IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE **DATE: 7/02/2005**

In the matter between Case number: A 2633/03

NATHI SITHOLE FIRST APPELLANT

VINCENT MOGALE SECOND APPELLANT

ANDRIES SHONGWE THIRD APPELLANT

and

THE STATE RESPONDENT

Robbery - denial of involvement false beyond a reasonable doubt - stolen articles having been found in appellants' possession - alleged other robbers not having existed.

Van Rooyen AJ

[1] The appellants were charged and convicted of robbery with aggravating circumstances as well as the illegal possession of two firearms and ammunition. They were convicted by a regional magistrate's court and sentenced to 17 years imprisonment for the robbery, 2 years for the unlawful possession of the firearms and 18 months for the possession of the ammunition. The latter sentences were to run concurrently with the 17 years.

[2] The appellants admitted that the complainant had been robbed in Standerton by two armed men; that the items robbed were the items as listed in the charge sheet; that they traveled in a Honda Ballade which was stopped

by the Police outside Heidelberg more or less an hour after the robbery; that a bag with some of the robbed jewellery was found in the car; and that some of the articles were found in possession of appellants one and two; that a fingerprint of appellant 2[1] was lifted from a display case in the complainant's shop; and that the firearms and ammunition were found in the Honda. A Mr Stemmet, the owner of the shop, testified that appellant 1 had threatened him with a pistol and that he and his wife were, thereafter, bound in his workshop. He did not take part in an identity parade but he identified appellant 1 in the dock. He had had the opportunity to look at appellant 1 for more or less 15 seconds when he threatened him with a pistol. Jewellery to the value of R200 000 was stolen. His wife's cell phone had also been robbed. Fortunately it had all been recovered.

[3] Appellant 1 testified that on their way from Soweto to Nqutu, he and the other two appellants interrupted their trip at Standerton, so as to buy food and cigarettes. Appellant 2 strolled off whilst appellant 3 was lying in the back of the car. When appellant 1 returned after more or less five minutes, appellant 2 was already back in the car. At this stage a person with a plastic bag, accompanied by a second person, entered the car, drew a firearm and

[1] The initial formal admission states that the fingerprint of appellant 1 was lifted, but later on in the trial the admission was amended to read that the fingerprint of appellant 2 was lifted in the shop.

made them drive off. Appellant 2 was driving. The man swore and said that the "dogs" had left without them. After about 15 minutes on the open road, they saw a BMW approaching from the opposite side of the road. Appellant 2 was told to flick the Honda's headlights so that the other car would stop. After a short discussion between the robbers who had alighted from the Honda and a man in the BMW, they were told that the bag would remain in the Honda and that they would follow them. Their ways parted at an off-ramp and shortly thereafter a police vehicle stopped the Honda. Appellant 1 denied any involvement in the robbery.

[4] Appellant 2 testified that his fingerprint was left on the counter since he had entered the shop after having seen a wooden boat on display in the window of the complainant's shop; the boat was similar to a boat which he had previously received as a present and he wished to inquire as to its price. He entered the shop. He must have touched the counter and that was the explanantion for his fingerprint.

[5] Appellant 3 denied any knowledge of the robbery, the robbers who threatened them or the BMW. He testified that he slept from Soweto up to the time that the Police arrested them.

[6] The denial by the appellants amounts to an alibi. In *S v Van Eck en 'n Ander* 1996(1) SACR 131 (A) it was held that when the evidence as to an

alibi is satisfactory and without contradictions, the evidence to counter such an alibi should be overwhelming before it can be accepted. There is no onus on an accused to prove an alibi. If the accused's version is ultimately reasonably possible true, it must be accepted. Zulman JA's statement as to the onus in *S v V* 2000(1) SACR 453 (SCA) at *455a-c* is, of course, also applicable:

"It is trite that there is no obligation upon an accused person, where the State bears the onus 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but unless it is satisfied not only that the explanation is improbable but beyond any reasonable doubt it was false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

[7] The version of the appellants would seem improbable. Yet, the above test entitles the appellants to a finding in their favour, even if their version is improbable. It must be false beyond any reasonable doubt to sustain a conviction. In *S v Phallo and Others* 1999(2) SACR 558 (SCA) the following was said in regard to onus.

"[10] On the basis of this evidence it was argued that the State had at best, proved its case on a balance of probabilities but not beyond reasonable doubt. Where does one draw a line between proof beyond reasonable doubt and proof on a balance of probabilities? In our law, the classic decision is that of Malan JA in *R v Mlambo* 1957 (4) *SA* 727 *(A).* The learned judge deals, at 737*F - H,* with an argument (popular at the Bar then) that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which " ... at one time found almost universal favour and which has served the purpose so

successfully for generations" (at 738 *A).* This approach was then formulated by the learned judge as follows (at 738 *A - B)* :

> In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.
>
> An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.

(see also *S v Sauls and others* 1981(3) *SA* 172 *(A) at* 182 *G-H;* S *v Rama* 1996(2) *SA 395 (SCA) at 401;* S *v Ntsele* 1998 (2) *SACR* 178 *(SCA) at* 182 *b - h.)*

[11] The approach of our law as represented by *R v Mlambo, supra,* corresponds with that of the English courts. In *Miller v Minister of Pensions [1947]* 2 *All ER* 372 *(King's Bench)* it was said at 373 *H by* Denning J:

> ... the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice.
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> If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice."

[8] Since the appellants were found with the stolen goods in the Honda within an hour after the robbery, the circumstances would seem to point to their involvement in the robbery. Of course, the so-called "doctrine of recent possession" should be applied with caution.

In so far as this "doctrine" is concerned, Holmes JA said the following in *S* v *Parrow* 1973(1) SA 603 (A) at 604E :

"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.(Whether the further inference can be drawn that he broke into the premises in a charge such as the present one, will depend on the circumstances. The *onus* of proof remains on the State throughout. Hence, even if, after the closing of the cases for the state and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless the only reasonable inference is that he did so; for the law demands proof beyond a reasonable doubt. I agree with the statement in *South African Criminal Law and Procedure, vol.* 2 by Hunt, at p 611, that

"the 'doctrine' (if it can be given such an elevated name) of recent possession is simply a common-sense observation on the proof of facts by inference."

As to the facts before the Court of Appeal, the learned Judge of Appeal then states the following:

" The Court a quo, in dismissing the appeal, correctly held that the magistrate had misdirected himself. It then gave its own reasons for concluding that the appellant's explanation was not one which might reasonably be true. This involves further reference to the facts.

[The learned Judge further analysed the facts and concluded]

To sum up, on analysis of the totality of the facts of this case, including the explanation by the appellant and the *absence by the trial court of any finding as to the impression which he made as a witness,* we do not consider that it can be inferred, as the only reasonable inference, that he is the person who stole the cheque or broke into the complainant's premises. He is therefore entitled to an acquitta1." (emphasis added)

In *S* v *Skweyiya* 1984(4) SA 712(A) at 715C Eloff AJA said the following in regard to one aspect of the "doctrine" :

" It is the requirement that the goods must have been recently stolen. The nature of the stolen article is an important element in the determination of what is recent. .. .If the article stolen is of the type which is usually and can easily and rapidly be disposed of, anything beyond a relatively short period will usually not be recent. The court has accordingly to ask itself' ... is the article one which could easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original thief.' "

Also compare S v *Rama* 1966(2) SA 395(A) - to which case Eloff AJA refers - where it was held that an unusual and expensive watch was not an article which would pass readily from person to person. Also compare *Matola* v *State* [1997] JOL 184(B).

The following dictum of Mpati JA in *Makaola* v *S* [2002] JOL 9573(SCA) at para[8] in regard to the approach to recent possession should also be borne in mind:

"When one considers the doctrine of recent possession (the stamp disappeared on 9 February 1996 and was used by appellant from 14 February 1996) this means that he failed to give an innocent explanation of his possession of it. *However, failure to satisfactorily explain his possession does not necessarily lead to a guilty verdict.* The onus remains on the State throughout and never shifts to an accused to prove his innocence. He may still be entitled to an acquittal where the court is not satisfied, looking at all the evidence that his guilt has been proved *(cf R* v *Neal* 1945 AD 1 at 4; *R* v *Nxumalo* 1939 AD 580 at 587). (emphasis added)

[9] Appellant 1 was identified in the dock by the complainant. He had no doubt that Appellant 1 was the person who threatened him in his workshop at the back of the shop. He had an opportunity to watch him for 15 seconds. The complainant testified that he had said that he would be able to identify the person who had threatened him. Of course, a dock identification is risqué, but when this testimony is considered with the admitted fact that the goods were found in the Honda in which appellant 1 was travelling about an hour later and that he knew of the goods, the conclusion is inescapable that

his BMW and other robbers alibi ("BMW robbers") IS false beyond a reasonable doubt.

[10] Appellant 2's explanation of his fingerprint on the counter is highly suspect. Complainant confirmed that there had been a boat in the display window of the shop. Unfortunately the complainant's wife did not testify; she would probably have been able to comment on appellant 2's claim. Appellant 2 testified that within more or less five minutes after he had left the shop he was back at the car. Appellant 1 testified that when, after more or less five minutes in Shoprite, he returned to the car he found appellant 2 already seated in the car. When cross-examined on this point, appellant 2 said that at the stage when he was in the shop the robbery had not yet taken place. He said that the robbery could have taken place within the five minutes after he had left and had returned to the car. Although the complainant was not asked how long the robbers took before they left the shop, the probabilities are that the robbery must have taken significantly longer than five minutes, given the fact that the appellant and his wife were also tied by a robber. The long list of stolen articles also strengthens the inference that the robbery must have taken longer than five minutes. Appellant 2' s testimony that after he had left the shop he was back at the Honda within more or less five minutes, is in clear conflict with his

testimony that when he left the shop no robbery had yet taken place. The "two robbers" arrived at the car when appellant 1 had just entered the car and he had not yet distributed the food and cigarettes bought. That was also, according to appellant 1, more or less five minutes after he had initially left the car to purchase food and cigarettes. When the facts are considered as a whole, the inescapable conclusion is that the explanation as to the fingerprint is false beyond a reasonable doubt. Since appellant 2 was back in the car after more or less 5 minutes and appellant 1 had also returned to the car after more or less 5 minutes, the testimony of appellant 2 that when he left the shop the robbery had not yet taken place is clearly false. Any slight doubt about the possibility that the evidence as to the boat and fingerprint could be true, is negated by the highly improbable testimony that the robbery had not yet taken place when he left. I am satisfied that the court a quo justifiably rejected the evidence of appellant 2 as false beyond a reasonable doubt. The presence of the recently stolen articles in the Honda, is ultimately also evidence that appellant 2 was involved in the robbery - the alibi having clearly been false and based on unsatisfactory evidence.

[11] Appellant 3 denied that he knew anything about the robbery or the "BMW robbers". He slept from the time they left Soweto until the Police stopped the Honda at the road block. That he slept the whole time is in direct

conflict with the testimony of appellants 1 and 2, who testified that he handed them some of the jewels from the bag; jewels which they placed in their pockets. The formal admission was that some of the robbed jewels were found in the personal possession of appellants 1 and 2. There was no reference to appellant 3. Appellants 1, 2 and 3 formally admitted that the bag with the robbed jewellery was found in the Honda. Mindful of the cautionary approach which should be followed in regard to the evidence of an associate and a co-accused, I can find no reason why appellants 1 and 2 would wish to implicate appellant 3 unjustifiably in the handing of the jewels to them; it simply explained their personal possession. There was no evidence that he took some of the jewels for himself from the bag. Appellant 3 sat in the back of the Honda, where the bag of jewellery was, and appellant 1 sat in the front passenger seat whilst appellant 2 drove the Honda. As to Standerton itself, the testimony of appellant 1 was that appellant 3 was lying in the back of the car. This is compatible with appellant 3's testimony that he was sleeping. However, after the "robbers" joined them, appellant 1 testified that appellant 3 was sitting, leaning against the door of the Honda. When asked how many robbers were in the shop, the complainant testified that he was aware of two: one had threatened him with the pistol and the other one had tied him and his wife.

[12] In the absence of the testimony of the wife of the complainant, who was at the counter of the shop, it is impossible to conclude that there were more than two robbers in the shop. The question is, accordingly, whether once it is found that appellants 1 and 2 were in the shop and were the robbers, whether it can be inferred, as the only reasonable inference, that appellant 3 was involved as a co-perpetrator or as an accomplice or as an accessory after the fact, ready to assist in the getaway. Once it is accepted that appellants 1 and 2 were lying as to the involvement of the robbers and their BMW associates one is, of course, left with the evidence of appellant 3 who denies any involvement in a robbery and any knowledge of the BMW robbers.

[13] After the robbery by appellants 1 and 2, appellant 3 was in the Honda and was aware of the bag of stolen jewellery. According to appellants 1 and 2 he was not asleep at this stage and handed some of the jewellery to appellants 1 and 2 in the front seat of the Honda. He must, accordingly, have been aware of the jewellery, if we accept the evidence of appellants 1 and 2.

[14] In so far as appellant 3 is concerned, his explanation that he slept the whole time is clearly false. It amounts to not answering the state case, which places him in a Honda one hour after a robbery was committed and with the

bag of stolen articles in the Honda. In S v *Boesak 2000(3) SA* 381 *(SCA) par [46]* and *[47]* the Court stated as follows:

" It is trite law that a court is entitled to find that the State has proved a fact beyond a reasonable doubt if a *prima facie* case has been established and accused fails to gainsay it, not necessarily by his own evidence, but by any cogent evidence ....

And also :

"Of course, a *prima facie* inference does not necessarily mean that, if no rebuttal is forthcoming, the *onus* will have been satisfied. But one of the main and acknowledged instances where it can be said that a *prima facie* case becomes conclusive in the absence of rebuttal is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation."

The approach of the Supreme Court of Appeal was confirmed by the Constitutional Court in *S v Boesak* 2001 (1) SA 924 (CC), the Court holding that the weight of the evidence to be attached by a Court in deciding whether the State had proved its case beyond a reasonable doubt, was influenced by the absence of contradicting evidence by the accused. At par [28] Langa DP (as he then was) stated as follows:

"Whilst the evidence to the contrary need not be the evidence of the accused, there can be no quarrel with the principle that that the absence of contrary evidence is relevant to the evaluation of evidence relied upon by the State for a conviction in a criminal trial. It follows therefore that in reaching its conclusion, the SCA was entitled to have regard to the absence of an allegation or evidence to the contrary raising the issue of forgery."

Given my finding that he was lying as to having slept the whole time and having due regard to the above approach in the *Boesak* matter, appellant 3 had to explain his presence in the Honda. He could not simply deny any involvement or knowledge. Appellants 1 and 2 testified that he was in fact aware of the jewels; he handed the jewels to them from the back of the car. Mindful of the cautionary approach as to the evidence of co-accused and associates, I do not believe that there is any reason to doubt the veracity of what they testified in regard to appellant 3' s having been awake and having been aware of the jewels. By not explaining his presence in the Honda in which the bag of jewels were found an hour after the robbery, the only reasonable inference is that he was involved in the robbery either as an accomplice or as a co-perpetrator.

[15] As to the conviction on the possession of the firearms and ammunition, the mere fact that a pistol and a revolver were found in the car, does not mean that it may validly be inferred that the appellants all possessed. Compare S v *Mbuli* 2003(1) SACR 97(SCA). As to the absence of a reasonable inference of *animus possidendi* in the case of the possession of

dagga where a number of people were in a vehicle in which dagga was found, compare the judgment of De Villiers J (with whom Roos J agreed) in S v *Mello* 1998(1) SACR 267(T). The only evidence of possession of a firearm is that of the complainant who testified that appellant 1 threatened him with a pistol. There is no evidence that it was loaded. Appellant 2 and 3' s conviction of possession is accordingly not justified. Appellant l's conviction of possession of ammunition is not justified.

[16] I can find no reason to interfere with the 17 years' imprisonment imposed for the robbery. It is a serious crime and the community must be protected against this kind of callous conduct. It is true that the minimum sentenced is 15 years, but there is no reason why a higher sentence may not be imposed. I do not find the 17 years to be disturbingly inappropriate.

[17] The appellants all had the benefit of having their sentences run concurrently with the 17 years. The mere fact that their convictions as to possession have either been set aside or reduced, should not have any influence on the 17 years for robbery. They have, as it were, already benefited from their sentences having been made to run concurrently with the seventeen years. The fact that their convictions are now set aside, does not entitle them to a lesser sentence on the robbery.

[18] **Order:**

(1) The appeals of appellants as to convictions and sentences for robbery are not upheld. Their sentences of 17 years are confirmed.

(2) The appeals of appellants 2 and 3 for the convictions of possession of firearms and ammunition are upheld. Their convictions and sentences in this respect are set aside.

(3) The appeal of appellant 1 as to the conviction of possession of firearms is upheld in so far as he is only convicted of the possession of a pistol and not also of the possession of a revolver. His conviction and sentence as to the possession of the revolver are set aside. Appellant l's appeal as to conviction of possession of ammunition is upheld and the conviction and sentence are set aside. His sentence for possessing the pistol is one year imprisonment, which is to run concurrently with the 17 years for robbery

JCW van Rooyen .....

Acting Judge of the High Court 7 February 2005

BR du Plessis ..... .1 agree

Judge of the High Court

F or Appellant 1: Mr Penton

For Appellant 2: adv F Roets

For Appellant 3: adv CJ Barnard