DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

30. 4 09 .... DATE .... SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG DIVISION, PRETORIA

CASE NO A 1482/2005

TEBOGO THAEDI
1ST APPELLANT

FLOYD KUMALO
2ND APPELLANT

SKUMBUZO DIMBA
3RD APPELLANT

ALFRED TINYIKO MTHEMBO
4TH APPLELLANT

ANDREW MHLONGO
5TH APPELLANT

BONGANI NDLOVU
6TH APPELLANT

AND

THE STATE

CRIMINAL APPEAL

16 04 2009 CORAM:

SAPIRE AJ
VILAKAZI AJ

JUDGMENT

Sapire AJ

This is a judgment reserved at the conclusion of the hearing of an appeal by the several appellants, made pursuant to leave granted by the Regional Magistrate's Court Daveyton (Benoni), which convicted and sentenced them. The Appellants were all charged with housebreaking with intent to steal and theft. Appellants 1 4 5 and 6 were found guilty as charged while Appellants 2 and 3 were found guilty on a competent verdict of receiving stolen property I knowing it to be stolen in contravention of section 36 of the General Law Amendment Act. The magistrate by mistake referred to the section as 37. It is not suggested that this error vitiates the conviction.

Accused 1, 4, 5, and 6, were sentenced to (8) Eight years imprisonment. Accused 2 and 3 were sentenced to five years imprisonment. This caused a noisy reaction in the court gallery which the magistrate was constrained to silence.

After the close of the proceedings the magistrate gave leave to appeal and admitted the appellant's to bail pending the hearing of the appeal.

The offence was alleged to have been committed on 17th November 2004.The conviction and sentencing took place on 25th February 2005, that is all more than four years ago. At that time the appellants were scholars or learners to use the word now in vogue, in their late teens. One of the appellants could not raise the deposit required and has we were told remained in custody until the hearing of the appeal. This state

of affairs is gravely disquieting giving rise to questions as to whether the appellant in question has been afforded the fair trial and speedy trial which is his right under the constitution. At the close of the hearing and when reserving judgment we ordered his immediate release on his own recognizance. This is cold comfort to the individual concerned who has been in custody for a longer period than that, if any, which he should have served, even if the appeal were to fail.. This instance, which is not unique, reflects poorly on the administration of justice and should be brought to the attention of those in the departments responsible, so that steps to avoid further injustices occurring in the future.

The prosecution arose because of a break in to a liquor store from which a quantity of liquor and other items were stolen. The State sought to link the accused to the commission of the crime by allegations that some liquor was soon after the event and in close vicinity found in the possession of each of the appellants. They found themselves arrested and brought before the court to face a single charge of breaking and entering with intent to steal and theft.

For the purposes of the appeal each is the appellant with the same number.

A Ms Qongqo, an attorney, is recorded as appearing for accused 1, 2, and 4.

The other accused, 3 5 6 and 7 were not represented

They all pleaded not guilty to the charge of housebreaking put to them.

The record (in so far as it is comprehensible) reveals that the following took place immediately after the pleas were taken

"COURT Ms Qongqo?

MS QONGQO (Inaudible) on behalf of accused 1, 2 and 4. The plea of not guilty is in accordance with my instructions and I would like to make the following admissions (inaudible). That in the early hours of the 16th, accused 2 and 4 – accused 2 and 4 (inaudible). They were at a certain corner when accused 5 and 6 came (inaudible) full of liquor. The trolley and the liquor was (inaudible) for them and they asked accused 2 and 4 to assist them (inaudible) the liquor. (Inaudible).

COURT In other words accused 2 and 4 are making admissions that they were found in possession of the liquor that was stolen from the bottle store?

MS QONGQO Accused 1 and 4, they were standing on the corner when accused 5 and 6 came pulling a trolley of liquor. They asked them to assist them carrying the liquor and they said they were taking the liquor to accused 2's place.

When they arrived at accused 2's place, they put the liquor to accused 2 – they took the liquor to accused 2's shack and the mother of the accused could hear that they were starting to...(Inaudible) and he went to them and he chased them. When they left the house, they left one – one crate, one box of – ja, accused (inaudible) place. And accused 6 – accused 5 and 6 gave accused 1 a box of liquor..(inaudible) to carry the ... (indistinct).

COURT The accused then admit in terms of Section 220 that – that is accused 1 and accused 2 that they were found in possession of stolen property, one box of liquor, is that correct?

MS QONGQO Accused 2 and – accused 1 and 2 admit that at their places a box of liquor was found.

COURT Which belonged to the complainant.

MS QONGQO This belonged to the complainant.

COURT That will be noted ... (interjection).

MS QONGQO And at 3 there was nothing, accused4 nothing was found.

COURT That will be noted as admissions in terms of 220. Do the accused admit?

ACCUSED 1 & 2 We confirm what the attorney said Your Worship."

Mr Jordaan who appeared for the 1st Appellant has with force strongly and with justification, criticised this passage. The argument is that the magistrate was over anxious to secure admissions on the strength of which to convict. Defence attorney was instructed that the clients' plea was one of NOT GUILTY. This implies a denial of all the necessary allegations which have to be proved by the prosecution to justify a conviction on the offence charged or any competent verdict available thereon

The plea explanation which was given did not include the incriminating admissions into which the magistrate transformed defence attorneys words. The magistrate then urged the attorney to accept the magistrate's interpretation. This the attorney did, and in so doing acted contrary to his instructions. The attorney without discussing with the accused persons the effect of such admissions and without receiving specific instructions whether they in the light of such information and advice wished to make such admissions, cravenly and with a conspicuous lack

of astuteness, acquiesced in the magistrate's damaging interpretation. The magistrate to then strengthen the case for the prosecution turned to the accused themselves and obtained "confirmation" of the damaging admissions. How were the accused to react? Can one reasonably expect them to have contradicted both the attorney and the magistrate?

What the magistrate did was neither to accept a proper clarification of the plea explanation, nor properly to record an admission in terms of section 220. This constitutes a serious irregularity in the proceedings.

Without the "admission" there is nothing to show that the liquor the possession of which is the basis of the convictions of all the appellants was stolen property taken from the complainant. The irregularity is thus seriously prejudicial and because of it the convictions cannot stand.

I would uphold the appeals of all appellants setting aside the convictions and the sentences consequent thereon.

Sapire AJ

I Agree

Vilakazi AJ

It is ordered

The appeals of all appellants are upheld and their convictions and sentences set aside