

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: A49/2017

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED</u>
<p>DATE: <u>20/6/19</u> SIGNATURE: <u>[Signature]</u></p>	

In the matter between:

PETER COLMEN MASINDI MABOTJA

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The appellant was charged with four counts of housebreaking with intent to steal and theft. The appellant appeared in the Regional Court

Mankweng and pleaded not guilty to all the charges he was facing. On the 2nd December 2014 he was found not guilty and discharged on count 1 and 2, and convicted on count 3 and 4. On 10th December 2014 he was sentenced to five years imprisonment on each count, and the court did not order the sentences to run concurrently. The effective term of imprisonment is therefore ten years. The appeal is with the leave of this court on both conviction and sentence on count 3 only.

- [2] The appellant attacks the conviction on the basis that there was no direct evidence linking him to the offence and also that he was neither linked by fingerprints or possession of any of the stolen properties. It was contended that the trial court failed to consider that other inferences could be drawn, in particular, that another person might have entered and stole the complainant's properties in the absence of the appellant.
- [3] With regard to sentence the appellant's notice of appeal is silent on that. The appellant is only addressing the issue of sentence in his heads of arguments. The appeal will be disposed on the basis that the appellant's appeal is based on conviction only.
- [4] The State called two witnesses to testify in relation to this count and that was the complainant and constable Gibbs. However, the evidence of Constable Gibbs is limited to arresting the appellant as the other portions of his evidence was rejected by the trial court.
- [5] The complainant testified that the appellant was known to her as he used to come to her place looking for a job. As she was already having other

people who were working for her, she would give the appellant food and fruits and thereafter he would leave.

[6] On the 22nd March 2014 the appellant came to her house and found that the yard was not looked after as it has been two weeks since the gardener was not coming to work due the fact that his parent has passed away. The appellant told her that he wanted to thank her by doing gardening as she has been giving him food. She told him that he can work but she will pay him for that day.

[7] She was supposed to take her client to Mall of the North. Before she left, she told him that she will come back with refuse bags and money to pay him. She gave him the tools to work. The appellant told her that there was no rake, and she told him to go to her friend who lives three houses from her and borrow that rake.

[8] Her client arrived and she left with her client after 12h00. Before she left, she told the appellant that she was going with the client and will come back with refuse bags. She closed the windows of her house and also locked the doors. She had dogs which will give trouble if you enter the yard alone.

[9] When she came back after an hour, she found that the appellant has left and the window frame was broken. She then phoned the police. The police took her statement and she went to Builders Warehouse to buy the window frame. On arrival at Builders Warehouse when she opened her bag she found that her purse was missing. She did not know what happened to her purse, but when she was with the police she had it.

[10] On Monday when she checked what could have been stolen, she found that two computers belonging to the boys, navigators, cell phones, necklaces, shoes, cutlery and clothes were missing. Sometime towards the end of March 2014 she was called by the police to come and identify any of her stolen properties from the items recovered by the police. She was able to identify only the navigator. She suspected that the appellant had used the rake to break the wooden window frame.

[11] The witness was cross examined and she stated because she left the appellant at her house, and when she came back he was not there, it was him who stole from her. She further stated that the police had taken fingerprints. The appellant closed his case without testifying.

[12] The issue on this appeal is whether the State proved beyond reasonable doubt that the appellant is guilty of the crimes with which he was charged. The State case was solely based on circumstantial evidence. **In S V Reddy & Others 1996 (2) SACR 1 (A) at 8C-D** the court said the following:

*"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piecemeal basis and to subject each individual piece of evidence to a consideration 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 oft-quoted dictum in **R v Blom 1939 AD 188 at 202-203**, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly that the inferences sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn."*

[13] The trial court in convicting the appellant has stated that the appellant was left alone at the house of the complainant to work after he was offered a job to which he was supposed to be paid. The trial court went on to state that the appellant has failed to give an explanation why he left before he was paid by choosing not to testify and it relied on the case of **S V Boesak 2001 (1) SA 192 (CC)**.

[14] The trial court has evaluated the evidence in a piecemeal fashion. The trial court has failed to take into consideration that when appellant volunteered to do gardening work for the complainant, he did that as a token of appreciation to the complainant who was assisting by giving him food. He did not expect any payments, but it was the complainant who offered to pay him. If indeed the appellant was doing that out of the good of his heart, there was nothing forcing him to wait for the complainant. After he had left anybody could have come and broke into the house.

[15] The appellant has closed his case without testifying. It is correct that in **S v Boesak** the Constitutional Court has warned about the consequences of remaining silent. In **Malahlela v State [2016] ZA SCA 181 (28 November 2016)** at paragraph 16 the court said:

“... Circumstantial evidence provides a basis from which the fact in dispute can be inferred. The salient question to be answered is whether the appellant was guilty of the crimes committed beyond reasonable doubt. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence. I agree that where a prima facie case proved against an accused person in a case built and resting upon circumstantial evidence to which a reply from an accused would be expected, the fact that the accused elects not to reply may


be a factor which, together with other factors in the case, leads to an inference of guilt. However, the weight to be attached to the accused's silent depends on the facts of the particular case. See S v Letsoko 1964 (4) SA 768 (A). It is settled law that there is no onus on the accused to prove his innocence. If an accused person remains silent, as in this case, the question remains whether the state proved the offences charged beyond reasonable doubt".

- [16] The fact that the appellant was left alone at the complainant house doing gardening and has left without being paid does not satisfy the two cardinal rules of logic as formulated in the Blom case. There are still number of reasonable inferences which could be drawn why the appellant left. There is no evidence that he left without completing his job. The complainant has closed the windows of her house and locked the doors of the house. If the complainant has finished what he was supposed to do, there was nothing preventing him from leaving since the house was safely locked and there were also dogs which will guard the house. Since the appellant did not expect any payment from the complainant that day, it cannot be said he was desperate to receive payment that day. He could have come back at other day and would have being paid what was due to him.
- [17] It is clear that the appellant's conviction was based on suspicion. In **Malahlela's** case *supra*, the court held that no person may be convicted on the basis of a suspicion, no matter how strong. In my view there is no factual foundation that exists upon which the appellant's conviction could be sustained on the basis of inferential reasoning.
- [18] In the result, I make the following order

(18.1) The appeal is upheld

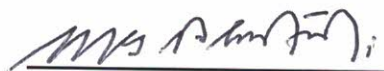
(18.2) The order of the trial court is set aside and substituted with the following.

"Accused is found not guilty and discharged on count 3."


M.F. KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, POLOKWANE, LIMPOPO DIVISION

I AGREE



M.G. PHATUDI J
JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, POLOKWANE

APPEARANCE:

COUNSEL FOR THE APPELLANT : Adv L.M Manzini

COUNSEL FOR DEFENDANT : Adv J.J Kotze

DATE OF HEARING : 24 May 2019

DATE OF JUDGEMENT : 20th June 2019