

SOUTH AFRICA / JUDGMENT

S v Mbatha (69/08) [2009]

ZAECHC 4 (15 January 2009)

[2009] ZAECHC 4

COURT

High Courts - Eastern Cape

BEFORE

M.W. Mkhize

CASE / FILE NUMBER

69/08

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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSKEI DIVISION) CASE NO: 69/08 In the matter between THE STATE vs SIPHO MPIYOMNDENI MBATHA ACCUSED NO1 THEMBINKOSI CELUMBUSO MVUBU ACCUSED NO 2 PATRICK SIBONGISENI SIMELANI ACCUSED NO 3 LAMA EPHRIAM NAVESS ACCUSED NO4 SANSUOGI LESHABA ACCUSED NO5 JOYCE TUKANE ACCUSED NO6 SEROKE KORTJAS ACCUSED NO 7

JUDGMENT

MKHIZE AJ: 1. The Seven accused namely; Sipho Mpiyomndeni Mbatha , a 36 year old male of Ulundi.

Thembinkosi Celumbuso Mvubo, a 38 year old male of Durban. Patrick Sibongiseni Simelane, a 29 year old male of Middleburg. (IV) Lama Ephriam Navess, a 38 years old male of Middleburg. (V) Sam Sipho Leshaba, a 41 year old male of Middleburg. Joyce Tukamelo, a 45 year old female of Maluti.

Seroke Kortjas, a 34 year old male of Maluti. Are facing three counts of Count

1. CONSPIRACY TO COMMIT HOUSEBREAKING AND THEFT IN THAT steal from sometime prior to 10 August 2007, the exact date Unknown and at or near Mthatha the accused unlawfully and intentionally conspired with one another to aid procure the commission of or to commit the offence of housebreaking with the intent to and theft. Count
2. HOUSEBREAKING WITH THE INTENT TO STEAL IN THAT from sometime prior to 10 August 2007 at or near Mthatha Boxer Store in the district of Mthatha, the accused did wrongfully and

intentionally break and enter the premises of Boxer store with the intent to steal. Count

3. THEFT IN THAT upon or about 10 August 2007 at near Mthatha in the district of Mthatha, the accused did wrongly fully and intentionally steal the amount of R253 802-20, the property or in the lawful possession of Boxer Super stone and or Xolani Nimrod Qushu. The state called the following witnesses, Tyelovuyo Nkoshubane. He stated that he was employed by Boxer Cash& Carry as a Receiving

Manager. On the 10th August 2007 he opened the store in the morning. He was not responsible for closing the shop on the 9th August 2007. The shop had an alarm system and he does not know whether it was activated on the 9th of August 2007. When he entered the shop the keypad was not functioning. He found the padlocks of the front door on the ground.

He used the entrance to the receiving bay. He got into the shop and inspected the office, there was nothing wrong in the office. He telephoned the Branch Manager to report that the shop had been broken into. The Branch Manager arrived shortly and he telephoned

the police who arrived immediately. They inspected the shop, how it was broken into. The safe had been damaged with a grinder. [2] The wall in the bakery section had been pushing outside, there was a whole of about 40cm square. He does not know any of the accused persons before Court. There was a Security guard who was on duty on the night of the 9th August 2007. [3] Mr Xolani Nimrod Gxulu, was employed as a branch Manager of Boxer Cash & Carry, he was called by Mr Nkashubane to the shop. He found the cash office doors were opened. He called the Manager for the bakery. He found that the extractor fan had been removed. The Surveillance cameras were off.. There was a whole on the side of the safe, the door of the safe was opened. The amount of R 253 803-20 had been taken from the safe. It was in two bags namely a big green bag used by Fedility for Banking. After the house breaking, he saw the green bag in the offices of the organized crime which was the same bag that had been taken from the safe. [4] He received from the organized crime the amount of R 201 000 on the 10th August 2007. The Manager had been put in the safe on the 9th August 2007 was Xolelwa Peter. He does not know all the accused before Court. He does not know how much was the damage as everything was done by Head Office. He signed for the return of the stolen money from the Police. Xolelwa Peter stated that on the 9th August 2007 he checked the money and found it to be an amount of R 253 802-20. The money was in the white Fidelity bag and other in the green bag. It was put in the safe. He saw the Fidelity empty bag lying in the offices at her place of the employment. She saw the green bag at the offices of the police. It was the same bag used to put money. She does not know all the accused before Court. [5] Constable Mfundo Siziba as the member of SAPS stationed at Mount Frere. On Friday the 10th August 2007 at about 4hrs30 minutes he was in the Patrol Van with Inspector Goodwill Somi. They saw a Toyota Corolla vehicle with registration letters and numbers NO 2489 next to FNB in Mount Frere. They stopped about 10metres away from the Toyota Corolla vehicle and nobody came out from the vehicle. They were using a Police Van a Double Cab with Police Lights on top. The Toyota Corolla vehicle sped away and they chased after it. They put the Police blue lights and it stopped about 200m away. The Toyota Corolla vehicle stopped and the driver came out and rushed to the police vehicle. It was accused no 1 who was the Inspector in the SAPS. He produced his appointment certificate. We told him we wanted to search their

vehicle. He gave us permission to do so. They were four passengers in the vehicle, the four people were accused No 2, 3, 4 and 5, he did not know anyone of them. Accused No 1 claimed that it was his vehicle. We found money from accused No 2 and from accused no 4. The other money was found in the bag wrapped in plastics. [6] They called the back up from other SAPS members who came immediately, they told the accused that they were arrested for

possession of suspected stolen money. The five accused were present when the off loaded the money. It amounted to R208 267-40. The Police from organized crime unit arrived and loaded the money. The accused were taken by the member of the Organized Crime Unit. Accused were never assaulted in his presence. [7] Inspector Goodman Somi Is the member of SAPS stationed at Mount Frere. He confirmed the evidence of Constable Siziba in its entirety. His statement was

received as exhibit 4, when they searched the vehicle they were assisted by accused no 1 who was also Inspector in the SAPS. They other accused were closed to the vehicle. [8] The Court moved to the trial within a trial, to determine whether the statements made by accused no 1, 2, 3, 4, 6 and 7 to the police officers were made freely and voluntarily with the accused in their sound and sober senses and having not been influenced to make such statements. [9] Captain Madubula took the statement of accused no3 which was received as exhibit No. 5. Inspector Qina brought accused No. 3 to the office where Captain Madubula took the statement on the 13th of August 2007.

Inspector Qina never threatened accused No. 3 nor did he him influence to make a statement to Captain Madubula. The defence made admissions in term of Section 220 of Act 51 of 1977 as amended as follows: Exhibit 6. We the undersigned accused persons do hereby admit to the following.

- (1) That the proforma form contents to the statements by us as accused persons herein is correct and has been correctly noted as per our instructions to the officer filling in the form. Therefore it may please this Honorable Court to have then admitted as such. Signed by accused 1,2,3,4,6, & 7. As a result of this Section 220 admission in the following proforma forms were admitted as evidence. Accused 1 as exhibit 7 Accused 2 as exhibit 8 Accused 3 as exhibit 5 Accused 4 as exhibit 11 Accused 6 as exhibit 9 Accused 7 as exhibit 10 In these proforma forms all the accused admit that they told the officers that: They were not threatened or assaulted. They made the statements before the said officers freely and voluntarily. They were not influenced to make such statements.

They made the statements in their sound and sober senses. The next witness was Xolile Madeba who was an Inspector in the SAPS and that accused 7 took him for a pointing out on the 16th August 2007. The following: Exhibits three screwdrivers, a grinder and a pound hammer and 28 disc that could be used with a grinder. Accused 7 pointed out these exhibits freely and voluntarily in his sound and sober senses. He took the items back to Umthatha for further investigations. The sixth witness is Inspector Msindwana who took accused 2 to Superintendent Kwesaba. He did not assault accused 2 and was not assaulted in his presence. He saw accused 6 6 7 in their offices. He was present when the accused 7 pointed out the equipment that was used in the housebreaking and theft at Boxer Superstore Umthatha. Accused 6 & 7 co- operated with the Police after Inspector Mabeba had explained their constitutional rights. Accused 6 & 7 were never

assaulted by the Police in his presence. The last witness in the trial with a trial for the State is Inspector Maqhubela. He was the investigation officer in the case he was present when the accused were fetched from Mount Frere on the 10 August 2007. he was present when accused 6 & 7 were arrested. None of the accused were assaulted in his presence. He denied that he assaulted any of the accused and that he influenced them to make confessions. The state closed its case in the trial within the trial. The defence call the six accused to say that their statements to the Commissioned Officer or Magistrate were not made freely &

Voluntarily. In fact they claimed that Inspector Maqhubela dictated to them what to say. Sipho Mbatha accused No.1 further stated that he was not warned about his rights against self-incrimination. He was assaulted by open hands and put him the plastic so that he could not breath. Thembinkosi Mvubu repeated the same version against Inspector Maqhubela he further stated that he was promised bail if he confesses to the officer. Sibongiseni Patrick Simelane - made a confession to Captain Madubula. He says when he said he knew nothing about the case he was hit with in his head with open hand and put a plastic bag cover his head and they cover his face and he fell down. Maqhubela took out a plastic bag from him. He told the police officer that he was not assaulted Ephriam Navess accused No.4 also claimed that he was put in plastic bag and suffocated. What he wrote in the statement had been dictated to him by Inspector Maqhubela. He did not make the statement freely and voluntarily as he was afraid that if he deviates from what Maqhubela had dictated to him he will be further assaulted. Joyce Tukane - accused No. 6 also testified that all that is contained in the statement she was instructed by Maqhubela to say she was assaulted

and suffocated with a plastic. She was instructed what to say to the police officer. She was assaulted on the 16 August 2007 on the date of her assaulted. Maqhubela promised her bail if she does not cause trouble for him. She agreed to co-operate as she wanted to go to her children. Seroke Kortjas he was arrested on the 16 August 2007. he was assaulted, suffocated with a plastic bag. He was handcuffed his hands and feet. He was made to undress. He was promised bail if he co-operated with the police, he was told that he must tell the magistrate that he was never influenced to make a statement. He lied in the statement to save his life. The defence closed their case in the trial within a trial the defence & the state addressed the court on the admissibility of the statements. The court ruled as follows. After listening to the evidence it is ordered that the statements made by accused 1,2,3,4,6 & 7 to the commissioned officers or magistrate were made freely & voluntarily with accused in their sound & sober senses having not been influence there to here to such statements are admissible as evidence against the accused persons. Moved out of the trial within a trial. The court directed that the evidence led during the trial within a trial be received as evidence on the merits as well as the statements made by accused 1,2,3,4,6 7. The state then closed its case. All the accused except accused 6 & 7 testified in their defence. They all denied complicity in the commission of the offence. They further claimed that on the day in question they were from King Williams Town where they had gone to the Herbalist Mangconde. The defence closed their cases. The main question is whether the state has proved its case against the accused person beyond reasonable see S vs Kubeka 1982 (1) SA 534; S vs Van der Meyden 1999 (2) SA 79 (w); S vs Aswageni 2001(2) SACR 97 SCA. In deciding whether the state has proved its

case the court has to look into the following aspects of the case. (10) The fact that accused 1,2,3,4 &5 were arrested with exhibits within two hours after the commission of the offence, see S vs Sikweyiya [1984] ZASCA 96; 1984 (4) SA 712 (A), R vs Rama 1 966 (2) SA 395 (A). If the accused is proved to have been found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, the court is entitled to infer that he or she stole them or in a proper case, that he or she is guilty of some other offence such as house breaking see. R vs Glentleman 1919 CPD 245. There is no onus the accused to prove that he or she acquired possession innocently. If his or her explanation may reasonably be true, the prosecution has not proved its case beyond reasonable doubt. As Curlewis J said in R v Du Plessis.1924 TPD 103 "Where the evidence for the Crown has proved that property recently stolen was found in the possession of

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In the matter between

THE STATE

vs

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THEMBINKOSI CELUMBUSO MVUBU ACCUSED NO 2

PATRICK SIBONGISENI SIMELANI ACCUSED NO 3

LAMA EPHRIAM NAVESS ACCUSED NO4

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JUDGMENT

MKHIZE AJ:

1. The Seven accused namely;

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Thembinkosi Celumbuso Mvubo, a 38 year old male of Durban. Patrick Sibongiseni Simelane, a 29 year old male of Middleburg.

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Seroke Kortjas, a 34 year old male of Maluti. Are facing three counts of

Count

1. CONSPIRACY TO COMMIT HOUSEBREAKING AND
THEFT

IN THAT steal from sometime prior to 10 August 2007, the exact date Unknown and at or near Mthatha the accused unlawfully and intentionally conspired with one another to aid procure the commission of or to commit the offence of housebreaking with the intent to and theft.

Count

2. HOUSEBREAKING WITH THE INTENT TO STEAL

IN THAT from sometime prior to 10 August 2007 at or near Mthatha Boxer Store in the district of Mthatha, the accused did wrongfully and

intentionally break and enter the premises of Boxer store with the intent to steal.

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3. THEFT

IN THAT upon or about 10 August 2007 at near Mthatha in the district of Mthatha, the accused did wrongfully fully and intentionally steel the amount of

R253 802-20, the property or in the lawful possession of Boxer Super stone and or Xolani Nimrod Qushu.

The state called the following witnesses, Tyelovuyo Nkoshubane. He stated that he was employed by Boxer Cash& Carry as a Receiving

Manager. On the 10th August 2007 he opened the store in the morning. He was not responsible for closing the shop on the 9th August 2007. The shop had an alarm system and he does not know whether it was activated on the 9th of August 2007. When he entered the shop the keypad was not functioning. He found the padlocks of the front door on the ground.

He used the entrance to the receiving bay. He got into the shop and inspected the office, there was nothing wrong in the office. He telephoned the Branch Manager to report that the shop had been broken into. The Branch Manager arrived shortly and he telephoned

the police who arrived immediately. They inspected the shop, how it was broken into. The safe had been damaged with a grinder.

[2] The wall in the bakery section had been pushing outside, there was a whole of about 40cm square. He does not know any of the accused persons before Court. There was a Security guard who was on duty on the night of the 9th August 2007.

- [3] Mr Xolani Nimrod Gxulu, was employed as a branch Manager of Boxer Cash & Carry, he was called by Mr Nkashubane to the shop. He found the cash office doors were opened. He called the Manager for the bakery. He found that the extractor fan had been removed. The Surveillance cameras were off.. There was a whole on the side of the safe, the door of the safe was opened. The amount of R 253 803-20 had been taken from the safe. It was in two bags namely a big green bag used by Fedility for Banking. After the house breaking, he saw the green bag in the offices of the organized crime which was the same bag that had been taken from the safe.
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- [5] Constable Mfundo Siziba as the member of SAPS stationed at Mount Frere. On Friday the 10th August 2007 at about 4hrs30 minutes he was in the Patrol Van with Inspector Goodwill Somi. They saw a Toyota Corolla vehicle with registration letters and numbers NO 2489 next to FNB in Mount Frere. They stopped about 10metres away from the Toyota Corolla vehicle and nobody came out from the vehicle. They were using a Police Van a Double Cab with Police Lights on top. The Toyota Corolla vehicle sped away and they chased after it. They put the Police blue lights and it stopped about 200m away. The Toyota Corolla vehicle stopped and the driver came out and rushed to the police vehicle. It was accused no 1 who was the Inspector in the SAPS. He produced his appointment certificate. We told him we wanted to search their vehicle. He gave us permission to do so. They were four passengers in the vehicle, the four people were accused No 2, 3, 4 and 5, he did not know anyone of them.
- Accused

No 1 claimed that it was his vehicle. We found money from accused No 2 and from accused no 4. The other money was found in the bag wrapped in plastics.

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possession of suspected stolen money. The five accused were present when the off loaded the money. It amounted to R208 267-40. The Police from organized crime unit arrived and loaded the money. The accused were taken by the member of the Organized Crime Unit. Accused were never assaulted in his presence.

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[8] The Court moved to the trial within a trial, to determine whether the statements made by accused no 1, 2, 3, 4, 6 and 7 to the police officers were made freely and voluntarily with the accused in their sound and sober senses and having not been influenced to make such statements.

[9] Captain Madubula took the statement of accused no3 which was received as exhibit No. 5. Inspector Qina brought accused No. 3 to the office where Captain Madubula took the statement on the 13th of August 2007. Inspector Qina never threatened accused No. 3 nor did he influence him to make a statement to Captain Madubula.

The defence made admissions in term of Section 220 of Act 51 of 1977 as amended as follows: Exhibit 6.

We the undersigned accused persons do hereby admit to the following.

(1) That the proforma form contents to the statements by us as

accused persons herein is correct and has been correctly noted as per our instructions to the officer filling in the form.

Therefore it may please this Honorable Court to have then admitted as such. Signed by accused 1,2,3,4,6, & 7.

As a result of this Section 220 admission in the following proforma forms were admitted as evidence.

Accused 1 as exhibit 7 Accused 2 as exhibit 8 Accused 3 as exhibit 5 Accused 4 as exhibit 11
Accused 6 as exhibit 9 Accused 7 as exhibit 10

In these proforma forms all the accused admit that they told the officers that:

They were not threatened or assaulted. They made the statements before the said officers freely and voluntarily. They were not influenced to make such statements.

They made the statements in their sound and sober senses.

The next witness was Xolile Madeba who was an Inspector in the SAPS and that accused 7 took him for a pointing out on the 16th August 2007. The following:

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6 & 7 in their offices. He was present when the accused 7 pointed out the equipment that was used in the housebreaking and theft at Boxer Superstore Umthatha. Accused 6 & 7 co-operated with the Police after Inspector Mabeba had explained their constitutional rights. Accused 6 & 7 were never assaulted by the Police in his presence.

The last witness in the trial with a trial for the State is Inspector Maqhubela. He was the investigation officer in the case he was present when the accused were fetched from Mount Frere on the 10 August 2007. he was present when accused 6 & 7 were arrested. None of the accused were assaulted in his presence. He denied that he assaulted any of the accused and that he influenced them to make confessions. The state closed its case in the trial within the trial.

The defence call the six accused to say that their statements to the Commissioned Officer or Magistrate were not made freely &

Voluntarily. In fact they claimed that Inspector Maqhubela dictated to them what to say.

Sipho Mbatha accused No.1 further stated that he was not warned about his rights against self-incrimination. He was assaulted by open hands and put him the plastic so that he could not breath.

Thembinkosi Mvubu repeated the same version against Inspector Maqhubela he further stated that he was promised bail if he confesses to the officer.

Sibongiseni Patrick Simelane - made a confession to Captain Madubula. He says when he said he knew nothing about the case he was hit with in his head with open hand and put a plastic bag cover his head and they cover his face and he fell down. Maqhubela took out a plastic bag from him. He told the police officer that he was not assaulted

Ephriam Navess accused No.4 also claimed that he was put in plastic bag and suffocated. What he wrote in the statement had been dictated to him by Inspector Maqhubela. He did not make the statement freely and voluntarily as he was afraid that if he deviates from what Maqhubela had dictated to him he will be further assaulted.

Joyce Tukane - accused No. 6 also testified that all that is contained in the statement she was instructed by Maqhubela to say she was assaulted

and suffocated with a plastic. She was instructed what to say to the police officer. She was assaulted on the 16 August 2007 on the date of her assaulted. Maqhubela promised her bail if she does not cause trouble for him. She agreed to co-operate as she wanted to go to her children.

Seroke Kortjas he was arrested on the 16 August 2007. he was assaulted, suffocated with a plastic bag. He was handcuffed his hands and feet. He was made to undress. He was promised bail if he co-operated with the police, he was told that he must tell the magistrate that he was never influenced to make a statement. He lied in the statement to save his life.

The defence closed their case in the trial within a trial the defence & the state addressed the court on the admissibility of the statements. The court ruled as follows. After listening to the evidence it is ordered that the statements made by accused 1,2,3,4,6 & 7 to the commissioned officers or magistrate were made freely & voluntarily with accused in their sound & sober senses having not been influence there to here to such statements are admissible as evidence against the accused persons.

Moved out of the trial within a trial. The court directed that the evidence led during the trial within a trial be received as evidence on the merits as well as the statements made by accused 1,2,3,4,6 7. The state then closed its case. All the accused except accused 6 & 7 testified in their defence. They all denied complicity in the commission of the offence. They further claimed that on the day in question they were from King Williams Town where they had gone to the Herbalist Mangconde. The defence closed their cases. The main question is whether the state has proved its case against the accused person beyond reasonable see S vs Kubeka 1982 (1) SA 534; S vs Van der Meyden 1999 (2) SA 79 (w); S vs Aswagani 2001(2) SACR 97 SCA.

In deciding whether the state has proved its case the court has to look into the following aspects of the case.

- (10) The fact that accused 1,2,3,4 &5 were arrested with exhibits within two hours after the commission of the offence, see S vs Sikweyiya [1984] ZASCA 96; 1984 (4) SA 712 (A), R vs Rama 1 966 (2) SA 395 (A). If the accused is proved to have been found in possession of recently stolen goods and has failed to give any explanation which could reasonably be true, the court is entitled to infer that he or she stole them or in a proper case, that he or she is guilty of some other offence such as house breaking see. R vs Glentleman 1919 CPD 245.

There is no onus the accused to prove that he or she acquired possession innocently. If his or her explanation may reasonably be true, the prosecution has not proved its case beyond reasonable doubt. As Curlewis J said in R v Du Plessis.1924 TPD 103

"Where the evidence for the Crown has proved that property recently stolen was found in the possession of

the accused, no onus is thereby thrown on the accused to prove how he came into possession of the property or to prove his innocence,

though some reasonable explanation is expected of him and in the absence of any such explanation, the court or jury may infer his guilt and convict him ". Holmes JA remarked in *S v Parrow* 1973(1) SA 603 (A) at 604 that he agreed with Hunt that: the doctrine' (if it can be given such an elevated name) of recent possession ... is simply a common-sense observation on the proof of facts by inference.

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Holmes JA remarked in *S v Parrow* 1973(1) SA 603 (A) at 604 that he agreed with Hunt that: the doctrine' (if it can be given such an elevated name) of recent possession ... is simply a common-sense observation on the proof of facts by inference.

The learned Judge of appeal went on to say: On proof of possession by the accused of recently stolen property, the court may (not must) convict him of theft in the absence of an innocent explanation which might reasonably be true. This is an epigrammatic way of saying that the court should think its way through the totality of the facts of each particular case, and must acquit the accused unless it can infer, as the only reasonable inference, that he stole the property. The onus of proof remains on the State throughout. Hence, even if, after the closing of the cases for the State and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless the only reasonable inference is that he did so; for the law demands proof beyond reasonable doubt. The court must take into account not only an explanation which the accused gives in evidence at the trial but also what he or she is proved by defence or prosecution witnesses to have said outside the court". In respect of accused 1,2,3,4 and 5 the inference is inescapable that they planned together to commit house breaking of boxer store and took all the money that was in the safe. The money was recovered by constable Siziba and Inspector Somi, See *R vs Blom* 1939 (A) 188 at 202 - 203 and *S vs Mtshweni* 1985 (1) SA 590 (A). The version by the accused 1,2,3,4 & 5 give that know nothing about the housebreaking at Boxer cash & carry, that they did not see the green bag in the vehicle driven by accused 1 whilst they were passengers bothers on stupidity and it is rejected as a lie, the accused according to the evidence were almost caught committing crime red handed. The court further ruled that the statements all accused made except accused 5 to the commissioned officer or magistrate were made freely & voluntarily with the accused in their sound & sober senses and that they were not influenced to make those statements. The six accused were appealing witnesses during the trial within a trial. I reject their version as false and accept the state version that they were not assaulted and exhibit 6 admitted in terms of Section 220 of act 51 of 1977 that the officers concerned who completed their pro forma forms proceeding their statements completed them correctly. In essence those forms establish whether the accused person was assaulted or threatened or unduly influenced before making a statement. In all those forms accused denied that they were assaulted I am satisfied that the accused were lying when they claimed that Inspector Maqhubela, Inspector Mdepha, Inspector Msindwana assaulted at various occasions. However the six accused are bound by their

Section 220 admissions contained in exhibit 6. The pointing out by accused 7 of the exhibits used in the commission of the crime was done freely & voluntarily see S vs Sheehama 1991

- (2) SA 379 (A) 383, S vs Monyane 2001 (1) SACR 115 (1) at 124. Section 209 of the Criminal Procedure Act Provides. "An accused person may be convicted of any offence on the evidence of the confession by such accused that he committed the offence in questions if such confession is confirmed in a material respect or where the confession is not so confirmed, if the offence is proved by evidence other than such confession to have been actually committed". I am satisfied that the evidence against all the accused is overwhelming. Accused 1,2,3,4,5 there is sufficient evidence from

their conduct when they were arrested at Mount Frere. All of them are not able to give an explanation why the money stolen from Boxer Store and the green bag are found in their car within two hours from the time Boxer Store at Mthatha was broken into. Accused 1,2,3,4,6,7 there is sufficient evidence from their confessions that they broke into Boxer Store. After accused 2 had done proper planning and surveillance of the scene of crime, accused two co-ordinated the whole operation. The Court must commend constable Siziba and Inspector Somi who through their instruction and dedication foiled the operation of all the accused persons at Mount Frere where accused 1,2,3,4&5 were arrested. I do not agree that under the presence circumstances the accused persons should be convicted of count 1 & count 3 and only avoid duplication of sentences & treat all counts as one for purposes of sentence as it is the position in the other parts of South Africa. I there fore finding that the state has proved its case against all the accused in respect of count 2 and that the accused are acquitted in counts 1 & 3 to avoid duplication of convictions. All the seven accused are found guilty of Count 2 Housebreaking & Theft.

The learned Judge of appeal went on to say: On proof of possession by the accused of recently stolen property, the court may (not must) convict him of theft in the absence of an innocent explanation which might reasonably be true. This is an epigrammatic way of saying that the court should think its way through the totality of the facts of each particular case, and must acquit the accused unless it can infer, as the only reasonable inference, that he stole the property. The onus of proof remains on the State throughout. Hence, even if, after the closing of the cases for the State and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless the only reasonable inference is that he did so; for the law demands proof beyond reasonable doubt.

The court must take into account not only an explanation which the accused gives in evidence at the trial but also what he or she is proved by defence or prosecution witnesses to have said outside the court".

In respect of accused 1,2,3,4 and 5 the inference is inescapable that they planned together to commit house breaking of boxer store and took all the money that was in the safe. The money was recovered by constable Siziba and Inspector Somi, See R vs Blom 1939 (A) 188 at 202 - 203 and S vs Mtshweni 1985 (1) SA 590 (A).

The version by the accused 1,2,3,4 & 5 give that know nothing about the housebreaking at Boxer cash & carry, that they did not see the green bag in the vehicle driven by accused 1 whilst they were passengers bothers on stupidity and it is rejected as a lie, the accused according to the evidence were almost caught committing crime red handed.

The court further ruled that the statements all accused made except accused 5 to the commissioned officer or magistrate were made freely & voluntarily with the accused in their sound & sober senses and that they were not influenced to make those statements. The six accused were appealing witnesses during the trial within a trial. I reject their version as false and accept the state version that they were not assaulted and exhibit 6 admitted in terms of Section 220 of act 51 of 1977 that the officers concerned who completed their pro forma forms proceeding their statements completed them correctly. In essence those forms establish whether the accused person was assaulted or threatened or unduly influenced before making a statement. In all those forms accused denied that they were assaulted I am satisfied that the accused were lying when they claimed that Inspector Maqhubela, Inspector Mdepha, Inspector Msindwana assaulted at various occasions.

However the six accused are bound by their Section 220 admissions contained in exhibit 6.

The pointing out by accused 7 of the exhibits used in the commission of the crime was done freely & voluntarily see S vs Sheehama 1991

- (2) SA 379 (A) 383, S vs Monyane 2001 (1) SACR 115 (1) at 124. Section 209 of the Criminal Procedure Act Provides. "An accused person may be convicted of any offence on the evidence of the confession by such accused that he committed the offence in questions if such confession is confirmed in a material respect or where the confession is not so confirmed, if the offence is proved by evidence other than such confession to have been actually committed".

I am satisfied that the evidence against all the accused is overwhelming. Accused 1,2,3,4,5 there is sufficient evidence from

their conduct when they were arrested at Mount Frere. All of them are not able to give an explanation why the money stolen from Boxer Store and the green bag are found in their car within two hours from the time Boxer Store at Mthatha was broken into.

Accused 1,2,3,4,6,7 there is sufficient evidence from their confessions that they broke into Boxer Store. After accused 2 had done proper planning and surveillance of the scene of crime, accused two co-ordinated the whole operation. The Court must commend constable Siziba and Inspector Somi who through their instruction and dedication foiled the operation of all the accused persons at Mount Frere where accused 1,2,3,4&5 were arrested. I do not agree that under the presence circumstances the accused persons should be convicted of count 1 & count 3 and only avoid duplication of sentences & treat all counts as one for purposes of sentence as it is the position in the other parts of South Africa.

I there fore finding that the state has proved its case against all the accused in respect of count 2 and that the accused are acquitted in counts 1 & 3 to avoid duplication of convictions. All the seven accused are found guilty of Count 2 Housebreaking & Theft.

M.W. MKHIZE ACTING JUDGE OF THE HIGH COURT
HEARD ON : 15 JANUARY 2009
DELIVERED ON : 15 JANUARY 2009
COUNSEL FOR THE STATE: ADV. VAN DRUNICK
COUNSEL FOR THE ACCUSED: MR MQUQU

M.W. MKHIZE

ACTING JUDGE OF THE HIGH COURT
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