IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A378/2005

DATE: 26 OCTOBER 2007

In the matter of:

THE STATE

Versus

FANI MASUKI MHLONGO

JUDGMENT

GRIESEL, J

The appellant, accused No 3, together with two co-accused, appeared in the regional court on five charges of robbery with aggravating circumstances, as well as illegal possession of firearms and ammunition.

All three accused pleaded not guilty to the charges, but the appellant and accused No 2 were nonetheless convicted as charged. The former accused No 1 was acquitted on all charges.

The various counts were taken together for purposes of sentence and the appellant and accused No 2 were thereupon

sentenced to effective terms of 15 years imprisonment each.

The appellant noted an appeal against his convictions.

The events giving rise to the prosecution took place shortly after 10:00 p.m. on Sunday evening, 12 November 2000, at the Silverado Spur restaurant in Hout Bay. The evidence of the State witnesses establishes beyond doubt that on that occasion four men, acting in concert, robbed the restaurant of some R10 000,00 in cash. In addition, four employees and patrons of the restaurant were robbed of personal items such as jewellery and watches. Three of the robbers were armed with firearms. The robbers thereupon left the restaurant and their victims called the police. The three accused were apprehended by the police shortly afterwards the same evening.

At the identification parade held approximately two weeks later, a few of the witnesses identified accused No 2. Only one of them identified the appellant, but she was not 100% certain of this identification. The evidence against the appellant therefore is largely circumstantial.

Against this background it was argued on his behalf that his guilt has not been established beyond reasonable doubt, more

particularly inasmuch as the evidence adduced on behalf of the State does not satisfy the two cardinal rules of logic laid down in R v Blom, 1939 AD at 202 - 203 all those years ago. The inference sought to be drawn must be consistent with all the proved facts and it must exclude every reasonable inference save the one sought to be drawn.

What is the evidence on which the State relies? Firstly, the Spur restaurant in Hout Bay was robbed after 10:00 p.m. on the night in question by four black men who were neatly dressed, at least three of whom were armed with firearms. Apart from approximately R10 000,00 in cash, the victims were robbed of jewellery and personal items such as wrist watches. Shortly after receiving the report of the robbery, the police observed four men walking in the street less than half a kilometre from the scene of the robbery. On the face of it, they fitted the description furnished to the police. There were four of them, they were black, male, neatly dressed and they were together. As the police van pulled up in front of the men, three of them ran away. The appellant stood still and was apprehended. The police found a silver 38 special revolver in his possession. At a later stage, so the police testified, they also found some jewellery in his possession, which was subsequently identified by some of the victims as their property. Two of the other suspects were apprehended

shortly afterwards while they were attempting to hide from the police. Firearms were found in their possession, as well as serviettes from the Spur.

In considering the impact of circumstantial evidence, the Court should not look at each factor in isolation, but should consider the totality of the evidence.

Turning to the evidence before the Court in this case, all the facts summarised above point overwhelmingly towards the guilt of the appellant. The crucial question is whether the guilt of the appellant is the only reasonable inference to be drawn. Put differently, whether the evidence is capable of an innocent explanation. None was proffered on behalf of the appellant who chose not to testify in his own defence. In these circumstances, the Court is not entitled to speculate as to the possible existence of facts which, together with the proved facts, would justify the conclusion that the accused is innocent. Where an accused has elected not to testify, this would have certain consequences for his case, as was pointed out by constitutional court in Osman and Another v Attorney-General Transvaal, 1998(4) SA 1224 (CC) at paragraph 22. I quote:-

> "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to

establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of the adversarial system of criminal justice."

This line was expressly approved and followed by the constitutional court in the case of S v Boesak, 2001(1) SACR, page 1 at paragraph 24.

In my view the circumstantial evidence adduced by the State in this case clearly called for an answer from the appellant. In the absence of an answer, the trial court was entitled to convict. I can find no reason to interfere with that conclusion.

In the circumstances, I would DISMISS the appeal. It is so ordered.

GRIESEL, J