FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 501/09

In the review between:-

THE STATE

and

THOLANG MOKHANYA

CORAM: RAMPAI, J *et* KRUGER, J

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 8 OCTOBER 2009

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[1] The matter served before me by way of a special review in terms of section 303, Act No. 51 of 1977 read with section 116 thereof. The accused was prosecuted in the Zastron district court where he was convicted. The district magistrate then stayed the proceedings and transferred the case in terms of section 116 to the regional court for sentence.

[2] The regional magistrate considered the matter but imposed no sentence on the accused. He had some reservation as regards the correctness of the conviction - hence he referred

the matter to the High Court in terms of section 303 for review.

[3] The accused was arrested on 30 April 2009. Subsequent to his arrest he was criminally charged. The charge preferred against him was housebreaking with intent to steal and theft. It was alleged that he committed the crime at 58 New Location in Zastron on 31 October 2008; that he stole certain goods valued at R5 600,00 and that such goods were in the lawful possession of Ms Yoliswa Ngogo.

[4] His trial began on 11 May 2009. He pleaded not guilty. Notwithstanding his plea, he was found guilty on 20 May 2009. He was then transferred in terms of section 116(1)(b), Act No. 51 of 1977 to the regional court for sentence, as already indicated.

[5] In a memorandum dated 16 August 2009 the regional magistrate summarised the facts and came to the following conclusion:

> "Die moontlikheid dat die beskuldigde die selfoon van die inbreker gekoop of andersins ontvang het in 'n periode van 14

> dae, is mynsinsiens rederlik en is die skuldigbevinding op die hoofaanklagte 'n mistasting."

[6] Seeing that the regional magistrate differed with the district magistrate on the conclusion reached, I would have preferred to have the comments of the district magistrate before I reviewed the matter. The last paragraph of the memo by the regional magistrate reads as follows:

> "Ek het die saak met die geleerde verhoor landdros breedvoerig in kamers bespreek en het hy aangedui dat hy nie enige kommentaar aan die hof van hersiening wens voor te lê nie."

In the light of the statement, which I accept as true and correct, I deem it unnecessary to bother the district magistrate with a request for his further input. I take that he has no further contribution.

[7] The facts were that the victim, a teacher by profession, lived alone. She locked her house, apparently on Friday 31 October 2008, and went to Sterkspruit. The next day, on Saturday 1 November 2008, she returned. She discovered that her house had been burgled and certain goods stolen. Among the stolen goods were four cellular phones:

Samsung, Motorola and two Nokias. There was no eyewitness. There was no obvious physical sign of forced entry.

[8] Two weeks later on Friday 14 November 2008, one of the cellular phones, a Nokia 5310, was traced. It was found in the possession of the accused. He was the victim’s back neighbour. Mr. Kamolelo Lebokeng was the victim’s side neighbour. At the request of the victim he had kept an eye on the victim’s house while she was away. He went over on one occasion or so and fleetingly inspected the victim’s house. His nickname was Poposo.

[9] The undisputed resume of the evidence reveals that the second state witness, Mr. Mothupi, owned a Nokia 5310 worth R3 000,00. He lent it to his girlfriend, a learner. She took it to school where the victim worked as a teacher. It rang in the classroom. The teacher took it away from her as punishment. Similarly the teacher took three more cellular phones from the other delinquent learners. She later put all the phones in her wardrobe. While she was away her house was broken into by unidentified burglar or burglars. Among

the stolen goods were the four cellular phones. Fourteen days later Mr. Mothupi recovered his from the accused.

[10] The critical question in the case was whether or not the accused was involved in the burglary of the victim's house fourteen days earlier prior to the recovery of the cellphone in his possession. The district magistrate found he was. The regional magistrate differed.

[11] The doctrine of recent possession means that where a person is found in possession of recently stolen goods, he is deemed to have acquired possession thereof, through direct participation in the actual stealing of such goods, unless he can give an innocent explanation, which is reasonably possible as to how he came to possess such goods.

[12] Still on the same doctrine, a brief survey of authorities shows that the goods must have been recently stolen; that the nature of the stolen article is an important element in the enquiry; that in the case of an unusually cheap and common article, which can easily and rapidly be disposed of, the doctrine loses much of its connective force, that in the case of an unusually expensive and rare article, which cannot

easily and readily pass from person to person, the doctrine retains its connective force between the current possessor and the original thief. **S v SKWEYIYA** 1984 (4) SA 712 (AD) at 715 C – G and the decisions there cited.

[13] The doctrine was eloquently elucidated by Holmes JA in **S v PARROW** 1973 (1) SA 603 (AD) at 604 B – D:

> "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 might 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 reasonable inference, that he stole the property."

[14] I now turn to the facts in the instant case. Subsequent to the burglary four witnesses individually had encounters with the accused. The accused's mother invited the victim to her place to talk to the accused about the missing property. The victim accepted the invitation. The accused ran away, according to the victim. The accused admitted the victim's visit and did not deny that he ran away. He implicitly

confessed running away but averred or rather suggested that he fled because the victim's companion was armed.

[15] It was not his evidence that the victim's companion attacked or threatened him in any way. At any rate the victim denied that her companion, a small boy 15 years of age, was armed. Her version was credible evidence. On that occasion, the accused had the first opportunity of telling the victim that he recently bought a cellphone from Poposo. He did not. Instead he ran away. He knew, as he ran away, that the victim was looking for a cellphone, among others. This was apparent from his cross-examination of the victim. He claimed she searched his bedroom and took his cellphone. She was his neighbour. She was within easy reach, but he made no effort to see her in fourteen days to let her know that he saw Poposo walking in and out of her house while she was away and that he subsequently bought a cellphone from him.

[16] The second state witness, Mr. Mothupi, suspected that the accused was the burglar. He was one of the owners of the stolen cellphones. He was on his way to lay a charge against the accused when, by coincidence, he met him on

Friday 14 November 2008. He asked the accused whether he had a cellphone to sell. The accused answered that he had. The cellphone the accused had in his possession was a Nokia 5310. The victim positively identified it as his cellphone stolen during the burglary into the complainant's house. The accused did not dispute the witness's claim that the cellphone was his stolen property. According to the witness, all that the accused told him was that he bought the cellphone, but gave no exact further particulars of the seller.

[17] Mr. Mothupi later testified in court. For the first time the court heard, during his cross-examination by the accused, that the accused bought the cellphone in question, a Nokia 5310, from Poposo. The witness told the court that at the time he met the accused, the accused did not mention the name of Poposo as the person who sold the cellphone to him. The witness was hearing about the name for the first name. It is significant to remark that the witness specifically denied that the accused ever named any particular person from whom he bought the cellphone. There was no reason for the trial court to disbelieve the witness. His evidence was credible. He and the accused were, after all, in good terms.

[18] The third state witness was the investigating officer, Mr. Faber, whose rank does not appear on record. According to him, he interrogated the accused and the accused told him he bought the cellphone at the taxi rank from an unknown person. During cross-examination by the accused, he denied the claim that the accused ever mentioned to him that he bought the cellphone from Poposo.

[19] The fourth state witness, Mr. Lebokeng, testified that he was nicknamed Poposo. He corroborated the victim's testimony in material respects. He stated that he did not sell any cellular phone to the accused. During cross-examination by the accused, he answered that the padlock of the victim's house was broken. He admitted that during the victim's absence, he was on her premises. However, he denied that he was in and out of the victim's house, as the accused had alleged. He, once again, specifically denied selling the cellular phone to the accused.

[20] It has to be repeated and stressed that the accused put it to the last three state witnesses that he had bought the cellphone from Poposo. All three of them denied his allegation. All of them heard about the accused's

explanation for the first time in court, although they had met the accused separately before the trial. Poposo was the victim's neighbour. He lived in the same vicinity as the accused. Although the accused was released on bail, he never confronted Poposo before the trial about the stolen cellphone he allegedly sold to him, which led to his arrest and prosecution. It will also be recalled that the accused never put it to the victim that he bought the cellphone from Poposo. The accused's failure to do so for the second time is not without significance. He heard the victim's testifying that Poposo had gone to Gauteng for work. He then reckoned that Poposo would not be available to dispute his allegation. When Poposo made his appearance in court, the accused knew he was in trouble. The testimony of Poposo completely destroyed the opportunistic defence of the accused. His version was not only opportunistic, it was also fiddled with inconsistencies.

[21] In **S v SKWEYIYA**, *supra*, the accused did not name any specific identifiable individual from whom he had acquired possession of the stolen goods. There was no direct evidence to gainsay his version that he tumbled upon such goods unattended in the street. This is an important

distinguishing feature. In the instant case, the accused committed himself to a specific and identifiable person. The alleged source was called. The source gave credible and reliable evidence which showed, beyond reasonable doubt, that the accused did not obtain possession of the cellphone from him.

[22] There is proof that the accused was found in possession of recently stolen property; that he failed to admit such possession at the earliest available opportunity when the victim confronted him and enquired about the missing property; that he attempted to shift the blame to an innocent person and that he clearly failed to give an innocent explanation which might reasonably be true. The court *a quo* appears to have painstakingly thought its way through the myriad of the peculiar facts of this particular case. It then came to the conclusion that the only reasonable inference was that the accused acquired possession of the stolen cellphone through direct participation in the stealing which the followed the burglary.

[23] That finding by the court *a quo* is one which, on review, I cannot find to be wrong. To disturb that finding would, in my

view, do serious injustice to the peculiar circumstances of this case. **S v PARROW**, *supra*, at 604 B – E. The nature of the stolen property is not the decisive factor in this particular case. It is not only inferentially probable that the accused stole the victim's property, the only legitimate and reasonable inference is that he did. The evidence as a whole established, beyond reasonable doubt, that the accused directly participated in the actual or original stealing. I would, therefore, confirm the conviction.

[24] Accordingly, I make the following order:

24.1 The proceedings in the district court were in accordance with justice.

24.2 The conviction of the accused is confirmed.

24.3 The case is remitted to the regional court to consider and to impose an appropriate sentence on the accused.

M.H. RAMPAI, J

I concur.

A. KRUGER, J

/sp