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IN THE HIGH COURT OF SOUTH AFRICA, BLOEMFONTEIN

FREE STATE PROVINCIAL DIVISION

Appeal No. A116/13

Case No.ASH44/11

In the matter between:

PHAKISO JOSEPH SIBEKO Appellant

and

THE STATE Respondent

CORAM:	EBRAHIM, J *et* MURRAY, AJ.
HEARD ON :	24 JUNE 2013
JUDGMENT BY:	MURRAY, AJ
DELIVERED ON:	1 AUGUST 2013

JUDGMENT

[1] This is an appeal against the conviction and sentence imposed on the appellant in the Bethlehem Regional Court on **12 September 2012.**

[2] The appellant was convicted on one count of housebreaking with intent to steal and theft and one count of theft and sentenced to five years' imprisonment on each count. He was granted leave to appeal both his conviction and sentence on **18 October 2012.**

[3] The charges against the appellant stemmed from two separate incidents in Bethlehem on 24-25 September 2009 and 19-21 February 2010. There were no eye-witnesses. The conviction is based on circumstantial evidence. Both complainants testified that they had never seen the appellant before. The fingerprint experts identified the palm- and fingerprint lifted at the two crime scenes, respectively, as indubitably those of the appellant.

[4] The appellant was the only defence witness. He denied any involvement in the two crimes. While he did not dispute that the prints were his, he offered explanations for their presence which he claimed were reasonable enough to cast doubt on the convictions.

[5] Regarding Count 1 he alleged that his palm-print could have been left on the television screen when he helped to carry two television screens into the complainant's house while working for the latter as a casual labourer during renovations to his house in November 2009.

[6] Regarding count 2 he alleged that his fingerprint could have been left on the vehicle door while he worked as a temporary car-guard at Pick-and-Pay in September 2009 since he frequently touched cars while assisting women with small children to close their car doors.

Count 1: The relevant evidence:

[7] That there was a break-in and theft of items to the value of R 46 670.00 at the Marais home on 19-21 February 2010 is undisputed. So is the fact that the appellant's palm-print was found on a flat-screen television which someone had evidently attempted to pull from the wall during the break-in. Only the appellant's involvement is in dispute.

[8] The complainant, Mr Marais, testified as follows: They moved into the house in November 2009. He used only employees from their dry cleaning business to move their furniture into the house. No renovations or building took place at his house in 2009. He has his own construction team with whom he has done several building projects. He did not pick up anyone from the street to help with the furniture or with renovations. They do use casual labourers from time to time to mix cement, clean, etc, but his foreman hires and

oversees them, so he himself does not always know them, although they call each other by name.

[9] On Friday 19 February 2010 he went to Bloemfontein with his family. They left the house locked up with everything in place. Upon their return on 21 February they found the house in disarray. The plasma television screen hung lopsided, cracked down the middle, where someone had tried to pull it from its bracket on the wall. Various items were strewn over the floor. A large bedroom window was broken. Clothes and jewellery had disappeared.

[10] The appellant was pointed out in court. The complainant remained adamant that he had never seen him before. He insisted that the appellant was not one of the people who had moved his furniture into the house or one of the casual labourers during the renovations. The renovations were only done in 2010, long after the break-in, when they installed an alarm system, put up a wall in front of the house and laid paving.

[11]. The fingerprint expert, Teepa, testified that he had found the appellant's left palm-print facing upwards on the top left-hand corner of a broken flat screen television at about 2,5 meters high on the living room wall. He submitted eleven colour photographs of the crime scene, three of which clearly showed the lopsided TV

screen with a crack down the middle and the top left-hand corner extending upwards. He testified that no other prints were found at the scene.

[12] The appellant claimed to have been a general labourer for three weeks during *“a lot of renovations”* done at the complainant’s home in November 2009. He averred that *“on that day”* the complainant picked him up from the street in his Kia *“mini-lorry”*, together with two other general labourers. He maintained that he and Petrus, one of the complainant’s permanent workers, had to help carry the furniture into the house; *inter alia* two boxed, used flat-screen television sets which the complainant told them to handle with care. He averred that he was not involved in their installation, but that his palm-print could have landed on the screen when he put it on the floor after the complainant had ordered them to take the TV’s out of the boxes and to throw away the latter.

<u>Count 2: The relevant evidence</u>

[13] It was not in dispute that on 24-25 September 2009 Mrs Smit’s vehicle was broken into and that items to the value of R7 900.00 were stolen. It was not in dispute, either, that the appellant’s fingerprint was lifted from the exterior of the front left door of the

vehicle. What was in dispute was the appellant's involvement in the break-in and theft.

[14] The complainant, Mrs Smit, testified that she worked at the Voortrekker High School Hostel in Bethlehem and that she left her GWM vehicle in one of the parking lots in the schoolyard at 18h00 on 24 September 2009. All the windows were closed, the face of the radio removed and the doors locked. When she returned to her vehicle at 8h30 the next morning she found the left front window completely shattered, part of the dash board ripped out, the car radio removed and items worth R 7 900.00 stolen from the vehicle. She testified that she was told that the police had lifted the appellant's finger-print from the outside of the car's left front door. She admitted that she sometimes bought groceries from Pick-and-Pay, but, like the complainant in Count 1, she remained adamant that she had never seen the appellant before.

[15] The fingerprint expert, Clark, confirmed that he had lifted the print of the appellant's right ring-finger from the exterior of the left front door of the complainant's vehicle. He explained that due to the nature of the material inside the vehicle, it was impossible to lift any usable prints from the interior and that the other prints that he found on the vehicle have not been identified. The only discrepancy between his testimony and that of the complainant was that he

averred that she was present when he lifted the print, while she maintained that she was not there when he did so.

[16] The appellant testified that he did not know the complainant, did not remember her car, its colour or its registration number, and had never been in the Voortrekker High schoolyard. He claimed to have worked at Pick-and-Pay as a car-guard from early July (*“after the contract was terminated and we were then retrenched at Nonco...”)* to around October. He would put customers’ bags in the boot, or would assist in closing the car doors when someone had a young child. He would also put a card on the wind-screen next to the wipers. Therefore, he would touch cars *“many times”.* The latter part of his version was never directly put to the complainant.

[17] In cross-examination the appellant admitted that he was released from gaol on parole on 30 or 31 July and that he started working at Pick-and-Pay after that. As for his finger-print on the car, he claimed that it might be a coincidence that he might have touched the vehicle on the day that it was broken into.

<u>THE CONVICTION:</u>

[18] It is not in dispute that the appellant's conviction was based on circumstantial evidence. He denies that the State has proved its case beyond a reasonable doubt. He claims, furthermore, that the presence of his palm- and fingerprints at the two scenes was the only evidence linking him to both crimes, that his explanations were reasonable and that the court *a quo* erred in finding that the only possible inference to be drawn from the evidence was that he was involved in both crimes.

[19] In assessing the evidence, the Court *a quo* accepted the evidence of the complainants and the fingerprint experts, and rejected the appellant's version. The appellant contends that it could not have done so on the evidence before it.

[20] Viewed in isolation, the Appellant's explanations for the presence of his prints at the crime scenes might very well sound plausible. But, viewed in the context of the entire case, they are not.

[21] Holmes AJA, with reference to an *alibi* defence in **R v HLONGWANE** 1959 (3) SA 337 (A) at 340H-341B, (and which principle Nugent, J (as he then was), in **S v VAN DER MEYDEN**, 1999 (2) SA 79 (WLD) at 81 B – C, said applied to all defences which might present themselves) stated that:

"...it is important to bear in mind... that the alibi does not have to be considered in isolation... The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses."

[22] The holistic approach to circumstantial evidence followed in **S v VAN TELLINGEN**, 1992 (2) SACR 104 (C) and **S v VAN DER MEYDEN**, *supra,* has been approved and followed in several instances by the Supreme Court of Appeal. (See: **S v VAN ASWEGEN** 2001 (2) SACR 97 (SCA), **S v TRAINOR** [2003] 1 ALL SA 435 (SCA), **S v MBULI**, 2003 (1) SACR 97 (SCA), **S v STEVENS** [2005] 1 All SA 1 (SCA), **NAUDE & ANOTHER v S** [2011] 2 ALL SA 517 (SCA) and **S v CWELE AND ANOTHER** 2013 (1) SACR 478 (SCA)).

[23] In **S v VAN DER MEYDEN**, *supra,* at 80 I-J and 81 A-C Nugent J (as he then was), stated that

"In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true... In whichever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the

exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

[24] Nugent J (as he then was), in **S v VAN DER MEYDEN**, *supra,* at 82 A and C – E stressed that the court's conclusion, whether it be to convict or to acquit, had to account for all the evidence. He made it clear that that cannot be done by examining the 'defence case' in isolation to determine whether it is so contradictory or improbable as to be beyond the realm of reasonable possibility. He also emphasised that the court cannot look at the exculpatory evidence in isolation. (See also **S v MBULI**, *supra,* at 110e.)

[25] This approach was echoed in **S v TRAINOR**, *supra,* which warned against *"a piecemeal assessment of facts"* instead of basing a conclusion on a conspectus of all evidential material; in **S v STEVENS**, *supra,* which warned against the dangers of a *'compartmentalised approach'* to the assessment of evidence which separates the evidence before the court into compartments by examining the *'defence case'* in isolation from the *'State's case',* and in **NAUDE & ANOTHER v S**, *supra,* at [29].

[26] The essential question with which this Court is faced, therefore, is whether on the basis of all the evidence presented by both the

State and the appellant, a reasonable doubt remains as to the appellant's guilt.

[27] In **<u>S v CHABALALA</u>** 2003 (1) SACR 134 (SCA) at 139i – 140d in par [15] the Supreme Court of Appeal held that:

> *"The trial Court's approach to the case was ... elastic and in this it was undoubtedly right (S v Van Aswegen 2001(2) SACR 97 (SCA)). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude a reasonable doubt about the accused's guilt ...".*

[28] The court *a quo* indeed listed the strong points of the State's case which point towards the guilt of the accused. In doing so it, first of all, considered the testimony of Marais and specifically listed those aspects which contradicted the appellant's version. It found that there were few aspects thereof that it could criticise and accepted the testimony as *"straightforward".*

[29] Even though Marais was, strictly speaking, a single witness, I cannot find any reason to fault the court *a quo'*s finding. His testimony was clear and satisfactory in all material respects. The court *a quo* had the opportunity to observe him in the witness box and evidently believed him. Nothing in the record indicates that Marais would have had any reason to falsely implicate the appellant.

[30] Although the court *a quo* did not explicitly apply the cautionary rule when he assessed the two complainants' evidence, there is no reason to doubt that he approached the evidence with caution. He did not, for instance, blindly accept everything that they said. In **R v J** 1966 (1) SA 88 (SRA) Macdonald AJP aptly stressed that *'the exercise of caution should not be allowed to displace the exercise of common sense.'* And I agree with Shongwe JA's acceptance of the stance in **R v DHLUMAYO AND ANOTHER** 1948 (2) SA 677 (A) at 678 that

> *''an appellate court should not seek anxiously to discover reasons adverse to the conclusion of the trial judge*' and that *'it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered''*.

[31] Such a more flexible approach to single witness testimony has been endorsed in, *inter alia,* **R v BELLINGHAM** 1955 (2) SA 566

(A), **S v BUDA AND OTHERS** 2004 (1) SACR 9 (T) and **S v FORTUIN** 2008 (1) SACR 511 (C) at [9]. And in **S v MAHLANGU AND ANOTHER** 2011 (2) SACR 164 (SCA) at [23] – [24] it was expressly held that a court's failure to expressly use the words 'cautionary rule' was not necessarily fatal. It was held that as long as the court has considered the conspectus of the evidence, weighed the pros and cons, made a judiciously considered judgment and observed the rules regarding the onus of proof, there would be no reason to intervene on appeal.

[32] In **R v NHLAPO** 1953 (1) PH H 11 (A) Schreiner, JA, held, furthermore that:

> *'it does not mean... that [an] appeal must succeed if any criticism, however slender, of the witness' evidence were well-founded'."*

[33] The court *a quo* made no explicit finding as to the credibility of Mrs Smit's testimony, but accepted it by implication. I cannot fault its dismissal of the discrepancy between her averment that the appellant's fingerprint was lifted in her absence and the expert's averment that it was lifted in her presence as inconsequential because the appellant's fingerprint was indeed found on the door.

[34] Likewise, I cannot fault the court *a quo's* unconditional acceptance of both fingerprint experts' testimony as "straightforward". The value of fingerprint evidence as evidential material to connect an accused to a crime is well-known. (**S v LEGOTE EN 'N ANDER** 2001 (2) SACR 179 (SCA) at 182b). Also that its evidential value depends on the possibilities as apparent from the evidence as a whole. It is trite that if a fingerprint expert's evidence is clear and convincing, a conviction could even be based solely on the fingerprint without any additional evidence connecting the accused to the offence (**S v ARENDSE** 1970 (2) SA 367 (C)).

[35] Both experts complied with all the technical requirements for acceptable fingerprint evidence. As stated in **R v NKSATLALA** 1960 (3) SA 543 (A) it would then be good enough for the Court to satisfy itself that the expert's opinion is reliable and to act accordingly. Although the expert, Teepa, did not testify about the probable age of the palm-print, the probability of the palm-print having been on the screen for any significant length of time is so remote as to justifiably be rejected as a reasonable possibility. The appellant averred that his print could have landed on the TV screen when he removed it from the box. He testified that Petrus also handled the screen. He also testified that he did not assist in mounting the screen. Other people therefore handled the screen during the installation. They would not have had any reason to

wear gloves. Yet no other prints were found on the screen. It is most improbable that despite the installation only his palm-print would have remained undisturbed until the break-in almost three months later. The photographs handed in by Teepo shows the house to be extremely neat and clean. It is most improbable therefore, too, that the screen would not have been cleaned after the installation, or for the next three months or would have been cleaned in such a way as to incidentally leave only his palm-print.

[36] Contrary to the "straightforward" evidence of the first complainant, the accused's version is evidently rife with inconsistencies and improbabilities. The so-called "personal details" regarding complainant on which the appellant relied as "proof" of his having been a part of the renovation team, are simply details anybody who was observing the house could have noticed, namely: that there was a 'For Sale' sign in front of the house when the complainant moved in in November 2009; that there were tenants on the property; that the complainant had a small child when he moved in; that the complainant owned a Kia Sportage, a grey car, and a Kia bakkie; that he paid his employees on a weekly basis and that the appellant knew what the complainant's wife looks like. I have to agree with the court *a quo* that that information merely showed that the appellant had observed the property for some time and could

even be construed as his having planned the break-in for some time.

[37] The court *a quo* analysed the appellant's explanation and his averments under cross-examination, pointed out the material inconsistencies, and found his explanation not to be reasonably possibly true. It rejected his version as a mere *"bare denial"* and *"false beyond doubt in so far as it contradicts the state's version".* This the appellant attacks on appeal. But, apart from the various aspects of his evidence that were contradicted by the complainant, the inconsistencies and improbabilities in the appellant's own version must have led the court *a quo* to have grave doubts about his credibility and the reasonableness of his explanations.

[38] One of the appellant's numerous alleged grounds for appeal was that the Court *a quo* had applied the civil measure of 'balance of probabilities' regarding the evidence. But, as held in **S v VAN TELLINGEN**, *supra,* in a full-bench appeal at 106d-f, the fact that it is wrong to reject an accused's version merely because the State's version is, on a balance of probabilities, more plausible, does not mean that the probabilities are irrelevant in the weighing of the competing versions of the State and the accused. Nor does the fact that an accused's evidence, when viewed in isolation, cannot be criticised mean that there can be no question of a positive

rejection of his evidence: the quality and weight of the opposing evidence may be so persuasive that the Court is compelled to eliminate the possibility that the accused's version may be true.

[39] In the instant case the court *a quo* indeed explicitly found the quality and weight of the State's evidence on both counts *"overwhelming",* in other words sufficiently persuasive to reject the appellant's version as false beyond a reasonable doubt.

[40] In my view the appellant's explanation for his fingerprint on the door in Count 2, for instance, amounts to pure speculation. His testimony is vague in the extreme. He does not remember the complainant, her vehicle, its colour or its registration number. He does not allege that he did assist her – he merely said that because he often touches cars he might have touched hers and it might be a coincidence that the break-in occurred on the same day. His only factual averment is that he worked at Pick-and-Pay as a car-guard in September 2009. In **LACHMAN v S** [2010] 3 All SA 483 (SCA) at 495 par [43] the court dealt with speculative testimony rather than factual averments which might lead to an accused's explanation being found wanting.

[41] The fact that the Court rejected the appellant's explanation regarding Count 2 as false, can, in view of all the evidence before

the court, not be faulted either. There simply were no other facts to support his version. The court *a quo* explicitly found that although the complainant admitted shopping at Pick-and-Pay occasionally, there was no evidence that she had ever been there with a child or that the Appellant had ever assisted her to close her vehicle's doors. She flatly denied ever having seen him before.

[42] In my view, furthermore, the appellant's own testimony renders his explanations unreasonable. Both explanations imply some measure of personal contact with the complainants which would make it highly improbable that both complainants would simply have 'forgotten' him and would for that reason have persisted in denying that they had ever seen him before.

[43] On his version on Count 1 there would have been at least three incidences of direct contact between him and Mr Marais: namely when he was picked up from the street, when Mr Marais told him and Petrus to handle the television screens carefully and when Mr Marais '*ordered*' them to remove the screens from the boxes. Further contact would have occurred if he had indeed worked there for three weeks, since he testified that Mr Marais was there from time to time. All of this makes it most improbable that Mr Marais would have simply have *'forgotten'* that the Appellant had indeed

worked for him as alleged. I cannot fault the court *a quo* for rejecting his version as a mere '*bare denial*'.

[44] On his version on Count 2 for his fingerprint to have accidentally landed on the complainant's door, he would have had to assist the complainant with her purchases or with a child or would have asked her permission to 'guard' her vehicle. If any of those had indeed occurred, she would have had to see him. She says she never has. To my mind the scenario presented on behalf of the appellant relies on pure speculation and must be rejected as a reasonable explanation.

[45] The fact that a number of mutually independent factors point in the same direction is of great importance. Although it is possible that each fact in isolation could separately be reconciled with innocence, their combined persuasive force needs to be assessed. (**R v MTEMBU** 1950 (1) SA 670 (A) at 679 – 680). In view of the evidence in totality, the appellant's explanations were simply too improbable to be true. So was the 'coincidence' of the car being broken into on the specific day that he 'might have' touched it. And so, for that matter, was the presence of his prints at both crime scenes, and the presence of only his palm-print on the TV screen.

[46] Also, in view of the appellant's own testimony, the fact that both complainants independently denied ever having seen the appellant before is too much of a 'coincidence' for his version to be either probable or reasonable.

[47] In **R v SOLE** 2004 (2) SACR 599 (LesHC) at 664h – 666i it was held that:

> *"The Court cannot convict an accused unless, on the proved facts, the inference of guilt is not alone a reasonable inference, but is the only reasonable inference".*

[48] Although the court *a quo's* reasoning was not as comprehensive and explicit as it should have been, especially regarding the evidence on Count 2, in view of the totality of the surrounding evidence and the court's acceptance of the State's evidence as straightforward and overwhelming, I cannot fault the court *a quo* for rejecting the appellant's version as false beyond every reasonable doubt. As Nugent J (as he then was) said in **S v VAN DER MEYDEN** *supra,* at 81 I – 82 E:

> *"It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and unshaken".*

[49] I am of the view, therefore, that the only reasonable inference in the conspectus of all the evidence was indeed that the appellant had been involved in both crimes and in my opinion, despite certain criticisms that can be levelled against the judgment, the conviction was fully justified on the evidence.

[50] The court *a quo* in my opinion, therefore, correctly found the appellant guilty as charged on both Counts 1 and 2.

SENTENCING:

[51] It is trite that a court of appeal will only interfere with the sentence imposed by another court if it is convinced that the court *a quo* misdirected itself or that the sentence is shockingly inappropriate (**S v PIETERS** 1987 (3) SA 717 (A) at 728B-C and **S v PILLAY** 1977 (4) SA 531 (A) at 535E-F). I have to agree with the submission on behalf of the State that the court *a quo* followed a balanced approach to all the relevant factors regarding sentencing.

[52] The Court explicitly considered the following mitigating circumstances:

52.1 That the appellant was 32 years old;

52.2 That he is unmarried;

52.3 That he has two children of 4 years and 1 month old, respectively, who are in the care of his mother who is a pensioner;

52.4 That he only passed Standard 9 in school;

52.5 That he did do odd jobs;

52.6 That he was incarcerated for more than a year.

[53] The court also considered the numerous aggravating circumstances, namely:

53.1 That the appellant had numerous previous convictions;

53.2 That most of his previous convictions were related to housebreaking with intent to steal and theft;

53.3 That he had nine recent convictions on housebreaking with intent to steal and theft for crimes all committed in a single day;

53.4 That the appellant was on parole for those convictions when he committed the present crimes;

53.5 That he was released early from a 10-year incarceration sentence for the said nine convictions only to commit the present crimes;

53.6 That both present crimes are serious;

53.7 That the appellant regarding Count 1 evidently observed the relevant property and the first complainant's other assets;

53.8 That he then committed the break-in after having observed the property for some time.

53.9 That both counts are connected to the crime scenes by way of the appellant's prints;

53.10 That none of the stolen items were recovered;

53.11 That the appellant did have a job at the time and therefore did not need to commit the crimes but did so out of mere greed;

53.12 That it was not the appellant's first conviction for housebreaking and theft; and

53.13 That due to the number of his previous similar convictions he runs the risk of being declared a habitual criminal.

[54] The court *a quo* explicitly considered and weighed up the appellant's personal circumstances against the interests of the community and the seriousness of the offence without over-emphasising anything. It addressed the needs of the children and noted that in its opinion the sentence imposed would not have a

direct impact on them since they are in the care of their grandmother. I cannot disagree with that in view of his having been in gaol anyway for the past seven years.

[55] The court also correctly considered alternative sentencing options, namely a suspended sentence, a fine, or correctional supervision and decided that, based on the appellant's history, a custodial sentence in the form of direct imprisonment was the only appropriate option seeing that he had already violated his parole.

[56] Since the appellant had already been serving an effective 10-year imprisonment sentence for his recent nine convictions on housebreaking with intent to steal and theft, I disagree with his submission that the two five-year terms amounting to an effective sentence of 10 years' imprisonment is a harsh and shockingly inappropriate sentence.

[57] I cannot find that the court *a quo* has misdirected itself or that the sentence is shockingly inappropriate and therefore find no reason to interfere with the sentence.

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The appeal is dismissed and the conviction and sentence confirmed.

MURRAY, AJ

I concur.

EBRAHIM, J

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