arrested the appellant on 10 June 2010 after receiving information. He found the appellant and a major female in a shack and upon searching the shack he found a firearm in a plastic bag behind a pressed wood standing out. The appellant apparently told him that the firearm belonged to him and that he did not have a license for the firearm. W/O Le Grange did not know who the shack belonged to.

5. Warrant Officer Maharela testified that he arrested accused one and three for a robbery that occurred in the Lyttleton area. Constable Bosch testified that on 10 June 2010 he accompanied Warrant Officer Le Grange and that there were two children in the shack with the appellant and the major female. The appellant could not explain the firearm according to Constable Bosch. After the close of the state's case it was reopened in order to hand in a ballistic report.

This report was confined to certifying that the firearm was a 9 millimetre pistol and functions normally. What the report and investigation could and should have done is to link the firearm to the husband of the complainant.

6. The appeal against the conviction rests on two grounds namely that the state failed to prove beyond a reasonable doubt that the appellant robbed the complainant and that the appellant was in possession of the firearm. It is clear that the complainant's description of the robbers is insufficient and this being the case, the state could not have proved the case against the three accused, let alone against the appellant.

7. It seems that the main consideration of the trial court is the firearm that was found in the shack where the appellant was present. There is discrepancy in the evidence of the two police officials about where the firearm was found. The state failed to call the appellant's wife or the owner of the shack to give evidence about the firearm.

8. The time lapse between the incident and the date on which the firearm was found is a material issue that the trial court did not place any weight on. I have had regard to the decision of S v Skweyiya 1984 (4) SA 712 (A) at 715 E to which reference was made in Zwane and another v The State (426/13) [2013] ZASCA 165 (27 November 2013) wherein the following was held:

> "The evidence against the second appellant is woefully inadequate to sustain a conviction and his election not to testify was entirely justified given the absence of any incriminating evidence against him. His appeal must accordingly be upheld. The inference that a person found to be in possession of recently stolen property is the thief or one of the thieves (or, in this instance, one of the robbers) can only be drawn as the only reasonable inference where the nature of the goods stolen and the time lapse between the theft (or robbery) and the discovery of the goods in that person's possession lend themselves to such a finding (see S v Parrow 1973 (1) SA 603 (A) at 604B-E; S v Skweyiya 1984 (4) SA 712 (A) at 715 C-D; S v Mavinini 2009 (1) SACR 523 (SCA) para 6). The crucial question would be whether the items concerned are of the type which can easily and quickly be disposed of, in which event anything beyond a relatively short time lapse cannot be said to be recently stolen (see Skweyiya at 715E)."

9. The state also failed to present evidence that the firearm found was indeed that of the complainant's husband. This being the case it cannot be said that the state proved its case against the appellant. In my view the appeal must succeed.

10. Consequently and taking all the circumstances into account I make the following order:

10.1 The appeal is upheld.

10.2 The conviction and sentence are set aside.

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AVVAKOUMIDES, AJ

ACTING JUDGE OF THE HIGH COURT

I agree:

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A. A. LOUW, J

JIUDGE OF THE HIGH COURT

Representation for the Appellant:

Counsel	L. Augustyn
Instructed by	Legal Aid South Africa

Representation for Respondent:

Counsel	C. P. Harmzen
Instructed by:	The State