

HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, PRETORIA

2016/114  
NOT REPORTABLE

CASE NO: A928/2013

In the matter between:

**MTHOKOZISI NKOSI**

Appellant

and

**THE STATE**

Respondent

**J U D G M E N T**

**MAKGOKA, J:**

[1] The appellant stood trial in the regional court, with a co-accused Mr. Mphikelele Dube. He was accused 2. They faced one count of housebreaking with intent to steal and theft. Dube was acquitted, while the accused was convicted and sentenced to four years imprisonment. The appellant appeals against both the conviction and the sentence, with leave of the trial court.

[2] What gave rise to the appellant's conviction is a house-breaking and theft incident at the property of the complainant, Mr. Vusi Ndaba on Christmas Day, 2012. Three witnesses testified for the state during the trial, while the appellant testified in his own defence and closed his case without calling further witnesses. The evidence of all three state witnesses has no bearing on the conviction of the appellant, as he was convicted mainly on the evidence of Mr Dube, the co-accused.

[3] The complainant, Mr Ndaba, is employed as a security officer. He worked day and night shifts on 24 December 2012. Upon his arrival at home from work on 25 December 2012 at around 18h30, he found that his property, a two roomed corrugated iron constructed-shack, had been broken into. Various valuable household items were missing. He called the police and after investigating, and were about to leave, they received a call from members of the community policing forum requesting them to come to the sports ground, where they found other members of the community policing forum with Mr Dube, whom they accused of knowing the whereabouts of the items stolen from Mr. Ndaba's s property.

[4] Mr Dube took the police and the community policing forum members to his shack which was locked with a chain. The chain was broken and most of Mr. Ndaba's property was found inside the shack. Mr Dube told the police that the items were brought to his shack the previous day, 24 December 2012, by the appellant, who was with one Khulekani and requested to place some items in his room overnight. He therefore knew nothing about the break-in and theft at Mr. Ndaba's house. This is the version that he repeated in court.

[5] As a result of the information conveyed by Mr Dube to the police, the appellant was arrested. In his evidence, the appellant pleaded an alibi. He testified that on the day of the incident he was in Johannesburg at his brother's place, and therefore, he denied any involvement in the break-in and theft. He knew the complainant as he was the complainant's tenant about 2½ years before the incident.

[6] In convicting the appellant, the learned magistrate said that he 'believed that (the appellant) had more to answer' to the crime than his co-accused. In arriving to this conclusion, the learned magistrate failed to take into account the unsatisfactory nature of Mr Dube's evidence, and the inherent improbabilities in that evidence. The unsatisfactory nature of Mr Dube's evidence is aptly described in the state's heads of argument as follows:

'It is inevitable not to discuss the state's case against accused 1 and the appellant including its shortcomings. The state had a strong case against accused 1 in that he was found in possession of the items which was most probably stolen within less than a day. In terms of the

doctrine of recent possession he was correctly charged with housebreaking with intent to steal and theft. His account or explanation of how he became in possession of the said property was not satisfactory and could have been reasonably possibly true at all. His opportunistic version of convenience that the said property was brought by the appellant to his shack whilst he was at his friend namely, Sicelo was prove beyond reasonable doubt after cross-examination by counsel for the appellant and the prosecutor. Appellant reside 400 meters away from accused 1 but when he bought the property to accused 1 at 22h30 during the night, to him it was just fine. Where the appellant got the property? Why he did not take them to his home which was just 400 meters away? Whether it was stolen property or not, he did not care, as long as such property was going to be removed from his shack in the following morning.'

[7] By failing to take into account the above, the learned magistrate committed material misdirection, which vitiates the conviction. The evidence of a co-accused must be treated with caution as that of an accomplice. Had the learned magistrate applied the correct approach, he would have concluded that the state had not discharged the onus on it to prove the appellant's guilt beyond a reasonable ground.

[8] In light of the apt and justified criticism by the state, it becomes in explicable that it, in the same breath, supports the conviction.

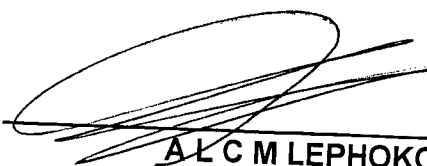
[9] In the result the appeal has to success. The following order is therefore made:

1. The appeal against the conviction is upheld;
2. The sentence imposed on the appellant is set aside.



TM MAKGOKA  
JUDGE OF THE HIGH COURT

I agree



A L C M LEPHOKO  
ACTING JUDGE OF THE HIGH COURT

**DATE HEARD** : 24 APRIL 2014

**JUDGMENT DELIVERED** : 20 JUNE 2014

**FOR THE APPELLANT** : ADV H W DEMPERS

**INSTRUCTED BY** : PRETORIA JUSTICE CENTRE

**FOR THE STATE** : ADV M MOLATUDI

**INSTRUCTED BY** : DIRECTOR OF PUBLIC PROSECUTIONS,  
PRETORIA