

Reportable: YES / **NO**
Circulate to Judges: YES / **NO**
Circulate to Magistrates: YES / **NO**
Circulate to Regional Magistrates: YES / **NO**



IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 100/2018

In the matter between:

NOVASA SAMUEL

Appellant

and

THE STATE

Respondent

CORAM: HENDRICKS JP et MMOLAWA AJ

DATE OF HEARING : 27 NOVEMBER 2023

DATE OF JUDGMENT : 08 FEBRUARY 2024

FOR THE APPELLANT : ADV. KEKANA

FOR THE RESPONDENT : ADV. MAHKUVHA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00am on 08 February 2024.

ORDER

Resultantly, the following order is made:

- (i) The appeal against both conviction and sentence is upheld.**
- (ii) The conviction and sentence on all six (6) counts are set aside.**

JUDGMENT

HENDRICKS JP

Introduction

[1] **Mr. Ishmael Tihane** and **Mr. Samuel Novasa** stood trial in the Regional Court, Potchefstroom as accused 1 and 2 (appellant) respectively, on two counts of robbery with aggravating circumstances, assault, pointing of a fire-arm, the unlawful possession of a fire-arm and ammunition. They both pleaded not guilty to all six (6) charges proffered against them. Whilst accused 1 tendered no plea explanation, it was indicated that the appellant

denied that he robbed, assaulted or possessed a fire-arm and ammunition, on the day of the incident.

[2] It was alleged in the annexures to the charge sheet that on the 30th June 2014, they committed the offences of robbery with aggravating circumstances (counts 1 and 2), in that they robbed **Ms. Johanna Du Bisani (Bisani)** and **Ms. Maria Magdalena Schutte (Schutte)** at 'Scandinavia Kontant Winkel', of a list of articles and cash. Aggravating circumstances being present in that a fire-arm and a knife were used. They also assaulted **Ms. Angelina Sejamong (Angelina)** with fists (count 3); pointed a fire-arm at Johanna Du Bisani (count 4); and being in the unlawful possession of a fire-arm (count 5); and ammunition (count 6).

[3] The facts can be succinctly summarized as follows. Schutte is the owner of a shop and bottle store named 'Scandinavia Kontant Winkel'. There is a house attached to the shop at the back, with a door between the shop and the house, through which access is granted to either the house or the shop. Between 08H30 and 09H00 Schutte was getting dressed, whilst Angelina was making the bed in a bedroom, inside the house. All of a sudden, a male person appeared armed with a knife. He ordered Schutte and Angelina to lie on the bed and covered their faces with a blanket and a duvet. This man was unknown to Schutte but Angelina identified him as accused 1, Ishmael Tihane. He demanded money and fire-arms. He took Schutte's bank cards, cash amounting to R800.00 out of her purse, and her Blackberry cellular phone. He also removed two (2) fire-arms namely a .38 Special revolver and

a 6.35 Star pistol from her handbag. Thereafter, he tied their hands and feet with handcuffs and insulation tape.

- [4] Du Bisani was brought into the bedroom from the bottle store by two men. She was also ordered to lie on the bed and her hands and feet were tied. The wardrobes and cupboards were ransacked. Their assailants thereafter left. Angelina managed to free herself and untied Schutte and Bisani. Angelina managed to exit through the window and phoned the police. Angelina corroborated the version of Schutte and said that she identified accused 1, as one of their assailants. Bisani said she opened the shop at 08H00. She saw three men at the door of the adjacent bottle store. One of the men enter the bottle store and bought a Hunters' Dry cider. She thought that the other two men went to the shop. When she went to the shop, she was pointed with a fire-arm by one of these men, who was wearing a balaclava. The one that was in the shop then came to the bottle store and demanded money. The cash (float) was removed from the till. Her purse containing R200.00 was also taken. She was taken to the bedroom wherein Schutte and Angelina were. She confirmed that Angelina managed to free herself and them and then summoned the police.

- [5] After approximately thirty (30) minutes, the police arrived and called Bisani and Schutte to the boot of the car in order to identify the items that were inside the boot. Except for Angelina who identified accused 1, both Bisani and Schutte could not identify any of their assailants.

[6] Sergeant Rakate (Rakate) and Constable Seemane (Seemane) were patrolling when they received a complaint *via* the two-way radio. They drove to 'Scandinavia Kontant Winkel'. There they received a report and based on this report, they drove in the direction of Viljoenskroon. Along the way, they saw two men standing on their right-hand side of the road and one on the left. They stop their motor vehicle. According to Rakate, all three men ran away. He chased after two and apprehended one of the two. These were the two men who stood on the right-hand side of the road. His colleague Seemane apprehended the man who stood on the left side of the road. This was the appellant. The man apprehended by Rakate was accused 1.

[7] When Rakate searched accused 1, he found two cellular phones in his possession, as well as an amount of cash. He did not explain the rights of accused 1 to him, when he was arrested. According to him, accused 1 then told him about the other items which were not far from where they were standing, which were hidden in the grass. He then went back to the scene with accused 1, who according to him was cooperative. Two bags were discovered hidden in the grass near the area where accused 1 and the other tall man who managed to escape, were standing. This is on the opposite side of the road from where the appellant was standing. The two bags were opened in the presence of accused 1 and the appellant. Liquor, cigarettes and cash were found in the brown bag. Inside the blue bag were a brown jacket, cigarettes and a 6.35 Star pistol. Accused 1 then mentioned that the brown jacket belongs to the appellant. Rakate testified that the appellant was

searched by Seemane and in his pocket a black installation tape was found. Accused 1 then said that the black insulation tape was used to tied the complainants at the shop.

[8] They then drove with the appellant and accused 1 to the shop, but stop some distance away. The police officer who attended at the scene was called and he confirmed that those were the items that the complainants listed as being robbed. They took the suspects, (the appellant and the accused 1), to the police station.

[9] During cross examination it was put to him that accused 1 dispute that he told him about the bags and the black insulation tape, the appellant, and that they robbed the complainants. Furthermore, it was put to him that the appellant, who was on the opposite side of the road, never ran away, nor did he had a black insulation tape in his possession. He was adamant about it. When confronted about the confession which accused 1 made, Rakate said that he warned accused 1 about his constitutional rights, but accused 1 insisted saying that he wanted to cooperate. This was in contrast to what he testified during his evidence-in-chief. Later on he conceded that the appellant was alone, hiking on the other side of the road in a different direction, but that accused 1 confessed and insisted that they were together.

[10] Seemane, who was with Rakate, testified that after receiving the complaint via the two-way radio about the robbery at 'Scandinavia Kontant Winkel', they drove in the direction of Viljoenskroon. They saw two men standing on their right-hand side of the road and one

on the left side. They decided to stop and search them. Immediately when their car stopped, the two men who were standing on the right-hand side of the road ran away, whilst the one who was standing on the left-hand side of the road did not run away. This is in contrast to what Rakate testified. He searched the one who was on the left-hand side of the road (appellant), and found a black insulation tape in one of his pockets. Rakate then came with accused 1. Accused 1 then pointed at the grass where they saw two bags. They searched the bags in the presence of the appellant and accused 1 and they found cigarettes, money, a pink wallet, a brown jacket, a fire-arm and balaclavas inside these bags. They then took them (as suspects) to the scene at Scandinavia, where the items were identified by the complainants. The two suspects were then taken to the police station and detained.

- [11] Accused 1 testified in his defence and also called witnesses. In a nutshell, his testimony is to the effect that he was sent by his mother to pay an account and to get water at the river. While standing next to the road to a hike a lift, a police motor vehicle came and stopped near the appellant, who was standing on the opposite side of the road. The appellant was ordered to lie down. A gunshot was fired in his direction, which caused him to also lie on the ground. There were three other men also in the vicinity where he was, who ran away, leaving their bags behind. The police took the bags and accused him and the appellant of robbing a certain shop. They were taken to the shop. He was assaulted. He was searched and then the money which his mother gave him to pay

an account was confiscated, as well as his cellular phone. During cross-examination by the legal representative of the appellant, he said that he did not converse with the appellant at the hiking spot along the road, as they were unknown to each other. His mother also testified in his defence, as well as his niece. He denied that he committed any of the offences that he was charged with. During cross-examination by the prosecutor, it was put to accused 1 that not only did Angelina recognized him as she testified, but he was also the one having a knife and was responsible for tying their hands with black insulation tape. The appellant elected not to testify and closed his case without presenting any evidence.

[12] None of the complainants namely Schutte, Bisani or Angelina identified the appellant as one of their assailants. There was therefore no eye-witness evidence presented by the State that implicate the appellant in the commission of any of these offences. The only evidence that could possibly link the appellant is the evidence tendered by the arresting officers Rakate and Seemane. Careful, close scrutiny of their evidence is therefore necessary.

[13] Rakate chased after accused 1 and the other man who was standing together with accused 1 on the right-hand side of the road, while Seemane approached the appellant. At first Rakate stated that Seemane searched the appellant in his presence and found a black insulation tape in his pocket. This proves to be incorrect and was conceded to by Rakate during cross-examination. He was apparently so informed by Seemane and

allegedly accused 1 also confirmed it. This was however denied by accused 1.

[14] So, Seemane is a single witness about the fact that a black insulation tape was found in the pocket of the appellant, when he was searched. This, as the only possible implicating evidence, is in sharp contrast to the testimony of Angelina, the eye-witness, who positively identified accused 1 as one of the perpetrators, and the person who tied them with black insulation tape. The contradiction between the evidence of Rakate and Seemane about the alleged discovery of a black insulation tape in one of the pockets of the appellant, cast serious doubt on the credibility of this single piece of evidence, apparently linking the appellant to the commission of these crimes.

[15] In her evaluation of the evidence of Rakate, Regional Magistrate Serei stated, and I need to quote extensively:

“Yes Mr. Rakate did not impress the court on some aspects regarding his evidence. However, the Court will take into consideration that not all parts of his evidence must be rejected in this regard. Court will take into consideration that not all parts of his evidence must be rejected in that regard.

It is a well accepted fact as a rule of evidence that the mere fact that a witness is a liar does not mean that all his evidence must be disbelieved. Liars tell the truth sometimes. As far as this particular matter is concerned not only must each case be examined in relation to its own particular circumstances but every individual item of evidence which the Court accept or reject must be so examined.

The Court must consider on the probabilities whether each item of evidence is credible or whether it is not. Yes Mr. Rakate testified that after arresting accused 1 accused 1 immediately told him that the cell phone was robbed at the scene and also that the cell phone belonged to the complainant, one of the complainants.

He never mentioned in his evidence that he warned accused 1 of his Constitutional rights to remain silent. It is only when being cross-examined by accused 2's Attorney that he said that he indeed warned the accused. If indeed he warned accused 1 of his Constitutional rights accused 1 was not going to go further and tell him about the bags.

The Court does not accept his explanation that accused insisted on cooperating. It cannot be that the accused just made a spontaneous admission or confession as there was enough chance for him to warn immediately after he found the items he found in his possession.

He further testified that he did not go, call the complainants to identify the items after he arrested the two accused. That is in contrast with what was said by Miss Schutte and Miss Du Bisani who said that they were called to the boot of the car where they observed the items and identified them as theirs.

Miss Du Bisani even went further to say that he could see that there were two people sitting at the back but he only saw the back parts of their head. Common sense dictates that the police officer who was there making a statement could not have known or identified the complainant's items as he had been there for twenty to thirty minutes and he does not know those items.

There were also items which Miss Du Bisani said she only realised while she saw them in the boot that they were stolen, that is cigarettes and liquor. Mr Rakate could not further explain what happened to the jacket which alleged accused one said belonged to accused 2.

He was also contradicted by Mr Seemane regarding the fact that accused 2 ran away. His evidence was that when they stopped at the

scene all the people ran away were as Mr. Seemane insisted that accused 2 did not run away. He was also confronted about his statement.”

and further

“The only issues the Court reject is regarding the fact that accused’s Constitutional rights were explained and the fact that the two accused were not taken back to the scene, to the scene.”

[16] In evaluating the evidence tendered by Seemane, Regional Magistrate Serei stated:

“Yes Mr Seemane was an unsatisfactory aspects too. He realise with Mr Rakate that they did not follow the law and tried to cover that by saying they stopped far away from the scene and only called police officer to identify the stolen items.

That is in contrast with what was said by the two witnesses Miss Schutte and Miss Du Bisani who said they went to the car and identified their, their, their stolen property at the back of the boot of the car. However they corroborated each other regarding the fact that accused 1 and another person ran away when the car approached.

There were items recovered from the scene which were later identified by the complainants. Regarding the fact of who ran away it clearly shows that Mr Rakate is the one who made a mistake when he said that accused 1, sorry accused 2 ran away when they stopped at the scene.”

[17] The quoted passages clearly indicate that Regional Magistrate Serei made very strong negative credibility findings against both

Rakate and Seemane, but yet opted to accept their evidence as credible nonetheless. The reasoning in this regard is flawed.

[18] Regional Magistrate Serei then dealt with the fact that the appellant elected not to testify “despite the fact that the witness testified that insulation tape was found in his possession, which was used to tie witnesses”. Which “witnesses” the Regional Magistrate refer to is unclear, bearing in mind the fact that Rakate contradicted himself and also contradicted Seemane, as to whether he was present when the insulation tape was allegedly found in one of the appellants’ pockets. Furthermore, this is in contrast to what Angelina testified namely that it was accused 1 (**and not the appellant**), who tied them with black insulation tape.

[19] However, it does not end there. The Regional Magistrate found:

“Yes the two witnesses Mr. rakata and simani said accused one, when a jacket was found in the bag, alleged that it belonged to accused 2 apparent. Accused one also mentioned that he perpetrated the robbery was accused 2 appellant and installation type was also found in possession of accused 2 appellant, which the witnesses allege what died with.”

“I agree with the Defence that the size and the size of the insulation tape was not stated but however the accused was arrested few metres from the scene of the robbery. Items which were stolen from the complainants were found not far away from where the accused were standing even tough accused as on the opposite side of the road.

Despite all this evidence accused 2 elected to remain silent. Court is well aware of also the fact that an admission or confession made by one accused cannot be tendered against another but taking into consideration what was said in R v Blom 1 939 AD 138 at page 202 it was said that there are two cardinal rules of logic relating to inferential reasoning in cases based on circumstantial evidence.

That applies in relation to accused 2 who was not identified by any witness at the scene. Court mentioned the proven facts of police officers finding items stolen from the robbery and insulation tape also found in possession of the accused. So from the proven facts the Court realises the Court must draw from those proven facts if there is any inference it can draw from those inference which are consistent with all the proven facts.

The proved facts that they exclude every reasonable inference from them safe 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.

Yes from there is on other inferences which can be drawn from this other facts that accused 2 was indeed at the scene of the robbery. His version accused 2 is rejected in this matter, it is improbable and inconsistent just like that of accused 1.”

[20] The Regional Magistrate also found that:

“The following facts to be proved beyond reasonable doubt. That the two accused together with another one went to the complainant’s place on the 30 June 2014. Accused 1 went into the house at the back where Miss Schutte and Miss Angelina were.

Others went to the shop where they took the items from Miss Du Bisani. The items taken from the house were loaded into two bags, a brown and a blue bag. The, the two then left and stood on different sides of the road. Accused 1 and another one who ran away

fled when the vehicle driven by Mr Rakate and Seemane, police car stopped.

Mr Seemane who was a passenger apprehended accused 2 who was on the right side and Mr Rakate pursued accused 1 and the other person who ran away. Accused 1 was then searched after Mr Rakate apprehended him under the trees and cell phone and money were found from his possession.

Yes accused 1 then took, sorry was taken back to the scene where accused 2 was found with Mr Seemane insulation tape was allegedly, was also found in accused 2's possession. The insulation tape in question, a black one was also used to tie the complainants at the scene of robbery.

Items were found in the grass near where accused 1 and the other one were standing and those items were later identified by the complainants as theirs. Accused, the two accused were then taken to the cells. Accused, from accused 1 money was found from his underpants when a thorough search was made at the police station.

The items recovered from the scene were then recorded in SAP13, SAPS13 including the firearm which was found in the items stolen from the house. Yes the Court must now decided whether the State managed to prove all the charges against the accused. Robbery consist in the theft of property by unlawfully and intentionally using violence or threats of violence to induce the possessor of the property to submit to the taking of the property.

The evidence proves that the accused reduced the State witnesses or the complainants to a state of submission. A knife and a firearm were pointed at Miss Angelina, Miss Schutte and Miss Du Bisani. Their cell phones, money, liquor from the bottle store and cigarettes and firearm were taken without their consent.

Yes according to the doctrine of common purpose where a group of persons act with a common purpose the unlawful actions of one member of the group will be attributable to the others in circumstances where such actions must have been foreseen and therefore by inference were foreseen as part of the general plan.

Again the doctrine of recent possession is applicable in this matter. The doctrine of recent possession is applicable in cases of robbery where the accused persons are found in possession of recently stolen items. The according to, the evidence in this matter reveals that the complainants were robbed and between twenty to thirty minutes earlier after the police officers were directed to the direction took by the robbers the items were then discovered.

It is highly improbable that this could have exchanged hands within such a short period of time. More so that officers confirmed that where they found the accused it was only them. This applies in respect of count 1 and 2 of robbery with aggravating circumstances.

The third count is that of assault, there is no evidence by Miss Sejamong that she was assaulted, Miss Angelina Sejamong that she was hit with fists as is alleged by the State on the charge. Regarding the fourth count pointing of a firearm Court is of the view that there is duplication of charges as the pointing happened at the time the firearm, the same firearm was being used to induce Miss Du Bisani and Miss Schutte to submit to the taking of their property.

Regarding the firearm Section 3 of Act 60/00, that is the Firearms Control Act, provides that no person may possess a firearm unless he holds a licence, permit or authorisation issued in terms of this Act to possess that firearm. More than one person can be convicted of possession of one firearm if the State is able to prove 20 that all the accused not only knew but also had direct control over the firearm.

In Nkosi 1 998 (1) SACR 284 the Court dealt with the question whether one firearm can jointly be possessed by a group of persons. At page 286G of that case the Court discussed the principle involved as follows. That the issue which arise whether the group possessed the guns must be decided with reference to the answers to the question whether the State established facts from which it can properly be inferred by the Court that the group had the intention to exercise possession of the guns throughout the actual, through the

actual detente and actual dentente had the intent to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the dentente or common purpose between the members of the group to possess all the guns. In S v Khambule 2001 (1) SACR 501 (SCA) the Court approved the application of common purpose as a tool to prove possession of an object by a number of accused persons.

However in S v Mzwakhe Mbuli 2003 (1) SACR 97 (SCA) the Court however indicated that the conviction of multiple accused for the possession of a prohibited object should not be based upon the principles of common purpose but rather on the principles of joint possession.

Yes and the evidence reveal that the firearm was found in the bag and the firearm was taken from the complainant's place. Physical possession is not necessary. The control had control of that firearm, over that firearm therefore they jointly possessed this firearm 5 and the ammunition was also found in the firearm that is 7 x 6.35 rounds of that Star pistol.

Yes and therefore the Court is satisfied that THE STATE MANAGED TO PROVE COUNT 1 AND 2 AND 5 AND 6 AGAINST THE TWO ACCUSED AND THEY ARE 10 THEREFORE FOUND GUILTY OF THOSE COUNTS AND THEY ARE ACQUITTED OF COUNT 3 AND 4.

- [21] The reasoning of the Regional Magistrate is flawed for the following reasons. **First**, the onus is on the State to prove the guilt of an accused person beyond any reasonable doubt, especially where an accused person made no admissions of any sort and put everything in dispute. Each and every element of every crime need to be proven, beyond a reasonable doubt. This is trite and there is

a plethora of caselaw in this regard. **Second**, as the Regional Magistrate correctly stated, the confession of one accused cannot be used as evidence against the co-accused.

See: S v Lithako and others 2014 (2) SACR 421 (SCA).

S v Nkosi 2015 (2) SACR 323 (CC).

[22] Yet, the confession of accused 1 made to Sergeant Rakate was used, apparently through the method of inferential reasoning, against the appellant. **Third**, and most importantly, what accused 1 said to Sergeant Rakate is inadmissible as evidence, since it amounts to a confession which was made to a non-commissioned officer, who did not follow the prescribed requirements in terms of Section 217 of the Criminal Procedure Act 51 of 1977, as amended. **Fourth**, Sergeant Rakate did not warn accused 1 and appraised him of his constitutional rights in terms of section 35 of the Constitution of the Republic of South Africa Act, 108 of 1996. This is fatal. Similarly, the evidence of Constable Seemane that accused 1 said that they were both from Extension 7 and that he was in the company of the appellant, is inadmissible because the rights of accused 1 was not explained to him by Rakate. The fact that accused 1 pointed out the two bags that were hidden in the grass and what was discovered as a result of this pointing out by accused 1, is on a total different footing.

See: S v Sheehama 1991 (2) SA 860 (A)

[23] The only piece of evidence that allegedly linked the appellant to these crimes is the black installation tape, which according to Constable Seemane, was found in one of the pockets of the

appellant. The appellant did not point out the bags hidden in the grass or that some stolen items were discovered as a result of him pointing at/out the said bags and items. The evidence of pointing out/at resulting in the items being discovered is also inadmissible as evidence against the appellant. Resultantly, I am of the view that the State failed to prove the guilt of the appellant beyond any reasonable doubt on all the charges levelled against him. The appeal against conviction and sentence should therefore succeed.

[23] Finally, I would like to express my sincere gratitude to counsel for their assistance and their comprehensive heads of argument. I am particularly thankful for Advocate Kekana, who appeared pro bono on behalf of the appellant.

Order

[24] Consequently, the following order is made:

- (i) The appeal against both conviction and sentence is upheld.**
- (ii) The conviction and sentence on all six (6) counts are set aside.**

**R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG**

I agree

**E M MMOLAWA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG**