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

Case No: A348 / 2007

Date heard: 01/02/2008

Date of judgment: 26/02/2008

REPORTABLE

In the matter between:

Nkosi, E	First Appellant
NtshinQila, T	Second Appellant

And

THE STATE	Respondent

JUDGMENT:

DU PLESSIS J:

The appellants, respectively as accused one and accused two, appeared in the regional on a several charges. With them appeared a third accused who absconded in the course of the trial and in respect of whom a separation of the trials was ordered. The regional court convicted the first appellant of housebreaking with the intent to rob (count 1), robbery with aggravating circumstances (count 2) and of attempted murder (count 3). He was respectively sentenced to five years imprisonment, fifteen years imprisonment and seven years imprisonment. The sentences were ordered to run concurrently so as to amount to an effective sentence of twenty years imprisonment.

The second appellant was convicted on count one, housebreaking with the intent to rob and on count two, robbery with aggravating circumstances. He was sentenced to five years imprisonment and to fifteen years imprisonment, with an effective term of fifteen years imprisonment. This is an appeal against the convictions and the sentences.

The charges stem from an incident that occurred at the Putfontein smallholdings at about 08hOO on 8 October 2004. The house of the late Ms. Bettie Pieters was broken into. Ms Pieters and her domestic assistant, Ms Shiba, were held at gunpoint and then tied up. The intruders stole several household goods.

Ms Shiba was busy in the kitchen when she saw two men who had entered the house. One of them had a firearm. Ms. Shiba identified the first appellant as the other one, who was not armed. She later attended an identification parade on which the first appellant was present but she was there unable to identify him.

At the outset Ms Shiba testified that there were only two intruders. In cross-examination and with reference to a statement she had made to the police, she said that she was confused and that she later did see four people in the house.

Of importance for purposes of this appeal is the fact that Ms Shiba later identified a pair of black gloves as being those of Ms. Pieters. It is common cause that Ms. Pieters had passed away after the robbery. Her daughter, Ms Van der Merwe also gave evidence during which she also identified the gloves as those of her mother. The importance of this identification will appear in due coarse.

After the men had left the house Ms. Shiba was able to raise alarm and the grandson of Ms Pieters, Mr Zander Sinden, was called. Mr. Sinden arrived and found two men still on the smallholding. One of them took out a firearm and shot Mr Sinden in the arm. He was unable to identify this person. (This shooting was the subject matter of the attempted murder charge.)

A certain Mr. Lubisi, who worked in the vicinity, became aware of what had happened. He saw a man emerging from the veldt in the vicinity of Ms. Pieters's smallholding. He identified this man as the first appellant. The man disappeared into a nearby shebeen. Mr Lubisi called his employer, Mr Potgieter, and the two of them started looking for the man who had disappeared into the shebeen. With the help of another witness, Mr Du Plessis, they learnt that the person had gone into an outside toilet. The two (Lubisi and Potgieter) and other bystanders managed to open the shut door of the toilet. Inside was the first appellant, fully dressed sitting on the toilet seat. They kept him there and contacted the police. The police came and found the

first appellant still in the toilet. They, so Potgieter and one of the policemen testified, searched the first appellant and found a pair of gloves in his pocket. The relevant witnesses testified that it was this pair of gloves that Ms Shiba and Ms Van der Merwe later identified as that of the late Ms Pieters.

As regards the second appellant, the only evidence linking him to the crimes in question is that he was arrested some two days after the incident and that he then made an admission to the police in the course of a so-called "pointing out". The appellant denied that the pointing out or the admission was voluntarily made. After a trial within a trial, the court a *quo* held that the pointing out as well as the admission was made voluntarily. I shall deal with the content of the admission in due course.

There is no doubt that the crime was committed and I proceed on the footing that the question is whether the appellants were identified beyond reasonable doubt as the perpetrators thereof. I shall deal with each appellant's appeal in turn.

As regards the first appellant, Ms. Sheba's identification is not of much value. Lubisi, however, saw him in the vicinity of the crime soon after it had been committed. The manner in which he was found in the toilet leaves no doubt that he was hiding there, still close to the scene of the crime. The appellant denied that he was found in the toilet with Ms Pieters's gloves, or

any glove for that matter, in his pocket. The learned magistrate, rightly in my view, accepted the states evidence and rejected that of the appellant as false beyond reasonable doubt. The only reasonable inference from the proven facts, including the fact that the appellant did not explain his possession of the gloves, is that the appellant was one of the persons who broke into the house and robbed Ms Pieters and Ms Shiba. Having regard to Ms Shiba's evidence, the first appellant probably did not carry the firearm. It is abundantly clear, however, that he associated himself with his armed co-perpetrator. In the circumstances the first appellant's appeal against his conviction of housebreaking with the intent to rob and robbery with aggravating circumstances cannot succeed.

Turning to the first appellant's conviction of attempted murder, the only evidence was that a person, one of the robbers it may be assumed, shot at Mr Sinden. I have found that the first appellant's co-perpetrator was in possession of a firearm and that the appellant knew it. The man probably shot at Mr Sindenin order to make good his escape. There is no evidential basis for holding that the first appellant knew that the man was going to shoot at Sinden. Similarly, there is no evidential basis for holding that beyond reasonable doubt the appellant associated himself with the shooting either before or after the shot had bee;\fired. In my view the trial court erred in holding that the appellant had a common purpose with the man who fired the shot to kill Mr Sinden. The first appellant's appeal against his conviction of

attempted murder must succeed.

That brings me to the convictions of the second appellant. The second appellant testified that he did not willingly perform the pointing out and that he was in any event told what to say during the pointing out. I assume for purposes of this judgment that the appellant voluntarily pointed the scene of the crime out and there made the admission that I shall now discuss. Before the second appellant took the officer who conducted the pointing out to the scene, he was asked how he gained the knowledge regarding what he was about to point out. He said: "I was there but I did not know something like that would happen". The second appellant then took the police to the house of Ms Pieters. There he said the following: "we were four guys. Two, Patrick and Efrahim went in the house. Me and the other guy, I call uncle, his name is George, and we stand at the gate. After a while, Patrick came out of the house and he called us. We approached the house and stand at the door. When we were at the door uncle went in, is when I went out and I left. Then I was back at the gate, uncle came out of the house. That is when he said to me something is happening inside. Then he joined me and we left. When we were next to the scrap yard uncle informed me that those two guys they were robbing in the house. When we were at the plot where they were selling sheep and goats we saw the two guys running away. They were chased with a red Bantam bakkie. Patrick and Efrahim, and they had goods with them, but I cannot say what kind of good. That is when we left. And I do not know what

happened after that."

What the appellant said did not constitute an unequivocal admission of guilt. There is no other evidence linking him to the crime. Accordingly, the question is whether the only reasonable inference from his words, read with all the other evidence, is that he was guilty of housebreaking with the intent to rob and of robber with aggravating circumstances.

In my view one inference that could be drawn is that the appellant accompanied the robbers without knowing what they were going to do, that he stood outside while they were inside and that he left when he realised what was afoot. Ms Shiba's evidence that, at some stage, she saw four people in the house is not reliable. Even if it were accepted, however, it would accord with the second appellant's statement that he was called and went to the door of the house. It is somewhat improbable that the appellant would have accompanied the robbers without knowing what they were about to do. That improbability it not sufficient to render the inference that I am considering not reasonably possible. In this regard is must be borne in mind that the events occurred in broad daylight and, therefore, that the second appellant's presence at the scene does not in itself indicate that he was there for an unlawful purpose. In my view the only reasonable inference from what the appellant stated is not that he actually took part in the robbery. In the result the second appellant's appeal against his conviction must succeed.

As regards sentence, counsel for the appellant did not submit that the learned magistrate misdirected himself when he considered and imposed the sentence. The individual sentences on counts 1 and 2 are by no means inappropriate. The trail court ordered that the two sentences must run concurrently. There is no basis for interfering with the learned magistrate's exercise of his discretion.

The following order is made:

1. The appeal of the first appellant, E. Nkosi, against his conviction on count 3, attempted murder, succeeds. The conviction and sentence (seven years imprisonment) of the first appellant on the charge of attempted murder is set aside.

2. The appeal of the first appellant, E. Nkosi, against his convictions of housebreaking with the intent to rob and of robbery with aggravating circumstances is dismissed.
3. The appeal of the first appellant, E. Nkosi, against his sentences on housebreaking with the intent to rob (5 years imprisonment) and robbery with aggravating circumstances (15 years imprisonment) is dismissed.
4. The order of the trial court that the sentences of the first appellant, E. Nkosi, on counts 1 and 2 must run concurrently is confirmed. The first appellant is thus effectively sentenced to 15 years imprisonment.
5. The appeal of the second appellant, T. Ntshingila, against his convictions of housebreaking with the intent to rob and of robbery with aggravating circumstances succeeds. The convictions and sentences are set aside.

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B. R. DU PLESSIS
Judge of the High Court

I agree

T.J. RAULINGA

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Judge of the High Court

Appellants' Legal Representation:
Mr. Manzini (012 401 9200 / 072 864 9523)

Respondents' Legal Representation:
ADV. W.A. Smit (084 640 4691)