IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A34/2007

DATE: 15 FEBRUARY 2008

In the matter between:

SISWE MAZO 1ST Appellant

LUYANDA KUTA 2ND Appellant

and

THE STATE Respondent

J U D G M E N T

MATOJANE, AJ:

[1] The two appellants were charged (together with three others) in the Regional Court at Wynberg with one count of housebreaking with intent to rob and robbery with aggravating circumstances on 29 June 2004. Both appellants (and all other accused) were convicted and sentenced on 31 July 2006 to an effective term of imprisonment of 15 years each. Leave to appeal was sought and granted.

[2] The first appellant now appeals to this Honourable Court against his conviction and sentence and second appellant appeals against his conviction only.

[3] It is argued on first and second appellants' behalf that the Court *a quo* erred in accepting that the State had proved its case beyond reasonable doubt in as much as its case was based on circumstantial evidence. It is submitted that the Court failed to properly apply the reasoning mentioned in R v Blom 1939 AD at 288.

[4] The sentence is attacked on the ground that the presiding officer failed to take into account that the first appellant was a first offender who has been in custody since his arrest on 11 February 2003 until sentence was imposed on 31 July 2006.

[5] Mr David James Chaka (the complainant) testified on the events that took place on 10 February 2006 at about 12 midnight. He and his wife were awoken by four males rushing into their bedroom and jumped onto their bed as they lay asleep. Torches were shone in their eyes as they woke up. Two males held him down on the bed and the other two held his wife and tied them up. His 15 year old son was also brought into the bedroom and tied up.

They were covered with blankets. The complainant was robbed of the items mentioned in the charge sheet including, amongst others, R2 000 in R200 notes and two vehicles.

[6] The arresting officer, Inspector Daniel Tredoux, testified that he and his partner were on patrol (accompanied by Netstar) in the early hours of 11 February 2003 when they received a radio report of a robbery that had taken place during which two vehicles, a Volkswagen microbus and a Volkswagen Golf, had been stolen. They proceeded to a place in Guguletu, known to them as a place where previous stolen vehicles had been recovered. The place is called Malunga Mews.

[7] The found the stolen Volkswagen Microbus parked at a block of flats in Malunga Mews and whilst waiting for a tow-truck to take it to storage, they heard people approaching the area where the vehicle was. They concealed themselves behind a wall and revealed themselves with their firearms in their hands as soon as they were near the vehicle.

[8] Inspector Tredoux said that the five males stood still and while they were standing there he heard a sound of metal

falling. He and his partner proceeded to search them and found the sum of R1 500 in R200 notes on first appellant. He then placed the money back in the pocket where he had found it. Appellant told him that the money belonged to his mother and that he was going to buy clothing with it the following day. He testified that first appellant, whose hands were now tied at the back, removed the money from his pocket and tried to pass it to one of his co-accused. He proceeded to search the area and found the keys of the microbus on the ground.

[9] It is not necessary at this stage to deal with the evidence of the other policeman, Inspector Drew Manson, and the fingerprint expert Mr Gregory Grieb.

[10] First appellant said that he had gone to collect the club money on his mother's behalf at approximately 11 o'clock in the evening. He was going to use the money the following day to buy school clothes for himself. He then went to a certain tavern in the area where he remained for two to three hours listening to music. Thereafter he decided to visit his girlfriend and was arrested on his way in the vicinity of the stolen Volkswagen Microbus in NY8. He said that he explained to the arresting officer that the money in his possession was the money he had collected

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for his mother and was to use the money to buy clothing for himself the following day.

[11] A number of fundamental misdirections appear from the judgment of the Court *a quo*. First, the Court applied a wrong standard of proof as appear from the following passage:

> "My bevinding met betrekking to beskuldigde nommer 1 en 4 (Appellant 1 en 2) is dat hulle het inderdaad daarvan geweet, indien hulle nie self deel geneem het nie, het hulle daarvan geweet en hulle vereenselwig met die optreding van die werklike rowers".

[12] In regard to the approach followed by the Court *a quo*, Brand, AJA in S v Shackell 2001(2) SACR at 185 said:

> "It is trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide

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the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent improbabilities. But it cannot be rejected merely because it is improbable, it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court *a quo* its reasoning lacks this final and crucial step."

The test the Court should have applied is whether there is a reasonable possibility that the evidence of both appellants could reasonably possibly be true.

[13] The judgment of the Court *a quo* makes a passing reference to R v Blom 1939 AD 288 but surprisingly, it does not follow the "two cardinal rules of logic" which, according to Watermeyer, JA, regulates the evaluation of circumstantial evidence. It is common cause that the two appellants were arrested as part of a group of men who were in the vicinity of the stolen vehicle and first appellant was found to be in possession of the sum of R1500. This was the only evidence against the two appellants. The State's version testified to by James Chaka (the complainant), Daniel Tredoux and Drew

Manson (the arresting officers) does not link the two appellants in any way whatsoever to the commission of the crime. The above facts amount to circumstantial evidence and the Court should have, according to the second part of the "cardinal rule of logic" test, have found that the proved facts do not exclude other reasonable inferences, especially as the Court had accepted the evidence of the arresting officer, that first appellant explained to him that the money belonged to his mother.

[14] The Court *a quo* reasoned:

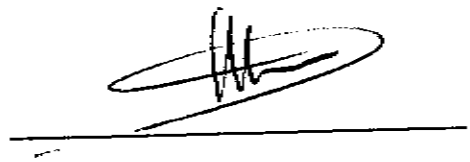
> "Oor die geld wat in sy besit gevind was het hy 'n inkonsekwente verduideliking gegee. Hy sê toe die polisieman getuig, dit word gestel deur middel van sy regsverteenwoordiger, hierdie is geld wat my ma vir beskuldigde 3 se pa geskuld het. In sy getuienis in hoof kom sê hy die geld is gooi–gooi geld. Dit was nooit gestel aan die staatsgetuie nie. Later toe stem hy saam met die weergawe van die polisie."

The criticism of this evidence is entirely misplaced. The first appellant explained that he discharged his legal representative as she had not carried out his instructions and that he had communication problems with her. This

evidence shows that the first appellant's version at the time of arrest is consistent with his testimony in court.

And in any event, even if first appellant is found to have lied with regard to his possession of the money, I am not satisfied that this is the only reasonable inference that can be drawn that the two appellants were involved in the commission of the offence as charged.

[15] I accordingly uphold the appellants' appeal and set aside the convictions and sentences.



MATOJANE, AJ

VELDHUIZEN, J: I agree. It is so ordered.

VELDHUIZEN, J