THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 20716/2014
Not Reportable

In the matter between:

KABELO MELVIN SHOLE **FIRST APPELLANT**

JAFTA BUSHY LEKENA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Shole v The State* (20716/2014) [2014] ZASCA 123 (17 September 2015)

Coram: Shongwe, Theron and Majiedt JJA

Heard: 19 August 2015

Delivered 17 September 2015

Summary: Criminal Law – Conviction – evidence of a 'confession' made to witnesses properly admitted and sufficient to establish the guilt of the first appellant.

Palm and fingerprint evidence – the second appellant's palm and fingerprints on the scene justified as only reasonable inference - an inference of guilt. Appeal dismissed.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Hendricks, Gura and Kgoele JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Theron JA (Shongwe and Majiedt JJA concurring):

[1] The appellants, Mr Kabelo Melvin Shole (first appellant), and Mr Jafta Bushy Lekena (second appellant), were arraigned in the high court, North West Division, Mahikeng, on charges of housebreaking with intent to rob, robbery with aggravating circumstances and murder. They pleaded not guilty to the offences but were convicted and sentenced to 15 year's imprisonment in respect of the housebreaking and life imprisonment in respect of the murder.

[2] The first appellant was granted leave by the trial court to appeal to the full court against his conviction, while the second appellant was granted leave to appeal against both conviction and sentence. The full court dismissed their appeals. The appellants were granted special leave to appeal to this court against conviction only.

[3] The complainant, Ms Manini Elizabeth Smith, managed a tavern and tuckshop in Ramatlabama, District of Molopo, from premises on which her residence was situated. The building housing the tavern and tuckshop was detached from the residential premises. It was common cause that there was a pool table (owned by someone else) in the tavern and in order to play pool, patrons

were required to deposit money in the money slot on the pool table. The money would drop and collect in a money box lodged inside the pool table. It was not disputed that the owner of the pool table visited the premises twice a month in order to, inter alia, collect the money in the money box.

[4] The incident giving rise to the charges being preferred against the appellants occurred during the night of 3 November and the morning of 4 November 2005. At least four persons broke into and entered the complainant's business premises. The robbers gained access to the money box and took its contents. They then gained entry to the residential premises by breaking a dining room window. Ms Smith and her sons, Stanley and Enoch, were assaulted during the incident. Stanley was fatally assaulted and died on the premises.

[5] The conviction of the first appellant was based upon the evidence of two State witnesses, Mr Godfrey Samuel Kutsuakai Moetaesi and Mr Otusitse Archibald Phefo, who testified that the first appellant had 'confessed' to having been involved in the incident at the Smith premises. The first appellant claimed that their evidence to this effect was false and denied participating in the commission of these offenses.

[6] The trial court convicted the second appellant on the basis of finger and palm print evidence. His palm print was found on the windowsill of the window through which access was gained into the residence. The palm print was facing away from the window about a metre from the ground. His fingerprints were lifted from the money box.

[7] It was the testimony of Warrant Officer Phillipus Nel, an expert who lifted and identified the prints, that they were fresh. He visited the scene and lifted the prints a few hours after the incident occurred. Mr Nel also testified that in the

ordinary course, a pool playing patron's fingerprints would not be found on the money box. His evidence was that in order to gain access to the money box, the drawer containing the balls had to first be removed. The only way a patron's fingerprints could be left on the money box, was if the patron removed the drawer containing the balls, and thereafter took out the money box.

[8] The second appellant denied having been present at the scene of the crime on that fateful night. He was not certain how his finger and palm prints came to be found at the scene but he did proffer an explanation. He testified that he was a regular customer at the tavern and guessed (because he testified more than five years after the incident) that his fingerprints landed on the money box either when he was removing the balls from the pool table or when the money box was opened by the owner during a visit to the premises. In regard to his palm print, he explained that he had on one occasion accompanied friends when they visited the deceased at his (deceased's) home. During that visit he entered the Smith's dining room and may have walked passed or opened the window.

[9] I deal first with the case of the first appellant. Counsel for the first appellant contended that the trial court and the full court erred in accepting and relying on the evidence of Mr Phefo and Mr Moetaesi. He criticised Mr Phefo for not immediately reporting what had been disclosed to him by the first appellant and waiting three years before doing so. It was further contended that as Mr Moetaesi was found to be an unreliable witness by the trial court, Mr Phefo was a single witness and his evidence, before it can be accepted, should be clear and satisfactory in all material respects. According to counsel for the first appellant, Mr Phefo's evidence did not meet the required standard.

[10] The trial court was alive to the fact that there were material contradictions and inconsistencies between Mr Moetaesi's evidence-in-chief, his evidence under

cross-examination and the statement he made to the police. The trial court concluded that this impacted negatively on his credibility and his evidence should be treated with caution.

[11] The trial court carefully considered the evidence of Mr Phefo and found that he was a reliable and truthful witness. The alleged delay in this witness reporting the 'confession' to the police was in fact misconstrued by the trial court. The evidence does not point to any delay. Relevant portions of Mr Phefo's evidence-in-chief reads:

'Now you only informed the police in 2008 of this information, why did you wait so long? --- I reported this to one of the members of the policing forum and he was, - he then became friends with them because he saw that they were winning their case.

But then how did it end up that you spoke to the police? --- The member of the policing forum made me to meet the police here at Mafikeng Police station.

And then you informed the police of this information? --- Yes.

. . .

And the reason why it took you three years? --- I was afraid to give this information by betraying my cousin.'

And later under cross-examination:

'Okay sir. You testified that you told a member of the police community forum about what accused 2 had told you about his involvement in this case, is that not so? ---Yes I told him.

Who is this person? --- Oupatjie Legwase.

And this Mr Legwase is a member of the police community forum at Miga? ---Yes.

When did you tell this thing to him? --- On 5 November 2005.

That would be the very same date you allegedly met accused 2 and he told you these things? --- Yes.

What did he do … in response to what you told him? --- He made me to meet a captain of the police at Mafikeng.'

[12] From a reading of the first question put by counsel for the State and referred to above, it is clear there was an assumption on the part of counsel that the witness only reported the 'confession' to the police in 2008. Under cross-examination, Mr

Phefo clarified that he had made a report to Mr Legwase the very day the information was disclosed to him by the first appellant.

[13] The credibility finding made by the trial court in favour of Mr Phefo was confirmed by the full court. The full court reasoned:

'It is interesting to note that the two witnesses, Godfrey and Phefo, each testified about a confession which was made to him alone but not in the presence of each other. In other words Godfrey and Phefo were not together when they received the news. However, there are startling similarities between their evidence. Despite that Godfrey was a poor witness, his version has to a large extent been corroborated by Phefo.'

[14] In *Magadla* v *S*,[1] it was pointed out that:

'There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and consider its merits and demerits and having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects in the evidence.'

This was the test adopted by the trial court as well as the full court.

[15] The ultimate question to be decided is whether, in light of all the evidence adduced, the evidence establishes the guilt of the first appellant beyond reasonable doubt. The full court assessed all the evidence and concluded:

'When one looks at the cumulative effect of the evidence of these two witnesses [Mr Phefo and Mr Moetaesi] as against that of second appellant, it becomes clear that his explanation of a total denial is not reasonably possibly true.'

The approach and conclusion of the full court is unassailable and there is no merit in the first appellant's appeal.

[16] I now deal with the case of the second appellant. Counsel for the second appellant argued that the inference of guilt was not the only reasonable inference

[1] *Magadla* v *S* [2012] JOL 28415 (SCA); (80/2011) [2011] ZASCA 195 (16 November 2011) para 25; *S v Sauls* & *others* 1981 (3) SA 172 (A); [1981] 4 All SA 182 (AD); *S v Webber* 1971 (3) SA 754 (A); [1971] 3 All SA 609 (A).

to be drawn from the finger and palm print evidence. It was contended that the second appellant's explanation that his 'finger prints [may have] got on the money box whilst I was removing … the snooker balls out of the snooker board' or when the money was collected by the owner and that his palm print may have been left when he accompanied friends to the Smith residence, was reasonably possibly true.

[17] The question on appeal is whether the full court, on the evidence before it, was correct in upholding the trial court's conclusion that the second appellant was part of the group who gained entry to the complainant's premises on the day of the incident and had participated in the offences under consideration. The finger and palm print evidence constitutes circumstantial evidence from which certain inferences may be drawn. In *R v Blom*[2] the Court distilled two cardinal rules of logic for the drawing of inferences. First, the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. Second, the proved facts should 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 doubt whether the inference sought to be drawn is correct. A court cannot convict an accused unless on the proved facts, the inference of guilt is the *only* reasonable inference to be drawn. It is not sufficient if the inference of guilt is merely a reasonable inference.[3]

[18] The first leg of the enquiry has clearly been met. The inference that the second appellant was one of the robbers is consistent with the finger and palm print evidence. The answer to the second leg depends upon the probative value to be accorded to the second appellant's finger and palm prints found on the money box and the windowsill. Put differently, can it be said that the second appellant's

[2] *R* v *Blom* 1939 AD 188 at 202-203.
[3] *R* v *Sole* 2004 (2) SACR 599 (Les) at 666G; *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182B; (197/96) [1998] ZASCA 49; [1998] 3 All SA 517 (A); *S v Boesak* 2000 (1) SACR 633 (SCA) para 13; (105/99) [2000] ZASCA 24; *S v Reddy & others* 1996 (2) SACR 1 (A) at 8C-G; (416/94) [1996] ZASCA 55.

explanation as to how his finger and palm prints came to be on the scene is reasonably possibly true?

[19] The full court, in dealing with this enquiry, agreed with the conclusions reached by the trial court that the finger and palm print evidence point conclusively to the second appellant's presence at the Smith residence when the incident occurred and that his version was not reasonably possibly true. The full court reasoned:

'In my view, the trial Court cannot be faulted in these findings. It was never put to Smith that in her presence, when the money was taken out of the pool table, any customer may touch the money drawer. Smith was the best and only witness who would have corroborated the version of first appellant. In my view, it would be absurd, and a security breach, if any patron at the tavern would touch the money drawer at any time. This drawer is inside the table for the sole purpose to keep it away from the reach of customers. The evidence of first appellant relating to how a fingerprint may be deposited on the money container was not put to W/O Nel also. This, despite the fact that Nel explained fully how one's print may be deposited on the money box.'

[20] The presence of the second appellant's fresh finger prints on the inside of the window, soon after the robbery operates powerfully against him.[4] It was not disputed that the prints were fresh. The circumstances under which the prints were found is damning. His finger prints were found on the money box – the very container from which the money was stolen and which was not easily accessible. His palm print was found near the window through which access was gained in a position consistent with entry through the dining room window. In addition, the explanation provided by the second appellant for his prints being on the scene, was not satisfactory and cannot stand. His version is so remotely possible that it can safely be rejected. His appeal must also fail.

[21] The appeal is dismissed.

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[4] *R* v *Nksatlala* 1960 (3) SA 543 (A) at 551E-G; [1960] 3 All SA 377 (A); *S* v *Legote* & *another* (206/99) [2001] ZASCA 64; 2001 (2) SACR 179 (SCA).

L V Theron

Judge of Appeal

APPEARANCES

For Appellant:	NL Skibi Instructed by: Justice Centre, Mahikeng Justice Centre, Bloemfontein
For Respondent:	MJ De Beer Instructed by: Director of Public Prosecutions, Mahikeng Director of Public Prosecutions, Bloemfontein