

REPUBLIC OF SOUTH AFRICA



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

Case no: A187/2010

In the matter between:

14/8/2012

BOIKIE NDUMA

APPELLANT

AND

THE STATE

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES:
(3)	YES / NO
	REVISED.
13/8/2012	Date
	Signature

RESPONDENT

JUDGMENT

BAQWA J

- [1] The appellant herein appeared before the Oberholzer Regional Court charged on seven counts namely:
- Count 1 House breaking with intent to steal and theft
 - Count 2 Robbery
 - Count 3 Unlawful possession of a firearm
 - Count 4 Unlawful possession of ammunition
 - Count 5 Possession of stolen property
 - Count 6 Attempted robbery
 - Count 7 Discharge of firearm

- [2] The appellant entered a plea of not guilty at the court **aquo** without tendering a section 115 statement explaining the basis of his plea.
- [3] He was found guilty and convicted on four counts namely, theft, robbery, unlawful possession of a firearm and unlawful possession of ammunition.
- [4] He applied for leave to appeal from prison and was granted leave to appeal against both conviction and sentence.
- [5] This matter served before this court on 13 September 2010 and it was postponed **sine die** for reconstruction of the record.
- [6] As stated, the first count was housebreaking with intention to steal and theft but the state had failed to prove the charge of housebreaking hence the conviction on theft only. In my view, it can hardly be argued that the appellant had no intention to steal when participated in the removal of goods from a place that did not belong to him without the owner's permission. The fact that the goods were removed for the concealment of the theft of a firearm that had been removed earlier can hardly come to the rescue of the appellant.
- [7] Concerning the robbery count, complainant states that it was at night and the only source of light was an Apollo light some distance away and this was to some extent obscured by a peach tree. Complainant was seeing appellant for the first time. The incident lasted for a few minutes. He does not identify the appellant in his police statement.
- [8] In this poorly lit environment, the evidence of Selibalo and Lekonjani does not lend much corroboration if any to the evidence of complainant. In my view their evidence clouds the issues even further. One fact is clear however and it is that there was a person (possibly the robber) who made a clean get away by jumping over a fence. If

appellant was a participant in the robbery, it is most unlikely that he would not also have jumped the wall and got away.

[9] The appellant is a single witness with regard to the robbery incident and with regard to the identity of the perpetrator or perpetrators. There was no identity parade held and the state tried to prove its case on the basis of dock identification.

[10] The law with regard to the Identification of an alleged perpetrator, is summarised in the case of

S v Charzen and another 2006(2) SACR 143 (SCA) (19) G-I :

" The court is to bear in mind the inherent possibility that even honest witnesses may be mistaken about identification. This means that the mere assertion by a witness that he recognises his offender, without more, leads to the inherent potential for mistaken identity. Such evidence would seldom suffice to justify a conviction. Despite this, and in addition, the honesty and sincerity of the identifying witness is not sufficient, as there must be certainty beyond a reasonable doubt as to the reliability of the evidence".

Add to this, the fact that not a single item robbed from the complainant was recovered from or found in the possession of the appellant and the fact that he was detained minutes after the incident, the result cannot but be a weak case for the state.

[11] There were not many people during the commission of the crimes that gave rise to this case yet the uncertainties and contradictions in the evidence of complainant, and state witnesses Lekonjani and Selibalo leave one in the state of discomfort regarding their credibility. For example complainant testified that Lekonjani handed a firearm to appellant. Lekonjani did not even refer to this incident in his evidence in chief. Yet Selibalo speaks of the appellant having been present earlier in the day in possession of a firearm.

- [12] If appellant was at the scene and in possession of a firearm, what is the likelihood that a knife would be used and not a firearm.

I cannot but agree with appellant's submission that there are significant material contradictions and inconsistencies in the state case that cannot but create a reasonable doubt regarding identity of the perpetrator regarding count 2. Regarding count 3 and 4 which were the unlawful possession of a firearm and ammunition, the evidence is equally unsatisfactorily. No ballistic or forensic reports were tendered by the state and the firearm was not presented at the trial.

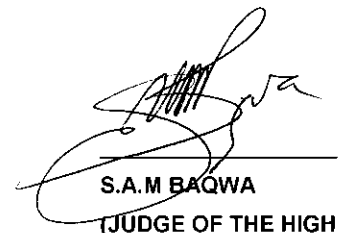
- [13] Regarding these counts the state called the evidence of constable Chikomo who says that whilst patrolling he saw the appellant alone next to a car. He then says "I told them I saw somebody throw something under the vehicle". This was at a shebeen where Chikomo and other policemen were searching people. It was at night. He looked under the car and found a Norrico Firearm with 14 bullets. Constable Chikomo was a single witness in this regard. The state did not prove that this was the firearm removed from complainant Mandlate. Further, the state did not prove that this was a firearm as envisaged by the Act and whether it was in working order and capable of discharging any ammunition. The state simply failed to provide the most basic evidence to sustain a conviction.

- [15] In the result, having considered the matter and having listened to counsel I am of the view that an appropriate order should be as follows:

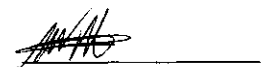
15.1. The conviction and sentence in respect of count one is hereby confirmed and the appeal is dismissed.

15.2. The appeal with regard to both conviction and sentence in counts 2,3, and 4 is allowed.

I agree, it is so ordered.


S.A.M BAQWA
(JUDGE OF THE HIGH COURT)

I agree.


N.V KHUMALO
(ACTING JUDGE OF THE HIGH COURT)