IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A191/15

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
09/03/2016 DATE SIGNATURE

9/3/2016

DIALE PHILIP LEKGAU APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

SIKHWARI, AJ

[1] This matter came by way of an appeal from the Regional Court for the regional division of Gauteng, held at Pretoria, the court *a quo*. The appellant is approaching this court with the leave of the *court a quo*. The appeal is against the conviction only on counts 1, 3, 6, 7, 9, 10, 11 and 12.

[2] The appellant was sentenced to the effective term of imprisonment of four years in respect of each of count 1, 3 and 6 for housebreaking with intent to steal and theft. The appellant was sentenced to three years imprisonment in respect of count 7 for

theft. The appellant was sentenced to two years in respect of each of counts 10, 11 and 12 for kidnaping. The appellant was further sentenced to twelve (12) years imprisonment in respect of count nine for robbery with aggravating circumstances. The court *a quo* ordered that all the sentences will run concurrently with the sentence of 12 years in count 9.

[3] The appellant wad granted leave to appeal against the conviction by the court *a quo*. There is no appeal against the sentences. During argument this court has intimated to counsel of both parties, and counsel agreed, that if the appeal may succeed against the conviction in count 9, then the matter will be remitted to the court *a quo* to revisit sentences in view of the fact that all the sentences are running concurrently with the sentence of 12 years imprisonment in count 9.

[4] This appeal is concerned with the probative value of fingerprints evidence which formed the basis for the conviction of the appellant on various counts stated above. The main issues to be adjudicated are; *firstly*, whether the presence of the appellant's fingerprints at various crime scenes justifies the only inference that he has participated in the commission of the offences for which he was convicted; *secondly*, whether the finger prints found on various scenes of crime are those of the appellant or one Aaron Phasha (or Paga); *thirdly*, if the above two issues are decided in the affirmative, then the last issue is whether the appellant's version is reasonably possibly true.

[5] At the court *a quo* and in his notice to appeal, the appellant disputed expertise and comparisons made through various fingerprints that were lifted from various crime

scenes. However, in paragraph 8.2 of the heads of argument, the appellant withdrew the dispute and admitted that *"no fault and real criticism can be leveled against their comparison and eventual findings with regard to the various identification processes and the comparison of the fingerprints to that of the appellant"*. This court accepts this concession and will not take that point any further.

[6] The only criticism which the appellant has still maintained is that there was no sound explanation as to why the same fingerprints were initially linked to one Aaron Phasha who is allegedly a known offender. Captain David Nkuna of the South African Police Service who testified as the police expert has testified that he made the comparison between fingerprints of the appellant and that of Aaron Pasha. On comparison of the said fingerprints, the police expert made an opinion that Aaron Phasha and the appellant is the same person.

[7] The expert's opinion and conclusion in this regard was not challenged by the appellant during cross-examination. Therefore, his version should be taken as true. The appellant cannot complain about the admissibility of the evidence to the effect that Aaron Phasha and the appellant is one person. The appellant has missed the opportunity to do so at the trial court. In the case of *S v Ndlovu* 2002 (2) SACR 325 (SCA) the court has correctly summed up the legal position when it held that "cross-examination was an integral part of the armoury placed at the disposal of an accused person to test, challenge and discredit evidence tendered against him or her". It is unfortunate that the appellant has not made use of this armoury at the trial court *a quo*.

[8] Appellant's counsel has submitted during argument that there is an inferential possibility that the person who committed offences is one Aaron Phasha and for that he relied on the fact that the opinion of the police expert was wrong due to the fact that there was no court chart prepared by the expert. This submission cannot stand in view of the above decision in *S v Ndlovu*.

[9] The submission by counsel is contradicted by the evidence of Captain Nkuna in *(page 303 lines 8–9)* who testified that *"I have prepared a court chart which I will also like to give in as an exhibit"*. He went further to testify that the said court chart is marked with police reference number LCRC 1388/02/2002 and it is exhibit 11. This exhibit is indeed appearing in page 710 of the appeal record. This crucial evidence was not challenged by the appellant at the court *a quo* by way of cross-examination.

[10] In passing judgment, the court a quo stated that the court has accepted the evidence of police expert(s) that Aaron Phasha and the appellant is the same person (see page 587 lines 21–23) of the transcribed record.

[11] The court *a quo* cannot be criticized for accepting this crucial piece of unchallenged evidence. In the case of *President of the Republic of South Africa & Others v South African Rugby Football Union & Others 2000 (1) SA 1 (CC) at page 37B-C* the court held that "the institution of cross-examination not only constitute a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the

party calling witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the *House of Lords in Browne v Dunn* and had been adopted and consistently followed by our courts.

"The rule in *Browne v Dunn* is not merely one of professional practice but is essential to fair play and fair dealing with witnesses...."

[12] The court held further in the *SARFU* case that "the precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how as to be challenged..."

[13] In the case of *S v Fortuin* 2008 (1) SACR 511 (C) at page 516G–H, Dlodlo J stated that:

"Zeffert, Paizes & Skeen, in their work *The South African Law of Evidence*" (LexisNexis Butterworths, Cape Town 2003), give the following formulation, in my view, is of cardinal importance:

If a party wishes to lead evidence to contradict an opposing witness, he or she should first cross-examine the witness upon the fact he or she intends to prove in contradiction, so as to give the witness an opportunity for explanation. Similarly if the court is to be asked to disbelieve a witness, he or she should be cross-examined upon the matters which it will be alleged make his or her evidence unworthy of credit. In *Small v Smith* 1954 (3) SA 434 (SWA) at 438, Claassen J said: 'It is grossly unfair and improper to let a witness' evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.' Failure to cross-examine may therefore prevent a party from later disputing the truth of the witness's evidence..."

[14] Dlodlo J went further to align himself with the above formulation and confirmed the trite law that failure to cross-examine a witness does not preclude a party from disputing the truth of the evidence but such a failure may often be decisive in deciding upon the guilt of the accused (see page *S v Fortuin, supra*, at page 517A–B). The above position was also confirmed in an earlier case of *S v Boesak* 2000 (1) SACR 633 (SCA). This court aligns itself with the above views and also accepts the conclusion of the police experts as it was never challenged.

[15] This appeal will be decided on circumstantial evidence and possible inferences which could be drawn. According to the cardinal rules stated in *R v Blom* 1939 AD 202, the enquiry before the court is whether the *court a quo*, on the evidence before it, could reasonably have to come to the conclusion that it was indeed the appellant who perpetrated the crimes in question. This involves the determination of the two cardinal rules of logic; being: *Firstly*, the inference must be consistent with all proven facts. If it is no, that inference cannot be drawn. *Secondly*, the proved facts should be such that they exclude every reasonable inference except that it was the appellant who was the perpetrator.

[16] Appellant relied on the decision in *Mana v S* [2009] 7 All SA 143 (SCA) where the Supreme Court of Appeal held that the presence fingerprints alone is not sufficient proof that the depositor of the fingerprints is the perpetrator of the crime. This is trite law. Evidence still has to be evaluated in its totality. In the *Mana v S* the fingerprints were found in the cardboard box which could have been touched by anyone in the course of life. There was no any other further evidence to justify a conviction. ev

[17] The difference between the case of *Mana v S* and the appellant's case is that the in this case there are further evidence which point to the appellant. Fingerprints herein were not found in the cardboard box–type of an item. Appellant's fingerprints were found in the scene of crimes. In count 1 the appellant's right thumb print was found on a painting found standing against the wall of the main bedroom. On count 3 the appellant's fingerprint was lifted from an alarm sensor found ion the passage of the house immediately after the housebreaking. In count 6 the appellant's fingerprint was lifted from the sliding door frame approximately 1.32 meters from the ground immediately after the housebreaking. Finally, in count 9 the appellant's palm print was lifted from slightly above the right rear door handle of the Pajero motor vehicle which was parked at the garage of the complainant.

[18] The presence of the fingerprints of the appellant, which has also been conceded in the heads of argument by the appellant, resolves the first leg of the *R v Blom* test. This concession places the appellant on the scene of the crime where his fingerprints were found. The question whether or not he is one of the perpetrators or the sole perpetrator would depend on the exclusion of other possible inferences, more particularly the exclusion of Aaron Phasha.

[19] In his heads of argument and also during oral submission before this court, the appellant did not say much about the fingerprints in respect of counts 1, 3 and 6. He concentrated much in the Pajero palm print in respect of count 9. This court is persuaded beyond reasonable doubt that the above circumstances, taken in totality with the fingerprints, they all point to the appellant as the perpetrator.

[20] In *S v Reddy* 1996 (2) SACR 1 AD at page 8C–D, the court has correctly stated that "in assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece–meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by the accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the often quoted *dictum* in *Rex v Blom* 1939 AD 188 at 202–203…"

[21] The circumstances in this case call for the evaluation of similar facts evidence. It is trite law that the admission or exclusion of similar facts evidence involves the theory of relevance in order to determine the probative value of certain circumstantial evidence. The ultimate test is the relevance of such similar fact evidence. Similar facts may be admitted if the same condition will produce the same results.

[22] In *S v Gakool* 1965 (3) 465 NPD at 475 d-f, Harcourt J said that "it is clear that each count brought against an accused person must be considered separately and that the admissibility of evidence on each count must be tested as if that count had been the only count against such accused – *R v Buthelezi* 1944 TPD 254, but this does not prevent material, which could be admissible under the rules relating to similar fact evidence from being received merely because a plurality of counts is involved in a case".

[23] The Supreme Court of Appeal has stated in the case of *R v Mathews* 1960 (1) SA 752 (A) at 758B-C that "relevancy is based upon a blend of logic and experience lying outside the law. The law starts with the practical or common sense relevancy and the adds material to it or, more commonly, excludes material from it, the result being what is legally relevant and therefore admissible…*Katz's* case is authority for asking oneself whether the questioned evidence is only, in common sense, relevant to the prosperity of the appellants to commit crimes of violence, with the impermissible deduction that they for that reason were more likely to have committed the crime

charged, or whether there is any other reason which, fairly considered, supports the relevancy of the evidence"

[24] It is unlikely that all crimes for which the appellant was convicted were committed through the same *modus operandi* and where the fingerprints of the appellant are found in various scenes of crimes. This could not be a coincidence. The only inference which could be drawn is that the appellant is the perpetrator in all the offences for which he was convicted.

[25] The appellant's main contention is that the fingerprints could be that of one Aaron Phasha. The State has entered evidence that the fingerprints of this fictitious Aaron Phasha are similar to that of the appellant. The State's expert finding is that Aaron Phasha and the appellant is one and the same person. This version of the state was not challenged in material respect with a counter-expert opinion. This court accepts the opinion of the police expert. The fingerprints evidence is incriminating to the appellant. Therefore, the appellant should have dealt with it and discredit its probative value; or rather create sufficient doubt by way of cross-examination.

[26] The version of the appellant is not reasonably probably true. The appellant is relying on the lapse of time from the date of the commission of the crimes to the trial date. The admissibility of the fingerprints evidence does not shift the burden of proof to the appellant. All it does is to constitute *prima facie* incriminating evidence; albeit circumstantial; which if unchallenged, the appellant may be convicted. Therefore, the appellant must create reasonable doubt in order for him to enjoy the benefit of doubt. In this case, this court finds that the appellant has failed to do so. Reliance on his

lapse of memory does not constitute a valid defence in light of *prima facie* incriminating evidence.

[27] In view of the above, the following order is made:

The appeal is dismissed. The convictions and sentences of the *court a quo* in counts 1, 3, 6, 7, 9, 10, 11 and 12 are confirmed.

DATED IN PRETORIA ON THIS THE 08TH DAY OF MARCH 2016

SIKHWARI, AJ

ACTING JUDGE OF THE HIGH COURT, PRETORIA

I agree.

ISMAIL, J

JUDGE OF THE HIGH COURT, PRETORIA