**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO.

A256/07

In the matter of:

**COLIN FRANSEN** Appellant

and

**THE STATE** Respondent

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**J U D G M E N T DELIVERED THIS 16th DAY OF MAY 2008**

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Weinkove A.J.

1. On 15 November 2006 Appellant was convicted on a charge of housebreaking with intent to steal and theft in the District Court at Oudtshoorn.

2. Because of his previous convictions sentencing was referred to the Regional Court in terms of section 116(3)(a) of Act 51 of 1977. Appellant was sentenced to 3 years imprisonment.

3. Appellant appeals against his conviction:

on the grounds that there was an absence of direct evidence that he had in fact broken into Complainant's premises;

that the Magistrate drew an erroneous inference that Appellant had committed the offence because he was found to be in possession of the stolen goods;

that the Magistrate erred in finding that the State witnesses had corroborated one another;

that the Magistrate erred in rejecting the explanation given by Appellant which, it is alleged, was reasonably possibly true; and

that the Magistrate erred in basing his conviction on an inadmissible admission made by Appellant.

4. The evidence showed that the home of Charlene Goliaths ("Goliaths") had been forcibly entered on 12 August 2006 and that 150 compact discs (they were actually copies of discs and not the originals), 2 gold men's rings and a cash amount of R3 000.00 was stolen from this home. The evidence further established that Goliaths was living together with her "husband", Raymond May (hereinafter referred to as "May").

5. The investigating officer, Brian Christopher Minnie ("Minnie"), testified in the bail application and later in the trial itself. Minnie is a senior detective employed by the South Africa Police with some 26 years experience. He said that he knew May well as a person who

was a vegetable hawker in the area.

6. On 15 August 2006 he received information from May which led him to Appellant's home and he said that when he went there and told Appellant that he believed that he had broken into the house of his friend and stolen certain goods, Appellant became aggressive. Appellant had resisted questioning and tried to stab him with a putty knife. He called for reinforcements and Appellant was taken to the Police Station.

He said that Appellant was warned en route to the Police Station that he was being held in connection with a charge of housebreaking and theft and that anything he said could be taken down and used against him, he was again warned at the Police Station. He said that May, who knew Appellant well (they had been friends), at one stage broke down and cried in the presence of Appellant and asked him to return the goods that he was alleged to have stolen and promised to withdraw any charges against him if he did so. According to Minnie and May, Appellant then admitted that he had broken into the house and said that he was prepared to return the stolen goods.

He then took Minnie and May to his mother's home where he went to fetch some of the compact discs and the 2 gold rings. He did not

return the money and Minnie said that heard May say to him "**you couldn't have smoked the whole of the R3 000.00**". In evidence, May had said that Appellant claimed he did not have the money because he had smoked all of it already. The reference to "smoke" indicated that Appellant claimed he had used it to purchase dagga. Later, Appellant is alleged by May to have said that he had divided the money up among some of his friends.

7. Appellant's explanation in the trial was that some unidentified people had sold the goods to him. He claimed he paid R200.00 for the compact discs and the rings and he knew nothing about the cash sum of R3 000.00 which had allegedly been stolen. Later he changed this story and said that these goods had been pawned to him on the basis that the persons concerned would recover these goods and pay him R250.00 (thereby making a profit of R50.00).

8. As far as Appellant's admissions are concerned, he disputes ever having made such admissions at all. He gives a completely different version and says that he came into possession of these goods having purchased them (later saying that he acquired the goods in a pawn transaction).

9. The State contends that, in the face of Appellant's denials, the issue

as to whether he made the admissions or not is accordingly a question of fact to be decided by the Magistrate and does not require a "trial within a trial" in order to determine whether the statements were voluntarily made or not. Where an accused person makes an admission or a confession to a police officer or in the presence of a police officer, the onus is on the State to prove that that statement was freely and voluntarily made. The Magistrate did not make any finding as to whether the statements by Appellant were freely and voluntarily made and, for the purposes of his judgment, he ignored those statements completely. In the circumstances, it is not necessary for this Court to determine the status of these admissions. I will also ignore them for the purposes of this judgment.

10. The Magistrate found that Appellant was a most unsatisfactory witness. His explanations were improbable and far fetched. He noted that Appellant at no stage questioned Minnie as to who the "friend" was whose home he is alleged to have broken into. Nor did he question Minnie as to what the goods were that he is alleged to have stolen. It is common cause that when these statements were made to him by Minnie.

11. The Magistrate found that the whole story of having purchased the

goods and then later alleging that he had taken the goods in a pawn transaction was unsatisfactory and palpably false. Furthermore, it seems to me highly unlikely that Appellant, who claims to have been a signwriter, would have had the money to purchase goods of this nature. The compact discs themselves were computer made copies and of little, if any, commercial value. The rings would appear to be gold, but it is unlikely that Appellant had the expertise to know whether the rings were gold plated or solid gold. He gave no evidence in this regard. Appellant claims that he had written signs for May to advertise his vegetables at his stall. This is hardly the kind of business that would have placed Appellant in a position to make a reasonable living let alone have sufficient spare funds to run a pawn broking or money lending business.

12. The Magistrate also observed that Appellant had stated in evidence that his sister was present when Minnie stormed into his home and made the accusations concerning the housebreaking charge. He alleged that his attack on Minnie was provoked because Minnie had proceeded to make an unauthorised search of his property. All of this was denied by Minnie, but the presence of Appellant's sister in the room was never put to him or May in cross-examination and the sister was never called as a witness to corroborate Appellant.

As far as the State witnesses are concerned, the Magistrate held that they had corroborated each other in all material respects. This finding is well supported in the transcript of the evidence.

13. The Magistrate also observed (and correctly so) that if in fact the goods were stolen by somebody else, they would have also acquired possession of the R3 000.00 in cash. It would make no sense whatsoever for them to expose themselves to arrest or identification by trying to pawn the discs and the rings to a stranger for a mere R200.00.

14. I am furthermore in agreement with the Magistrate's observation that if Appellant had innocently acquired possession of the compact discs and rings, he would have volunteered the information much earlier, particularly when he realised, or must have realised, that the person who was the victim of the robbery was his good friend, May.

15. In his judgment, the Magistrate rejected Appellant's explanation for his recent possession of the stolen goods and convicted him on the housebreaking and theft charge. This raises the question whether a person can be convicted of housebreaking and theft based on his recent possession of the stolen goods and his inability to furnish an acceptable explanation for his possession.

In the case of ***R. v Gentleman*, 1919 CPD p.245** a Full Bench of this Court held that being in possession of recently stolen property may be evidence not only of theft but also of housebreaking with intent to steal. In that case, the accused was found to be in possession of missing articles from premises which had been broken into. It was argued that there was no evidence of housebreaking with intent to steal because mere possession of the stolen property, although evidence to show that a theft was committed, was not evidence to show that the accused was also guilty of housebreaking with intent to steal.

The Court found that in a case such as the present, a person found in possession of another person's property which had recently been stolen can be guilty of theft and that same inference of his possession of another's property can also be applied in determining that he had also committed the housebreaking.

The Court considered a number of previous authorities and the Roman Dutch writers to the effect that in a case such as the present, the law allowed the conviction not only of theft but of theft accompanied by violence or housebreaking, so to speak a "qualified" theft.

16. The case of ***R. v Gentlemen*** has been followed in a number of

other decisions, including a Full Bench decision of the Orange Free State in the case of ***R. v van Vurren & Another*, 1959 (2) SA p.46** and in ***S. v Screech*, 1967 (2) SA p.407 at p.409**, Eksteen, J. confirmed a long line of decisions dating back to *R. v Gentleman (supra)*, Eksteen said:

> "**Where an accused person charged with housebreaking with intent to steal and theft is found in possession of recently stolen goods and he fails to explain his possession, or if he does explain his possession and his explanation is disbelieved, a presumption of fact may, in all the circumstances of the case, arise that he stole the goods, and a court might be entitled to convict him of theft on such evidence (cf. *R. v. Kulamo,* 1930 A.D. 193 at p.213). As was pointed out in *R. v. Nxumalo*, 1939 A.D. 580 at p.587, this result follows not because of any rules of law relating to the matter but simply from the logical inferences which are to be drawn from the facts of the case. Where, therefore, this line of reasoning may compel a court to come to the conclusion that the accused who was found in possession of the recently stolen property is guilty of theft, it may equally lead to the conclusion that he is the person who broke into the house with intent to steal.**"

17. For the reasons set out above, I consider that Appellant was rightly convicted and that the criticisms of the Magistrate's judgment are unfounded. The Magistrate did not rely on the admissions made by Appellant. He relied on Appellant's false explanations for his

possession. The State witnesses did corroborate each other and Appellant was a most unsatisfactory witness. His explanation was far fetched, improbable and palpably false. The Magistrate effectively based his judgment not on any admissions made by Appellant but on "**the logical inferences which are to be drawn from the facts of the case**" taken together with Appellant's false explanations.

18. In the result, I would dismiss the appeal against the conviction.

19. Insofar as sentence is concerned, the State correctly points out that leave to appeal against sentence was neither requested nor granted. Notwithstanding the aforegoing, this Court is seized with the matter and the question of sentence has been argued on Appellant's behalf. In my view, the sentence is appropriate and, having regard to Appellant's long list of previous similar convictions, I do not think that this Court should interfere with that sentence on any of the grounds submitted on Appellant's behalf. In the result, I would also confirm the sentence imposed.

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Weinkove, A.J.

I agree. The conviction and the sentence are confirmed.

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E. Moosa, J.