

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No. : A15/2011

In the matter between:-

THABO VALENTINE MOKUBENG

First Appellant

MDUDUZI JOSHUA NKOSI

Second Appellant

ANDRIES KHUMALO

Third Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, AJP *et* VAN DER MERWE, J *et* MBHELE, AJ

HEARD ON: 2 JUNE 2014

JUDGMENT BY: RAMPAL, AJP

DELIVERED ON: 12 JUNE 2014

- [1] This was an appeal. The first appellant, Mr Thabo Valentine Mokubung, was tried together with two others, namely Mr Mduduzi Joshua Nkosi and Mr Andries Khumalo, as accused number 1, 2 and 3 respectively. At the end of the trial they were all convicted as charged. Following their conviction they were all sentenced to an effective 12 year imprisonment.

- [2] The first appellant came to us on appeal with the leave of the court below granted on 13 July 2010. His two erstwhile co-accused were not before us in these appeal proceedings. Initially all three of them were aggrieved by their convictions and sentences. Originally they all signalled their intention to appeal, but accused number 2 and accused number 3 did not prosecute their appeals to their logical conclusion. I shall revert to this aspect later on. From now on I shall refer to the first appellant simply as the appellant. On 30 July 2010 the appellant, after appointing new attorneys, filed a fresh notice of appeal in which he indicated that he would pursue his appeal only as regards his conviction.
- [3] The three gentlemen were tried in the Phuthaditjhaba Regional Court. There were three charges against them. The first was robbery with aggravating circumstances; the second unlawful possession of firearms and the third unlawful possession of ammunition. They pleaded not guilty on 22 July 2008. All of them were legally represented. The first appellant was represented by a certain Attorney P.S. Mokoena, a local public defender. Adv Mokoena appeared for the respondent.
- [4] Notwithstanding his plea, the appellant was found guilty on 2 April 2009. On the same day he was sentenced as follows:
- In respect of robbery with aggravating circumstances – 12 years imprisonment;
 - In respect of unlawful possession of firearms – 10 years imprisonment;

- In respect of unlawful possession of ammunition – 5 years imprisonment.

The trial magistrate made an order in terms of section 280(2) Act No 51 of 1977. He directed that the last two sentences run concurrently with the first. Moreover, the trial magistrate also declared the Volkswagen Golf 1600 TBS 278 GP forfeited to the State. The motor vehicle belonged to Mr Andries Khumalo, accused number 3.

[5] As regards his conviction, ten grounds of appeal were listed in the appellant's notice of appeal. Among others, the appellant contended that the regional magistrate erred in finding that he was involved in the violent dispossession of the victims, namely Mr Obed Nhlapo and Mr Pieter Simpson – *vide* 2 notice of appeal; that the appellant was in possession of a firearm and ammunition – *vide* 6 notice of appeal and that the evidence proved his guilt beyond reasonable doubt – *vide* 4 notice of appeal.

[6] The version of the prosecution was narrated by eight witnesses. They were

- Mr Leputla Michael Ramasilo – the owner of the house at Tsirela where the stolen goods were recovered.
- Ms Selina Ramasilo – the daughter-in-law of the aforesaid Mr L.M. Ramasilo.
- Mr Pieter Simpson – the first victim and driver of a cash carrier owned by Coin Security Services.
- Mr Obed Nhlapo – the second victim, a crew member of the cash carrier in the employ of Coin Security Services.

- Captain Lisbeth Makhabanyane – the police officer in the forefront of the arrests of the suspects.
- Constable Andries Molefe – the police officer who found the firearms.
- Mr Michael Pitout – the proprietor of Coin Security Services and employer of the victims.
- Inspector Mahlomola Mothapo – the police officer who arrested accused number 3.

[7] I deem it necessary to briefly deal with the prosecution version. The undisputed facts were: that the two victims were in the employ of Coin Security Services; that they were at Setsing, the central business district of Phuthaditjhaba, on 17 September 2007; that they were attacked, assaulted and robbed of R114 756,49 and firearms, among others; that the actual scene of the crime was between the food outlet known as Hungry Lion and the Capitec Bank; that Captain Makhabanyane received a radio report of the incident; that she ascertained that a white sedan VW Golf was apparently involved.

[8] The undisputed facts further showed that the police witnesses, acting on a tip-off, proceeded to the house of the first state witness, Mr L.M. Ramasilo at Tsirela, where a white VW Golf 1600 with registration number TBS 278 GP was found parked in an open garage; that inside the house an amount of R73 140,00 cash, briefcase, bag containing firearms, 4 x firearms, 2 x receipt books, keys were found; that partially burned money bags were found outside the house, but still on

the property; that a young man who was busy burning those plastic bags was the son of state witness number 1, the owner of the residential property; that one firearm, two receipt books, keys and plastic money bags were identified as goods stolen from the victims at Setsing earlier on that same day; that the appellant was also found on the premises; that the appellant and accused number 2 had been staying there for a few weeks as patients of state witness number 1, who was a traditional healer; that accused number 2 was not on the premises at the time of the police raid.

- [9] The crisp issue in the case was the identity of the robbers. The following factors were of utmost importance in that regard. None of the eight prosecution witnesses positively identified the appellant as one of the armed robbers on the scene. The two victims did not know what happened on the scene of the crime. Mr Simpson could not identify the appellant as the man who robbed him or his fellow workman, Mr Nhlapo. The converse was also true. Mr Nhlapo could not identify the appellant as the man who robbed him or his fellow workman, Mr Simpson. None of the remaining six witnesses actually witnessed the robbery incident at Setsing. Over the radio, police Captain Makhabanyane received information relayed from the radio control centre about the incident.
- [10] The next radio message she received, came from Inspector Mothapo. He told her that he had just seen a white Golf driven at a high speed. Besides that description, no further identificative details concerning the provincial suffix letters,

which would normally indicate the province in which the suspect car had been officially registered, the prefix letters or the middle number of the registration plate of the suspect Golf were given to the captain or seen by the inspector. Those three components of a vehicle registration plate are collectively designed to define and identify a motor vehicle. The information given and obtained by the police was, therefore, materially unreliable to make a proper identification of the vehicle involved. The information was, therefore, inadequate for the police to reliably identify the car used by the robbers, if at all they did, to get away from the scene of the crime at Setsing.

- [11] There was absolutely no evidence tendered to show that accused number 3's car, VW Golf 1600 TBS 278 GP, was indeed on the scene of the crime. The police were clearly not hot on the heels of the getaway car at all times material to the incident. It was clear that they never saw the car involved. They made inquiries about a white Golf. The only common features between accused number 3's car and the suspect car were the colour and the make. That was where the descriptive similarities ended. The police were tipped off about accused number 3's car, which had already been parked in a garage. There was certainly a clear passage of time between the parking of the car and its discovery by the police. In the absence of cogent evidence that accused number 3's car was in fact actually seen on the scene at Setsing and that it was in fact used by the robbers to flee from the scene, a reasonable

doubt must have existed whether a similar car found parked at Tsirela, some distance from the scene, was in fact involved.

[12] It was also significant to bear in mind that accused number 3 was alone when he arrived back and parked the car. There were no passengers. Neither the appellant, or accused number 2 were seen inside his car by any witness. Virtually nothing incriminating was found inside his car or in his possession. The evidence of Mr Ramasilo that the police were chasing the appellant's car was inconsistent in many respects with the testimonies of all the police witnesses. The evidence of Mr Ramasilo represented the high watermark of the prosecution's case against accused number 3. Unlike the appellant and accused number 2 there was no allegation that accused number 3 was seen carrying any plastic money bag.

[13] Mr Ramasilo alleged that he saw the appellant and accused number 2 in his bedroom. He saw them taking the money out of the bags – yet he did nothing and said nothing about it. His evidence in court that he did not venture to enter his bedroom was pathetically unconvincing. Questioned by the police about the money and all the highly incriminating goods found in his bedroom, he was very evasive. The gentleman was an important witness in the case. Not so much for what he said to the world in court but rather for what he did not say to the police on his property at the time he was confronted about the hot potatoes found in his bedroom. He withheld information. He did not inform the captain despite, repeated questions, that the appellant and accused number 2 had just arrived carrying

bags; that they took those bags into his bedroom and that he saw them together with accused number 3 in his bedroom shortly before the police arrived. At one stage during the course of the trial he claimed that his memory was poor and that he was visually impaired in one eye. The uncertainty thickens when it is borne in mind that he had been consuming intoxicating brew shortly before the police arrived.

- [14] On the residential property of Mr Ramasilo, the police found a man busy burning plastic money bags belonging to Coin Security Services. The man turned out to be Mr Ramasilo's son, Mr Teboho Ramasilo. Teboho was found in possession of goods identical to those stolen from the victims less than an hour earlier at Setsing. Worst still, he was caught red-handed deliberately destroying deadly incriminating pieces of evidence. In **S v Rama** 1966 (2) SA 395 (A) at 400A – E the court held that when a person is found in possession of recently stolen goods he is presumed to have acquired possession thereof through direct participation in the actual stealing of such goods, unless he can give a reasonably innocent explanation for his possession. Mr Teboho Ramasilo and his father certainly had a far stronger case to answer, than the appellant in order to explain their possession. We know now that none of them could give any contemporaneous and innocent explanation at the time they were interrogated.

- [15] There was a strong connective tissue between the scene of the robbery at Setsing and the scene of the recovery at Tsirela. Mr Ramasilo Snr was the lawful owner of the residential

property where the loot was recovered soon after the robbery. As such he was presumed by law to be the possessor of the loot found on his property unless he could give a reasonably innocent explanation as to how he acquired possession of such stolen goods – the firearm(s), the keys, the receipt books, the briefcase, the guns bag, and plastic money bags all of which were identified as goods belonging to Coin Security Services. The principle in **S v Rama** *supra* applies to him as well with equal force.

[16] The evidence seemed to indicate that father and son were very culpable. I have a feeling, and it is a very strong feeling, that Mr Ramasilo Snr probably had a motive to falsely incriminate the appellant and his erstwhile co-accused in order to protect Mr Ramasilo Jnr and to diminish the role he himself probably played in this criminal enterprise. For some inexplicable reasons, Mr Ramasilo Jnr was never charged. So was Mr Ramasilo Snr. Mr Ramasilo Snr was in fact a single witness. In my view his evidence was of a very poor quality. It was unsatisfactory in many material respects. He was an untrustworthy witness. The two counsel before us were *ad idem* that he should have been charged and perhaps offered the protection in terms of section 204. It was not done.

[17] Mr Van der Merwe, counsel for the appellant, submitted that the salient principle of inferential reasoning was misapplied by the trial magistrate. The inference drawn by the regional magistrate from the circumstantial evidence was not the only inference that could reasonably be drawn from the proven

facts. The proven facts did not exclude every other possible and reasonable inference other than that drawn by the regional magistrate. I am in respectful agreement with counsel's submission – **R v Blom** 1937 AD 188

[18] To sum up: I have to stress that there was no evidence: that the firearms were used to rob the victims; that the appellant ever had any firearm in his possession anywhere on the day in question; and that accused number 2 who was arrested in the nearby mountain was the same topless fugitive who was seen running away from the scene where the incriminating goods were recovered. Finally the admission of accused number 3 that he owned the car in question did not take the prosecution case anywhere. Whether he was arrested on Mr Ramasilo's property, like the appellant, or in the nearby mountain like accused number 2 – was of no moment. None of the three was, without any reasonable doubt, proven to have actually participated in the criminal enterprise. Their convictions were shrouded by heavy clouds of doubt. The prime suspects were let off the hook by the police.

[19] Certainly there is a lingering cloud of suspicion that the three gentlemen, in collaboration with Mr Ramasilo Snr and his son, Mr Teboho Ramasilo, were involved. But it always has to be borne in mind though, that suspicion of guilt, however strong, can never be enough to secure proper conviction – **S v Ralukukwe** 2006 (2) SACR 394 (SCA).

- [20] Ms Bester, counsel for the respondents, submitted that she could not support the conviction of the appellant or any of his erstwhile co-accused. I have already covered all the reasons she advanced in support of her stance. I am indebted to her for her responsible attitude.
- [21] On the facts, I am persuaded that no cogent reasons existed to justify a conclusion that the state had succeeded in establishing the guilt of the appellant beyond a reasonable doubt. The same applies equally well to his erstwhile co-accused, Mr Nkosi and Mr Khumalo. To the extent that the regional magistrate concluded otherwise, it is my respectful view that he erred. There was no credible and reliable evidence, direct or indirect, to sustain the inference drawn by the regional magistrate. In my view none of them could have been correctly convicted on the strength of the doctrine of recent possession or the cardinal rules of logic that underpin the principle of inferential reasoning. The relevant principles were, with respect, misapplied. Such misapplication constituted material and appealable misdirection. I would therefore uphold the appeal. The grounds of appeal earlier enumerated are hereby sustained.
- [22] By virtue of the inherent powers vested in us as a court with appellate jurisdiction, I am inclined to extend a similar relief to the appellant's erstwhile co-accused even though they were not before us in these appeal proceedings.

[23] There remains one more aspect to deal with. The vehicle of accused number 3 was declared forfeited to the state. In view of the conclusion I have reached on the substantive merits of the appeal, it follows that the forfeiture order cannot be allowed to stand. It was not shown beyond reasonable doubt that accused number 3's vehicle was used as an instrument for the furtherance of the criminal activity we had to wrestle with in this appeal. That being the case, I am inclined to set aside the forfeiture order relating to the vehicle.

[24] Accordingly I make the following order:

24.1 The appellant's appeal against his conviction succeeds.

24.2 The conviction and sentence of the appellant in respect of all the charges are set aside.

24.3 The convictions and sentences of accused number 2 and 3 are likewise also set aside.

24.4 The order whereby the motor vehicle belonging to accused number 3, Mr Andries Khumalo was declared forfeited to the state is also set aside.

M. H. RAMPAL, AJP

I concur.

C. H. G. VAN DER MERWE, J

I concur.

N. M. MBHELE, AJ

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