IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 2012-02-20

Case Number: A731/2010

In the matter between:

MDUDUZI COMFORT NDLANGAMANDLA Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] On 8 February 2010 the appellant and his four co-accused were convicted of the theft of a motor vehicle and various other items in the Piet Retief regional court and on the same day the appellant was sentenced to 7 years imprisonment. (His four co-accused were each sentenced to 5 years imprisonment.) With the leave of this court, granted on petition, the appellant appeals against both his conviction and sentence.

[2] There was no direct evidence that any of the accused (including the appellant) were involved in the theft. The state relied on circumstantial evidence to prove that accused numbers 1, 3, 4 and 5 had stolen the motor vehicle and other items. This consisted of five sets of footprints (made by shoes) which the expert was able to follow from the place where the vehicle was stolen to the place where the vehicle was eventually found, which matched the shoes worn by accused numbers 1, 3, 4 and 5. Accused numbers 1, 3 and 4 all admitted that they had been at the scene and had assisted two other persons to push the vehicle. Accused number 5 denied that his footprints had been found at the scene and that he had had anything to do with the vehicle. In the light of the footprint evidence the court *a quo* rejected their evidence as not reasonably possibly true. As appears from ***S v Mkhabela* 1984 (1) SA 556 (A)** at 563B-F evidence of footprints is admissible but the court should be cautious of relying upon such evidence especially where it is the only evidence against the accused. The cogency of such evidence must depend upon all the circumstances of the case. In view of the admissions of accused numbers 1, 3 and 4 that they were physically at the scene and had helped to push the vehicle it seems that their guilt was proved beyond reasonable doubt.

[3] As far as accused number 5 is concerned the evidence of footprints is of doubtful reliability and he had disputed throughout, supported by

accused numbers 1, 3 and 4, that he had been at the scene. I shall deal with this later.

[4] The appellant did not admit that he had been on the scene and his footprints were not found there. The expert witness also did not place the appellant's vehicle at the scene. The only evidence to connect the appellant to the crime was the fact that some of the stolen property was found in his vehicle and that accused numbers 1, 3 and 4 all testified that they had travelled with the appellant from Swaziland. This implies that he had been with them at the time of the theft. The appellant formally admitted that the stolen property was found in his vehicle but testified that it must have been put there by the other accused who he had picked up next to the road. He denied having conveyed accused numbers 1, 3 and 4 from Swaziland and stopping at the farm where they stole the motor vehicle and other property.

[5] The court *a quo* could not and did not find that the tracks of the appellant's Camry motor vehicle were found next to the stolen vehicle and that these tracks showed that accused numbers 1, 3, 4 and 5 had entered the appellant's vehicle. The court correctly referred to the fact that the expert witness was unable to look at the Camry's tyres and compare them with what he found at the crime scene. The court *a quo* convicted the appellant on the strength of accused numbers 1, 3 and 4's evidence that they had travelled with him and his vehicle from Swaziland and had stopped near the farm where the vehicle and other

property was stolen. The court *a quo* found that the appellant had probably sat and waited in his vehicle and that he had probably offloaded the other accused. The court *a quo* found that it was clear that the appellant had the lion's share and that he made the arrangements. Clearly, in doing so, the court accepted the truthfulness and reliability of the other accused.

[6] The court *a quo* obviously convicted the appellant on the evidence of accused numbers 1, 3 and 4. In doing so the court was required to take into account the cautionary rule relating to the evidence of accomplices which is equally applicable to the evidence of co-accused – see ***S v Johannes* 1980 (1) SA 531 (A)** at 532H-533C; ***S v Dladla* 1980 (1) SA 526 (A)** at 529D-F. In ***Rex v Ncanana* 1948 (4) SA 399 (A)** at 405-406 the court summarised the rule as follows:

> 'The rule of practice which it was intended to state and which is consistent with, if it is not expressly approved in, decisions of this court (see ***R v Kubuse* (1945 AD 189); *R v Brewis* (1945 AD 261); *R v Kristusamy* (1945 AD 549))** is that, even where sec. 285 has been satisfied, caution in dealing with the evidence of an accomplice is still imperative. The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What *is* required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside

> knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone; so that satisfaction of the requirements of sec. 285 does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although sec. 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and a rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question.'

Where the court relies upon the evidence of a co-accused it must be satisfied that the co-accused is a reliable witness – see ***S v Dladla supra*** at 529G-530C. And where the court relies upon the evidence of a co-accused as corroboration for another co-accused the court must be satisfied that they are both reliable witnesses – see ***S v Johannes supra*** at 533H.

[7] In the present case there is no indication that the court *a quo* was aware of the cautionary rule or that the court applied it. The court pertinently found that the other accused all lied and that their evidence

was rejected where it was in conflict with the state's evidence. The court did not explain how it was possible to reject the other accused's evidence where they testified as to accused number 5's innocence and accept their evidence where they placed the appellant on the scene. As pointed out in ***S v Johannes***, before convicting the appellant on the evidence of accused numbers 1, 3 and 4 the court had to find that they were reliable witnesses. There is no such finding in the judgment.

[8] On appeal, the appellant's counsel contends that the court *a quo* did not properly take into account the cautionary rule and erred in its reasoning. The appellant's counsel also contends that it cannot be found that the appellant's version is not reasonably possibly true. The state concedes that the evidence does not clearly justify a finding that the appellant's version is not reasonably possibly true and points out that this court must consider whether the court *a quo* correctly warned itself with regard to the application of the cautionary rule.

[9] As already mentioned the court *a quo* did not apply the cautionary rule and there is no finding that the other accused were reliable witnesses and that the appellant was not. The court *a quo* also did not explain why the appellant's evidence cannot be reasonably possibly true – see ***S v Shackell* 2001 (2) SACR 185 (SCA)** para 30.

[10] The court *a quo* accepted that accused number 5's footprints were found at the scene of the theft. The court did not explain why it

accepted this. The court *a quo* also found that all the accused (including accused number 5 were in the same vehicle). The court also did not explain why it made this finding in respect of accused number 5. Presumably this finding was also dependent upon the acceptance that accused number 5's footprints were found at the scene of the theft as the court made a general statement to that effect later in the judgment. The question is whether the evidence shows beyond a reasonable doubt that accused number 5's footprints were found at the scene.

[11] In ***S v Mkhabela* 1984 (1) SA 556 (A)** at 563B-D the court summarised the legal position relating to footprints:

> 'In argument before us counsel referred to various cases dealing with identification by means of footprints. (See ***R v Modesane* 1932 TPD 165**; ***R v Nkele* 1933 TPD 36**; ***R v Mabie* 1934 OPD 34**; ***R* v *B Louw* 1946 OPD 80**.) I do not think that any general principles are to be derived from these cases, save that evidence of footprints is admissible, that the Court must nevertheless be cautious of relying upon such evidence, especially where it is the only evidence against the accused, and that the cogency of such evidence must depend upon all the circumstances of the case. In regard to this last-mentioned point, the Court may, for example, find it easier to rely on footprint evidence where it relates to the imprint left by a boot or shoe that has some distinctive characteristic or pattern than where it relates to the imprint made by a naked human foot. Similarly, it will always be more satisfactory if the Court is able, by means of a photograph or a plaster cast or some other visual

medium, itself to make the necessary comparisons and to assess the cogency of the footprint evidence.'

[12] The state relied on the evidence of a single witness, Rudolf Christiaan Uys, to prove that the footprints found at the scene of the theft were made by the accused. Mr. Uys arrived on the scene a few hours after the theft. He found multiple footprints (made by shoes) next to the vehicle, which he followed from the place where the vehicle was stolen to where it was found. The footprints disappeared next to the tracks of another vehicle and Mr. Uys concluded that that vehicle had picked up the thieves. Mr. Uys identified and photographed five different footprints, all made by shoes. He then reproduced the footprints by means of plaster of paris. He was then shown the six suspects who had been arrested in connection with the theft of the motor vehicle. With their consent he examined their shoes and found that the shoes of five of the six matched the footprints which he found at the scene and reproduced. Mr. Uys photographed each of the suspects with their shoes. Accused number 5 refused to hand over his shoes for examination. According to Mr. Uys a policeman attached accused number 5's shoes and they were handed in as exhibits. However these shoes were stolen from the exhibits store and were no longer available for further examination. Uys found that four suspects' shoes matched the plaster of paris casts which he had made. One of these belonged to accused number 2 who escaped and did not stand trial. Uys was then left with the footprints of accused numbers 1, 3 and 4. Uys did not complete his comparison between the plaster of paris casts

and accused number 5's shoe. He nevertheless expressed the opinion that the prints were made by accused number 5's shoe. Mr. Uys did not explain why he had not completed the comparison and why he had not prepared a court card relating to the alleged footprint of accused number 5. He clearly was not satisfied that he had done everything required. Mr. Uys did not hand in as evidence the product of his labour and the court was therefore not able to make its own comparison.

[13] Accused numbers 1, 3 and 4 all testified that accused number 5 had not been in the motor vehicle or at the scene where they pushed the vehicle.

[14] Accused number 5 testified that he had not been at the scene of the theft and had been arrested for something he did not do. His cross-examination did not demonstrate that his evidence is not reasonably possibly true.

[15] In these circumstances there is insufficient evidence to justify the conviction of accused number 5 and the court must exercise its review powers in terms of section 304(4) of Act 51 of 1977 and set aside his conviction and sentence.

[16] The following orders are made:

<u>In respect of the appeal</u>:

The appeal is upheld and the appellant's conviction and sentence are set aside.

In respect of accused number 5, Themba Thabo Mtshali:

The conviction and sentence of accused number 5, Themba Thabo Mtshali, for the theft of the Ford Ranger motor vehicle, two pairs of binoculars, keys, a cellphone charger, a vehicle battery and a radio on 23-24 July 2008 are reviewed and set aside in terms of section 304(4) of Act 51 of 1977.

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B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

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S.A.M. BAQWA
ACTING JUDGE OF THE HIGH COURT

CASE NO: A731/2010

HEARD ON: 20 February 2012

FOR THE APPELLANT: MR. M. JUNGBLUTH

INSTRUCTED BY: Botha & Van Dyk Inc.

FOR THE RESPONDENT: ADV. J.J. KOTZE

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 20 February 2012