"SPECIAL INTEREST"

CASE NO.: CA 38/2004

SUMMARY

FRANS IIHUWA IMENE **versus** ***THE STATE***

DAMASEB, JP *et* HINRICHSEN, AJ

26/11/2007

DISCUSSED:

- Evidential value of shoeprint evidence;
- Doctrine of recent possession as proof of commission of offence applied.

"SPECIAL INTEREST"

CASE NO. CA 38/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FRANS IIHUWA IMENE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: DAMASEB, J.P *et* HINRICHSEN, A.J.

Heard on: 26th November 2007

Delivered on: 26th November 2007

APPEAL JUDGMENT

DAMASEB, J.P.: [1] On 2nd June 2006, the appellant was found guilty by the district Court, Ondangwa, of housebreaking with intent to steal, and theft. He was sentenced to 4 years imprisonment of which 1 year was suspended on conditions. He now appeals against both conviction and sentence. The appellant was accused 1 in the

court *a quo* where he was charged with another person who was accused 2. I shall hereinafter refer to the appellant as accused 1.

[2] It was alleged in the charge sheet that accused 1 on or about the 26th May 2004 at or near Oshetu location in the district of Ondangwa, wrongfully and intentionally broke and entered the cuca shop of one Frans Shipanga and, with the intent to steal, there and then stole goods which are the property of or in the lawful possession of Frans Shipanga. The items allegedly stolen are listed on the charge sheet as: 1 gas stove, 6 x bottles of spirit, 3 bottles of beer, 1 x box of biscuits and 1 box of cigarettes.

[3] The complainant, Frans Shipanga, testified. The gist of his evidence is that when he came home on the 26th May 2004 he found that his cucashop had been broken into and zinc plates removed. He followed two sets of footprints which went dead somewhere at Onezezi. The following day, as the search went on, they observed the shoe prints they had been tracking which led them to Oupopo. The police ordered a search of all the shacks at Oupopo. It was then that accused 1 emerged from his cucashop/shack, as the witness put it *"still putting on the same shoeprint that we were following and that we found at my cucashop when broken into"* (sic). Shipanga testified that he then went into the shack of accused 1 and found therein his pot, radio tape and a gas stove. In cross-examination it emerged that

accused 1 had taken Shipanga to the house of someone he said he got Shipanga's goods from but *that* person was not there. Accused 1 did not challenge the 'shoe print' evidence in any shape or form.

[4] The other witness whose evidence implicates accused 1 is a police officer, one Bernard Pashukeni. He was called to attend to a complaint of an alleged theft on 26th May 2004. The place is not named in his evidence but it is clear that it involved, amongst others, the theft testified to by Shipanga. Pashukeni was part of a group which then followed shoe prints left by the suspected thieves until they got to Oupopo location in Ondangwa. He followed some shoe prints which led him to a shack from which accused 1 emerged. Accused 1 wore shoes which had 'similar tracks' as the shoe prints they had been following. The witness confirmed that Shipanga then identified his property in the shack dwelling of accused 1. Pashukeni thereupon arrested accused 1.

[5] Another victim who testified was Edward Kalla. The relevance of his evidence as far as accused 1 is concerned, is that he was also one of the people who had been following the shoe prints after the thefts were discovered. He confirmed that Shipanga found his stolen property in the dwelling of accused 1. Kalla's evidence was that accused 1 admitted ownership of the shoe whose prints they had been

following. That much is confirmed by the exchange between the two during cross-examination.

[6] Aron Amupolo is another police officer who testified. He received the complaints of theft on 28th May. He accompanied the complainants as they followed the shoe prints until they located accused 1 and Shipanga identified his property in the dwelling of accused 1. According to Amupolo, accused 1 was wearing police shoes which fitted the tracks left at the crime scene at Shipanga's place and which the witnesses had been following.

[7] It is clear from the evidence of some of the witnesses that the shoe prints they had been following were consistent with the tracks of standard police issue.

[8] Accused 1 testified on his own behalf. He said Shipanga's property found in his dwelling was brought there by one Andreas. In chief, he did not state for what purpose. He also made no mention of the shoe prints which were attributed to him at the crime scene and certainly did not dispute it in a serious way. On cross-examination he said Andreas had told him the goods were his when he brought them in the early hours of 27 May. He testified that he could not call Andreas as a witness as he could not find him. He admitted ownership of 'police shoes' and said that he got them from a relative

who was a prisoner at Oluno. He then denied that the shoe prints the witnesses had testified to following were his and said he did not know how the items were brought in his room. To at this stage deny knowledge of the stolen goods, is most implausible considering he had earlier said the items were brought to him by Andreas.

[9] In *Jacob Reinold v The State*, Case No. CA 69/2003 (unreported) delivered on 28/10/2003, Silungwe, J said:

> "It is trite law that footprints may provide circumstantial evidence of identity. In *S v Mkhabela* 1984 (1) SA 556 (A), the Appellate Division remarked at 563B (per Corbett, JA, as he then was, with Joubert, JA, and Cillie, JA concurring) that cases that deal with footprints, such as *R v Modesane* 1932 TPD 165; *R v Nkele* 1933 TPD 36; *R v Mabie* 1934 OPD 34; and *R v Louw* 1946 OPD 80, merely lay down that evidence of footprints is admissible but that the Court must be cautious in relying upon it, especially where it is the only evidence against the accused; and that the cogency of such evidence must depend on all the circumstances of the case."

[10] *In casu* the shoeprint evidence is not the only evidence against accused 1. The crucial link in the evidence of the state witnesses whose evidence bears on accused 1 is the following:

(i) They saw shoe prints at the scene of the crime which appeared to belong to the person responsible for the break-in at complainant's cuca shop. These shoe prints resembled those of shoes normally worn by the police.

(ii) The shoe prints were again observed at the village where accused 1 resides and the prints of the shoes worn by accused 1 at the time he was found at his home were similar to the shoe prints which the witnesses had observed at the scene of crime.

(iii) At least some of the complainant's stolen goods were found in the shack dwelling of accused 1 a day or two after the theft was committed.

[11] As was said by Strydom JP (as he then was) in *S v Kapolo* 1995 NR 129 at 130 D-F:

> "It is correct that where a person is found in possession of recently stolen goods and has failed to give an explanation which could reasonably be true, a court is entitled to infer that such person had stolen the article or that he is guilty of some other offence. (See Hoffmann and Zeffert The SA Law of Evidence 4th ed at 605-6.) I also agree with the magistrate that there are instances where a lapse of 14 days or longer was still regarded as recent possession. The test to be applied in this regard was laid down in *R v Mandele* 1929 CPD 96 where the following was stated at 98, namely:
>
> > "…is the article one which could easily pass from hand to hand, and was the lapse of time so short as to lead to the probability that this particular article has not yet passed out of the hands of the original theft?
> >
> > This dictum was approved on many occasions and again by the South African Appeal Court in *R v Skweyiya* 1984 (4) SA 712 (A) at 715E.

> See: Generally South African Criminal Law and Procedure (Vol. 11, Common Law Crimes), 3rd ed. by J R Milton (Juta 1996), pp 636-638 and the authorities there collected."
>
> (See also *Mc Donald Kambonde v The State*, Case No. 107/02 (unreported) delivered on 10/02/2004; NCLP 99.)

I am satisfied that the present is such a case. The stove is not an item that passes hands easily. Accused 1 offered no explanation which could possibly be true for how he came to be in possession of Shipanga's stolen property. He does not explain why Andreas who has his own place would leave a stove with him. If the stove is the only thing Andreas entrusted to him, there is no explanation whatsoever, at least not one that could reasonably possibly be true, for how the other items found in his shack by Shipanga ended up there. Accused 1's subsequent denial that he was aware how the stolen goods got there, shows clearly that he was aware that the goods were illegally acquired.

[12] If any danger exists as to the reliability of the shoe print evidence implicating accused 1, it is removed by the fact that on the day of his arrest accused 1 wore shoes whose prints were similar to those found at the scene of crime. I am satisfied that the shoeprint evidence was properly received in evidence against accused 1. That evidence, coupled with the finding of the stolen goods belonging to the complainant in the dwelling of accused 1, establish, beyond

reasonable doubt, that accused 1 was the person, or one of the persons, who broke into and stole from Shipanga's cuca shop on or about 26th May 2004. The appellant's explanation – for all the damaging evidence of the shoe print and the stolen goods found in his home – is that the stove was brought to him by a certain Andreas. The accused's explanation is in conflict with the proven fact the shoeprints found at the scene of the crime are similar with the prints of the shoes found on him when he was arrested. That explanation is therefore false and is not reasonably possibly true. Accused 1 was therefore properly convicted.

[13] The sentence imposed *a quo* does not induce a sense of shock and I am unable from a perusal of the record to find any irregularity committed during the sentencing procedure. Accused 1 got a 3 years effective term of imprisonment for the offence of housebreaking and theft. This court has repeatedly confirmed sentences of comparable length for that offence, and stated that custodial sentences ought to be the norm for such offence. (Compare: *Thomas Goma Jacobs v The State* CA 7/96 (unreported) delivered on 22.04.96 at p.3. The fact that this Court may have imposed a different, perhaps lesser, sentence if it sat at first instance, is no warrant for interference with the trial Court's sentence in the absence of proof that it induces a sense of shock. The appeal against sentence has no merit.

[14] In the result:

The appeal against conviction and sentence is dismissed.

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DAMASEB, J.P.

I agree

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HINRICHSEN, A.J.

ON BEHALF OF THE APPELLANT: **Mr Dos Santos**

Instructed by: **Dos Santos & Co**

ON BEHALF OF THE STATE: **Mr J W Pienaar**

Instructed by: **The Office of the Prosecutor-General**