IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A448/11

DATE: 2 December 2011

In the matter between:

PATRICK ABEL Applicant

and

THE STATE Respondent

JUDGMENT

BOZALEK, J

The appellant was convicted on one count of robbery in the Wynberg Regional Court on 10 March 2010 and sentenced to six years imprisonment. With the leave of the magistrate he now appeals against conviction and sentence. The appellant pleaded not guilty to the charge of robbery with aggravating circumstances by robbing Ms Tapiwa Modise of her cell phone on Rondebosch on 19 September 2008, threatening her with a knife. He offered no plea explanation and was legally represented throughout his trial.

The State's case comprised the evidence of the complainant and the arresting officer, Constable Williamson. The appellant

testified and called no witnesses.

The complainant's undisputed evidence was that she had been robbed by two men of her cell phone in Devonshire Hill Road, Rondebosch at about 9pm. She was dazed and shocked as a result of being thrown to the ground and was not able to identify either of her assailants. She had noticed that one of the men carried a knife during the robbery but was not able to state what role it had played. Within minutes of being robbed the police had arrived in a vehicle and, either at the scene or at the police station to which she was taken, she had identified a cell phone in their possession as hers.

Williamson testified that he and a colleague had been on patrol duty when they had seen two men sprinting across Main Road, Rondebosch from the direction of Devonshire Hill Road. They gave chase and apprehended the two men nearby without ever having lost sight of them. One of them was the appellant. He had resisted arrest and had to be subdued. Upon searching him Williamson found a cell phone and in the appellant's sleeve a knife with a fixed blade. Asked where he had obtained the phone, the appellant replied that it belonged to his girlfriend. The two men were arrested and the police vehicle immediately retraced their steps in the direction of Devonshire Hill Road where they came across the complainant

being assisted by a member of the public. She advised that she had just been robbed of her cell phone by two men. She furnished the cell phone number and when Williamson rang the number the phone which he found on the appellant rang. The phone screen also showed a picture of the complainant.

The appellant testified that he had met a friend in Rondebosch that night who had told him that he got a cell phone from a woman and handed it and a knife to him to keep. As they were crossing Main Road, Rondebosch a police vehicle came quickly towards them and they were arrested. When he was searched the cell phone and money were found on him and later a knife. Although he was asked for an explanation for the cell phone he said he gave none because the police were gratuitously assaulting him.

The magistrate found that both State witnesses had given clear evidence which he accepted. He found that the appellant was a poor witness whose evidence was both internally inconsistent and at odds with the instructions which he had given to his legal representative. The magistrate found that the circumstantial evidence proved the appellant's guilt beyond any reasonable doubt but convicted the appellant of robbery *simpliciter* because there was no evidence that the knife had been instrumental in the robbery.

/DS

The main grounds of appeal on conviction are that the magistrate erred in not accepting the appellant's version as reasonably possibly true, and not taking into account that a cell phone is a small and easily transferable object. As regards sentence it is contended that the magistrate misdirected himself and over-emphasized the interests of the community and the seriousness of the offence at the expense of the personal circumstances of the appellant and further that the sentence which he imposed was shockingly inappropriate.

Inasmuch as the case against the appellant was based on circumstantial evidence the primary issue is whether the proved facts support the inference that the appellant had robbed the complainant and, if so, whether that was the only reasonable inference which could be drawn from such facts. These principles of inferential reasoning were classically stated in R v Blom 1939 AD 188 at pg 202 – 203 as follows:

"1. The inference sought to be drawn must be consistent with all the proved facts. If it is not then the inference cannot be drawn.

2. The proved facts must be such that they exclude every reasonable inference from them save the one

sought to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to be drawn is correct."

The other dictum which is applicable in the present matter relates to the evaluation of evidence and the onus in a criminal matter which is expressed as follows in S v Van der Meyden 1999(1) SACR 447 W at 449c – 450b:

"The proper test is that an accused is bound to be convicted if the evidence establishes guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonable possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular matter will depend on the nature of the evidence which the Court has before it. What must be borne in mind however is that the conclusion which is reached (whether it is to convict or to acquit) must account for all the evidence, some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

The undisputed facts are that the complainant was robbed of her cell phone by two men of the same race as the appellant and his friend, one of whom bore a knife. Minutes later, no more than 100 metres away, the appellant and his friend were observed sprinting across the Main Road. When apprehended the complainant's cell phone was found in the possession of the appellant, as well as a knife. Apart from the precise interval between the robbery and the arrests the appellant admitted these facts. Clearly the inference that he was one of the two persons who robbed the complainant is consistent with all the proved facts. In essence the appellant's contention is that it is a reasonable inference that he was completely uninvolved in the robbery and that his friend merely palmed the cell phone and the knife off on him after the robbery.

In my view when one has regard to the evidence as a whole, including the probabilities, this is not an inference which can reasonably be drawn. Although the appellant maintained that he had been given the cell phone some 20 minutes before his arrest this was completely at odds with Williamson's evidence that the arrest took place only after the robbery. In this he was supported by the complainant who said that the police found her about five minutes after she had been robbed. Williamson testified that he never lost sight of the appellant

and that it was highly unlikely that any transferral of the cell phone from the one to the other took place whilst he had them in sight. He testified further that the appellant and his friend were already sprinting across Main Road from the direction of the Devonshire Hill Road and with their backs to the police when he first observed them and it was this suspicious behaviour which caused him to arrest them.

The appellant's attorney did not challenge Williamson's evidence that the appellant's explanation for possession of the cell phone was that it belonged to his girlfriend. In his testimony however the appellant denied giving any explanation to Williamson. The appellant also changed his initial evidence regarding the knife, admitting it was his and claiming that he carried it as a taxi guard.

I can find no fault in the magistrate's evaluation and acceptance of the evidence of the State witnesses or his evaluation of the appellant's evidence. The undisputed facts and the timing of the events point ineluctably towards the appellant and his friend as being the two persons who robbed the complainant. When regard is then had to the probabilities there is simply no room to cast the appellant in the role of an innocent bystander who unwittingly and unquestioningly accepted a cell phone and a knife pressed upon him by his

friend, for no apparent reason, and then proceeded to sprint together with him across Main Road, away from the scene of the robbery. In my view the appeal against conviction is without any merit.

When sentenced the appellant was 35 years of age, unmarried, with an 11 year old child. He had been in custody for seven months awaiting trial, prior to which he had worked as a taxi guard earning R350 per week. The appellant had 15 previous convictions commencing in 1990 when he was 16 years of age. Thirteen of these were directly relevant being either convictions for theft, housebreaking, possession of stolen property or robbery. His last two convictions were for robbery, committed in 2006, for which he was sentenced to six months imprisonment, and housebreaking in 2007, for which he was sentenced to eight months correctional supervision. His criminal record reveals the use of several aliases.

The magistrate correctly noted that the appellant had been convicted of a serious crime and that had the complainant resisted the robbery she could have suffered a serious if not a fatal injury. Rondebosch is home to a substantial student population and reports of students being robbed and injured are not infrequent. Not surprisingly the complainant herself testified that it took her several weeks to recover from the

trauma, the psychological trauma of the robbery. The appellant's persistence with his dishonest account of what took place that night and his record of previous convictions does not bode well for the prospects of his rehabilitation. Again I can find no fault with the magistrate's reasoning or the sentiments he expressed in sentencing the appellant.

When the triad of factors is taken into account I consider that the sentence imposed is entirely appropriate, as was the magistrate's formal warning to the appellant that in the event of a further conviction he runs the risk of being declared a habitual criminal in terms of Section 286 of Act 51 of 1977, and being sentenced accordingly. In fact the appellant can consider himself quite fortunate not to have received a longer term of imprisonment. There is in my view certainly no question of the sentence inducing any sense of shock.

I would thus DISMISS THE APPEAL AGAINST CONVICTION AND SENTENCE.

It is so ordered.

BOZALEK, J

/DS

I agree.

5

HENNEY, J

10

/DS