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

NOT REPORTABLE DATE: 29/4/2008

SYDWELL MASHILA

In the matter between:
THE STATE
v
Magistrate Giyani
Magistrates' Court Case Number GYA 69/2007
High Court Reference Number 1104
REVIEW JUDGMENT
BASSON, J

The accused was convicted of five counts of housebreaking with the intent to steal and theft. He was sentenced to three years' imprisonment on count 2, one year's imprisonment respectively on counts 3 and 4 and two years' imprisonment respectively on counts 5 and 6. The court *a quo* did not order the sentences to run concurrently.

"It is trite that the accused's guilt must be proven beyond reasonable doubt.

Counts 2 to 5 relate to crimes committed during the night of 21 to 22 February 2007. In all instances, except for counts 2 and 5, cellular phones were stolen. In count 2 the theft of clothes also took place and in count 5 the theft of R 3 000,00 also took place.

In regard to count 3, there is doubt whether the crime of housebreaking with the intent to steal and theft was proved against the accused. Given the fact that the evidence of Cry Mashaba (hereinafter referred to as Cry) was to the effect that the window was wide open and the cellular phone was on a charger, three paces from the window, there is no evidence that the house was broken into. The inference is justifiable that the accused simply entered the premises through an open window.

The question thus arises whether the State proved the guilt of the accused beyond a reasonable doubt regarding count 3. It is not disputed that Cry's cellular phone was in fact stolen and later found in the house of Kensani Martha Shiviti (hereinafter referred to as Shiviti). Further it is also not disputed that the phone was found inside the house in a blue work suit or that Cry identified the phone as his property. It is, however, in dispute whether the accused is the person who stole the phone. The.court *a quo* found that the accused was

linked to the crime by the "pointing out" he had made to the police. Shiviti testified that when the police arrived they asked the accused where his clothes were and they found it inside another room in her house. Inside the clothes, they found the cellular phone which belongs to Cry.

It is trite that "pointing out" is nothing more than an *extra-curial* admission by conduct. The admissibility requirements are that the admission had to be made freely and voluntary without undue influence. From the record it is clear that the accused was assaulted by members of the community before the police arrived. It is also clear that the accused was questioned by the police in the presence of the community that had assaulted him. It is clear that these circumstances would vitiate the requirement of voluntariness, making the "pointing out" inadmissible. It is therefore clear that

the required *nexus* between the stolen cellular phone of Cry and the accused was not proved beyond a reasonable doubt and that the accused ought to receive the benefit of the doubt regarding count 3.
Cry testified that three cellular phones were found in the possession of the accused, to wit an 1100 and two V118 cellular phones. Cry thereafter, in an attempt to trace his cellular phone, phoned his number, which was answered by someone in the household of Shiviti. On their arrival there, he received his cellular phone. Shiviti described her phone as a Nokia while Cry is clearly not an expert regarding the makes and models of cellular phones. Bearing in mind, however, the circumstances that led to Shiviti's identification of her phone, barely hours after it was stolen, the inference is undeniable that she identified what was her own property. This is also confirmed by the evidence of Cry and Zitha.
By virtue of the same reasoning, it is clear that Berlina Ntsaro Mashava's (hereinafter referred to as Mashava) identification of her cellular phone is reliable. Her C1l8 Motorolla phone was stolen from her house. Entrance was gained through windows which were opened. She recovered her phone from the police, after she was informed at her workplace that she must go to the police station. It must be noted that she did not identify her phone in the presence of Cry. Inspector Ben Phosa Zitha (hereinafter referred to as Zitha) testified that the community handed him three cellular phones. He testified that Mashava identified one of these phones as hers. The inference is inescapable that the three phones were the same ones recovered by Cry.
As far as count 5 is concerned, there is no evidence to suggest that the accused is linked to the offence. The accused, therefore ought to receive the benefit of the doubt regarding count 5.
The question remains whether the State succeeded in proving beyond a reasonable doubt that the accused had also stolen the clothes he was wearing when he was apprehended. It was pointed out above that the *extra curial* admission by conduct of the accused was inadmissible. It is therefore not proven that the blue suit which was found inside Shiviti's house belonged to the accused. Shiviti, however, testified that when the accused was brought with the cellular phones, he was wearing her son's trouser, a belt and a lumbar jacket. She identified the trouser because it had a school ticket inside. Her son also recognised the clothes. The identification of the clothes is accordingly reliable.
The accused initially pleaded guilty to count 6. After the accused was questioned in terms of section 112(1)(b) of Act 51 of 1977, a plea of not guilty was entered on behalf of the accused. The complainant in that count did not testify. All the elements of the offence were not proven and that the accused ought to receive the benefit of the doubt on count 6.

In the event, the convictions regarding counts 2 and 4 ought to be confirmed and that the convictions on counts 3, 5 and 6 ought to be set aside.
In regard to sentence, I am of the view that the three years' imprisonment imposed in count 2 and one year's imprisonment imposed in count 4 ought to run concurrently. The sentence of three years' imprisonment could not be regarded as excessive, taking into account the accused's previous convictions.
In the event the convictions and sentences on counts 3, 4 and 5 are set aside on review. The accused is found guilty in regard to counts 2 and 4 and is sentenced to three years' imprisonment and one year's imprisonment respectively. The sentences are to run concurrently.

D A BASSON
JUDGE OF THE HIGH COURT
I agree.

RD CLAASSEN
JUDGE OF THE HIGH COURT