IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: **A438/10**

In the matter between:

LINDA STOLO Appellant

And

THE STATE Respondent

JUDGMENT DELIVERED ON 5 NOVEMBER 2010

CLOETE, AJ

[1] The appellant was tried and subsequently convicted in the regional court, on a charge of robbery with aggravating circumstances, as defined in s1 of the Criminal Procedure Act, No 51 of 1977.

[2] The appellant was sentenced to 18 years imprisonment. The magistrate found that the one substantial and compelling circumstance which justified the imposition of a lesser sentence than the applicable prescribed minimum sentence was that because of the appellant's commission of the offence, the balance of two years imprisonment in respect of his previous offence (the appellant had been on parole at the time of the

commission of the offence for which he was convicted in this matter) had been put into effect.

[3] The appellant appeals against conviction only.

[4] In her judgment, the presiding regional magistrate summarised the evidence given during the trial in some detail. I do not deem it necessary to repeat this level of detail; suffice it to highlight certain aspects thereof.

[5] Early on the morning of 30 April 2009 the complainant, Joao Elvio De Oliveira Da Silva Esavido was robbed at his business premises which he conducted from his home. He stated that about five or six persons entered the premises, at least one of whom was armed with a firearm. After initially accosting the complainant, they then also confronted his receptionist and the gardener employed at the premises. The men then proceeded to rob the complainant at gunpoint of several items, namely an amount of R25 000, a Tata bakkie, a laptop, two cellphones and a toy rifle. During the course of the robbery, the complainant was tied with an electric cord and assaulted. The complainant managed to escape and alerted a neighbour who called the police.

[6] The appellant was arrested and charged as a result of a right palm print found at the scene which, according to the expert evidence adduced at the trial by the state, was identical to that of the appellant. During cross-examination of the complainant, his attorney put it to the complainant that the appellant's position was that he was never at

the complainant's home, let alone in the suburb in which the complainant's home is situated (Milnerton), and that he had no idea how the palm print came to be found there.

[7] On the following court day, the appellant requested that the complainant be recalled because he had thought about the case and accordingly instructed his attorney that it could be possible that he might have been at the complainant's premises. It was put to the complainant that the appellant had in fact been to his premises with a friend of his (i.e. the appellant's), Sakhumzi. It was further put to the complainant that the complainant's receptionist was Sakhumzi's girlfriend and that she had stolen goods sold by the complainant in the course of his business and handed them over to Sakhumzi. This was vehemently denied by the complainant. He testified that this would not have happened, because his receptionist had been working for him for a matter of two to three months, that he trusted her, that she was married and that she did not appear to be the type of person who would have 'had an affair'.

[8] The appellant's allegations were also denied by the receptionist, Badrunisa Adams, whose evidence was much to the same effect as that of the complainant's. She also denied that she would have had access to any of the goods to give to any third party as the complainant had a strict security system in which he locked everything if he was not on the premises and kept the keys with him. She further testified that at the time of the incident, she was being trained by the complainant regarding the ordering of goods and that she could never have ordered goods that were in excess of those required for invoicing.

[9] The appellant testified in his own defence. There were a number of inconsistencies in his evidence. The most material were as follows: Despite having had ample opportunity (through his legal representative) to view the photographs of the scene, he remained adamant, until it became clear that he could not avoid the identification of his palm print, that he had never been at the complainant's home, let alone in the area in which the complainant's home is situated. It was only when confronted with the unassailable evidence of his palm print that he 'apparently came to realise' that he had been at the complainant's home. On the basis of this new version, he was again inconsistent in respect of the events which allegedly took place at the complainant's home and which gave rise to his fingerprints/palm print being found at the complainant's property. Initially, he alleged that he had stood at the outside door when his friend, Sakhumzi (whom he was unable to call as he had allegedly passed away during April 2010) went into the home of the complainant.

[10] He yet again altered his story when it became clear to him that the palm print was lifted from a door inside the house. He then stated that he had got tired of waiting for Sakhumzi (who had only been absent for five to ten minutes on his version) and that he had in fact entered the property and that this was the reason why his palm print must have been found at the property. He repeatedly changed his version of what Sakhumzi had carried out of the property. He testified that Sakhumzi exited the property with a plastic bag. He initially testified that the bag was a black bag but was unable to explain

how he thus knew what was in the bag. He then changed his evidence to state that the bag was a white plastic bag, and that was why he could see its contents..

[11] In her judgment, the presiding regional magistrate considered and evaluated all the evidence, accepted that of the state witnesses, rejected that of the appellant, and convicted him as charged.

[12] On appeal before this court, the appellant's counsel submitted that *"Without putting an oversight on the nature of the version(s) put forward by the appellant at different stages of the trial … the explanation that was eventually given by him justifying the presence of his palm print is reasonably possibly true given the following reasons …"*. The first reason advanced is that the expert who came onto the scene after the commission of the offence and investigated the prints could not identify the direction of the palm print, nor could she state for how long the print could have been there. The second reason advanced was that there was no other surface where another *"similar palm or finger print was uplifted"* either in the office or in the complainant's bedroom, given the version of the complainant himself when he said that the assailants were not wearing gloves and that they moved about the property.

[13] The appellant further submitted that the magistrate failed to test the credibility and reliability of the explanation given by him regarding Sakhumzi and his alleged death in April 2010. Counsel submitted that this evidence, if thoroughly investigated by the

state, would have assisted the court. It is noted however that the appellant himself did not call any witnesses in support of this averment.

[14] From this summary of the evidence which was given during the trial, it is clear that it was not only the evidence of the palm print which implicated the appellant in the commission of the offence, but the magistrate's finding that the appellant tried his utmost, at the expense of the truth, to tailor his evidence as the evidence of the state mounted overwhelmingly against him.

[15] The courts take judicial notice of the fact that no two persons can have identical fingerprints. Palm prints are on the same footing as fingerprints. Seven points of similarity between the print found on the crime scene and the print of the accused are regarded as proof beyond reasonable doubt that they were made by the same person:

See *R v Debati* 1951 (1) SA 421 (T) at 423C

[16] In any event, on appeal it should be borne in mind that it is a well established principle governing the hearing of appeals against findings of fact that, in the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong;

See *S v Hadebe & Others* 1997 (2) SACR 641 (SCA) at 645e-f

[17] In this matter, one looks in vain for any such misdirection on the part of the presiding regional magistrate. Whatever the merits of the conclusion of the expert evidence, the unassailable finding of the existence of the appellant's palm print found on the scene of the crime raises but one reasonable inference: that the appellant was on the premises of the complainant. This called for some plausible explanation, yet all that the appellant produced was a litany of contradictions, tailored to meet the implications of the state's case as he was progressively confronted thereby.

[18] In my view therefore the conviction of the appellant was based on a proper consideration of the whole body of evidence, and I am satisfied that she evaluated the evidence correctly and arrived at the correct conclusion.

[19] The appeal of the appellant against his conviction is dismissed.

J I Cloete, AJ

D M Davis, J