

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A287/2006

In the appeal between:

<u>MHLUPHEKI HENRY MKWANANZI</u>	1 st Appellant
<u>MXILISI JOSEPH MPONDO</u>	2 nd Appellant
<u>TSUBASA SAMUEL MOTSAPI</u>	3 rd Appellant
<u>WILLIAM RATAU MOREKE</u>	4 th Appellant

and

<u>THE STATE</u>	Respondent
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<u>CORAM:</u>	EBRAHIM, J <i>et</i> MOCUMIE, AJ
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<u>JUDGEMENT:</u>	MOCUMIE, AJ
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<u>HEARD ON:</u>	3 DECEMBER 2007
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<u>DELIVERED ON:</u>	6 DECEMBER 2007
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[1] The four appellants appeared in the Regional Court, Bethlehem on a charge of robbery with aggravating circumstances. They were all convicted as charged on 4 May 2004. The second appellant was also convicted of

contravention of section 3 of the Firearms and Ammunition Act No. 60 of 2000, possession of unlicensed firearm. They were sentenced to: Count 1, the first to the fourth appellant, 10 (ten) years imprisonment and count 2, the second appellant, 5 (five) years imprisonment which was wholly suspended for 5 years on certain conditions.

They were all represented during the trial.

They now appeal against both convictions and sentences.

[2] Mr. Pretorius who appeared on behalf of the appellants submitted that the trial court misdirected itself on amongst others the following grounds:

2.1 That first appellant was linked to the commission of the robbery through the car that was found inside his premises five days after the robbery;

2.2 That first appellant was not asked for an explanation on how he came to be in possession of the said vehicle;

2.3 The jewellery found in first appellant's possession was not positively identified as American Swiss' property;

2.4 That there was no sufficient evidence which linked second appellant to the commission of the robbery and possession of a

firearm. The fact that he was found inside a house in which jewelry belonging to American Swiss as well as a firearm were found was not sufficient evidence to link him to the commission of the robbery. The house belonged to one Dan Khambule;

2.5 That third appellant was identified erroneously at the identity parade.

[3] He however conceded that in so far as the fourth appellant, evidence of the State was sufficient to prove him guilty beyond reasonable doubt.

[4] He submitted further that the sentence that the trial court imposed cannot be said to be inappropriate or shockingly inappropriate in the circumstances.

[5] The four appellants were arrested in the early hours of 13 May 2004, five days after the American Swiss Jewellery Store in Welkom was robbed of an undisclosed quantity of jewellery and cellphones. The staff of American Swiss had just reported on duty the day in question when one man walked in and made some enquiries and then held them up at gun-point. Only to be joined by three others. In this group third appellant

was the most conspicuous due to his striking features: light complexion and a scar on the cheek as he was later identified at the identity parade.

[6] Each of the four appellants were found in possession of American Swiss jewellery and cellphones. They offered no explanation why they possessed such goods. A year later after their arrest first appellant alleged that the vehicle was brought to the premises some day before 13 May by one Captain Twala to repair it as he was a mechanic. The jewellery was his, none which was found in his possession belonged to American Swiss. He could not explain how his sim card was found inside one of the cellphones, a Samsung stolen at American Swiss during the armed robbery.

[7] The second appellant too alleged that the house he and his girlfriend were arrested in belonged to a man called Dan Khambule. His girlfriend who was with him was found in possession of jewellery inside her handbag. He did not know

about the firearm under the bed.

[8] Third appellant simply denied being found in possession of the jewellery and being at American Swiss. Whereas fourth appellant just fluffed his lines on how his finger-prints ended on a cellphone box of one of the cellphones stolen at American Swiss. All of them just laid the blame at the doorstep of this Khambule or Captain Twala. As one would expect all of them did not know the whereabouts of this man who trusted them with his house and jewellery and firearm. Furthermore none of the appellants even suggested to the police, their legal representatives and the trial court how these men could not be brought to court as witnesses. It is not difficult to see the creation of these men as a smoke-screen to avert to accept responsibility.

[9] Mr. Pretorius argued that the one feature of this case is that apart from the jewellery and this vehicle, the appellants were linked to be commission of the robbery obtained illegally from

MTN IBA indicating that the first, second and third appellants were communicating with each other but alleged it was in the ordinary course of their friendship and business transactions not related to the robbery.

[10] Apart from the patent error on the part of the trial court on the MTN number used to trace calls made between the appellants on the day of the robbery with regard to second appellant, counsel did not contend as would have appeared during the trial, that the inclusion of the evidence of the information from MTN operated unfairly against the appellants. They confirmed that indeed they made calls to each other but for their own personal reasons not necessarily linked to the commission of the robbery.

[11] From Van der Merwe's evidence it is clear that, the explanation given to the trial court a year later was never given to the police or anyone else for that matter. Appellants' insistence that they were not at American Swiss in Welkom on

13 May 2004, that they were not found in possession of large quantities of jewellery with tags of American Swiss and the vehicle that was seen in the vicinity of the crime scene, five days after the robbery is highly improbable. Their lame excuses that some of the jewellery was theirs and the vehicle and the house belonged to some other people is totally unconvincing. The argument that the trial court misdirected itself on the grounds alluded to in para 2 *supra* is without substance.

- [12] The approach to adopt in the evaluation of circumstantial evidence in the final adjudication of a criminal case rests on two cardinal rules whether (i) the inference which the State pleads is consistent with all the proved facts and (ii) no other reasonable inference can be drawn from those facts. See **R v Blom** 1939 AD 188 at 202 – 203. The objection is against “a *piecemeal process of reasoning*.” The Court must take the totality of facts into account. See **S v Snyman** 1968 (2) SA 582 (A) at 589F, **S v Ntsele** 1998 (2) SACR 178 (SCA) at 189 c – d;

S v Campos 2002 (1) SACR 233 (SCA).

[13] The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one taken. It must carefully weigh the cumulative effect of all of them together, and only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have. (**R v De Villiers** 1944 AD 493 at 508).

[14] In my view the cumulative effect of the evidence presented by the State formed a network “*so coherent in its texture that the appellants cannot break through it.*” (**S v Reddy** 1996 (2) SACR 1 (A)).

[15] Mr. Pretorius’s argument that inference which were not reconcilable with the guilt of the appellants could also be drawn from the State’s evidence cannot be correct **Zulman AJA** in **S v Reddy** *supra* at 10 b - d stated:

*“The fact that a number of inferences can be drawn from certain facts, taken in isolation, does not mean that in every case the state, in order to discharge the onus which rests upon it, is obliged to indulge in conjecture and find an answer to every possible inference any more than the court is called on to seek speculative explanations for conduct which on the face of it is incriminating.” (Per Diemont JA in **S v Sauls and Others** 1981 (1) SA 172 (A) at 182 G – H). See also **S v Rama** 1966 (2) 395 (A) at 410 A – C, approving the remarks of Malan JA in a minority judgment in **R v Mlambo** 1957 (4) SA 727 at 738 A – B).*

[16] In my view appellants’ bear denial of their involvement pales next to the evidence of Ms Bell and Van der Merwe. There is no reason for this Court to interfere with the findings of the trial Court on the appellants’ guilt in respect of both counts.

[17] On the question of sentence Mr. Pretorius correctly conceded that the sentence of ten years imposed by the trial court was

appropriate. This issue will then not be addressed as in my view the Magistrate was not guilty of any misdirection. I also do not consider the sentence to be startling inappropriate or to induce a sense of chock. If anything he erred on the side of leniency.

[18] **The following order is made:**

17.1 The appeals of the appellant against their convictions and sentences are dismissed.

17.2 The convictions and sentences of the Magistrate dated 4 May 2004 are confirmed.

B. C. MOCUMIE, AJ

I concur.

S. EBRAHIM, J