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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEAL CASE NO: A36/2022

TRIAL COURT CASE NO: RC195/15

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
19.05.23

In the matter between:

MOKOENA SUNNYBOY

APPELLANT

And

THE STATE

RESPONDENT

Neutral Citation: *Mokoena Sunnyboy v The State* (Case No. A36/2022)

[2023] ZAGPJHC523(19 MAY 2023)

JUDGMENT

JOHNSON AJ.

[1] The appellant was charged with robbery with aggravating circumstances in that he unlawfully and intentionally assaulted Mosa Joseph Tshabalala on 12 March 2015 and robbed him of his Toyota vehicle [...]and a Nokia cell phone. He was

represented by Mr Paile and pleaded not guilty. As his evidence is part of the missing record, we will give a complete summary of his plea explanation.

[2] His defense was that he worked as a metered taxi driver for “Tshepo”. On the day in question Tshepo asked him to drive him to Alexandra. Xolani Masemula, a former accused was also in the vehicle. On the way Tshepo told him to stop next to a Toyota Yaris, the vehicle mentioned in the charge sheet, which was occupied by the complainant. Tshepo got out and into the Toyota Yaris. After a few minutes Tshepo got back into the vehicle with him and told him to follow the Toyota Yaris. It stopped at an Engen garage and the complainant approached them. Tshepo then told the appellant to drive to Midrand. The Toyota Yaris was left behind.

At Midrand the complainant and Tshepo met two unknown males where an argument ensued between them. The complainant called him and told him to go and fetch his vehicle, which he did. Xolani drove Tshepo’s taxi back to Midrand. When he got back, Tshepo informed him to go and wash the Toyota Yaris, and that he and the complainant would be going to Pretoria in the taxi that he drove. The appellant gave him the taxi’s keys and they left.

On the way to the car wash he and Xolani was stopped by the police, who alleged that they had hijacked the Toyota Yaris from a female person. He was charged with possession of a suspected hijacked vehicle. He denied that he hijacked the vehicle.

[3] Mosa Joseph Tshabalala testified that he is a junior sales rep for Diplomat SA. He owns the vehicle in the charge sheet. On 12 March 2015 he was at a shop in 12th Avenue, Alexandra when he received a call from a person who said he was at his office, who wanted to meet him immediately. They arranged to meet at a garage at around 10:00. When the person did not turn up, he phoned him and they arranged to meet at a garage in Tsunami. While speaking to the person on the phone, he saw the vehicle of which he was given a description of, and parked behind it. The appellant got out of the car and approached him. There was someone else in his car who also approached him. From what can be gathered from the evidence, it was the former co-accused.

[4] They went to a safer garage where he got into the appellant's vehicle. Initially he gave the impression that he was the third person who joined the appellant and his companion in the vehicle. During cross-examination he conceded that he got into the car with the appellant, Tshepo and Xolani, the previous co-accused. As he got into the back seat, the appellant told him to lock his car. He used his immobilizer to lock the car. They then drove off to allegedly look for the superior of the witness who got lost. They drove quite a distance. At Olifant they got out. The person who accompanied them, probably Xolani, took out a firearm, cocked it, said he was being hijacked and instructed him to lie on the floor.

[5] His hands were tied with a rope and the gun was placed at the back of his head. Before he walked away, he was asked about a tracker in his vehicle. He was searched and his Nokia phone and car keys taken. Someone from a church group who came to pray, found him, and untied him. His car was recovered the following day. The appellant and the former co-accused are unknown to him.

[6] William Makela Mashishi is a constable in the SAPS. He was on duty on 12 March 2015. He received a lookout for the vehicle mentioned in the charge sheet which he spotted. They stopped the vehicle, which stopped without hesitation. The appellant drove it. He had a passenger in the vehicle. Both were taken to Midrand Police Station. There they told him that the vehicle was not hijacked, but that it came from Tshepo.

[7] The case was postponed on 2 November 2015 to 9 November 2015. According to the record, the court resumed on 19 May 2016. There is no transcribed record of the proceedings between 9 November 2015 and 19 May 2016. On the latter date the court enquired about previous convictions. The appellant had a new legal representative, Mr Mapheto from Legal Aid SA as Mr Maile had withdrawn. He addressed the court in mitigation of sentence and after the address by the State, the appellant was sentenced.

[8] No further evidence by the state, the appellant or the judgement was recorded between 9 November 2015 and 19 May 2016.

[9] There was an attempt on 23 April 2018 to reconstruct the missing portions of the record. The presiding officer, Mr Maphiri for the state, Mrs Ngobese the interpreter and a new attorney Mr. Mengoi for the appellant were present. During the reconstruction the magistrate indicated that they would proceed with the reconstruction of the record before the application for leave to appeal. The appellant was also present as he was questioned by the court during the reconstruction.

[10] The transcript of the reconstruction left much to be desired as it contained many unclarities (indistinct) at crucial stages, and answers that were not completely recorded. It was left to us to attempt to decipher what was meant by what was said, or not said. As it would be prejudicial to send a reconstructed record back for reconstruction, we decided to accept what was on record and dispose of the matter. All the parties should have perused the reconstructed record to ensure that it was complete before it was enrolled again.

[11] The reconstruction commenced with the following comments by the learned regional magistrate: "Now with regards to the, I believe it is the, Mr prosecutor, please appeals clerk for the evidence of Tshepo and what follows the defence case.....[indistinct]..

PROSECUTOR: And judgement, yes.

COURT: Now Tshepo Julius Manamela's evidence as far as the reconstruction thereof he admitted that he owed the Tshabalala family money, it the complainant a R1 000. He had a problem. He was unemployed; apart from that I did not really write a lot. I can now even vividly remember that I had a...[indistinct] to speak in that Tshepo was the principal wrongdoer. I remember cross-examination of this ...[indistinct], by a prosecutor, that we asked Tshepo about the appellant's involvement *et cetera*, he confirmed that appellant was indeed involved. Why he was not charged. I am not sure. He appeared to me as if he was the main culprit. But apart from that, my recollection of his evidence is not detailed, and I cannot take it much further than to say that it did not really impressed the court, in all material respect. That concluded the state's case."

[12] Initially it was unsure whether Tshepo was a witness for the State or the defence. This was however cleared up when the court *a quo* mentioned, after his questioning, that that concluded the State's case. Since the court clearly had

reservations about his credibility and found him to be the principal wrongdoer, it that the State's case was on shaky grounds. It is evident that he contradicted the complainant's evidence in material respects, and his credibility was doubtful. The fact that this flaw in the State's case was not given any weight by the court *a quo*, led to it finding that Tshepo or the complainant's evidence (it is not sure which one) rebutted the appellant's plea explanation. There appears to be no cogent reasons why it came to this conclusion.

[13] As far as the version of the appellant is concerned, the following remarks by the learned magistrate appears on page 80 and further: "The appellant then testified that he was with Tshepo. Tshepo set up this meeting with a person in Alexandra. He met them. The complainant at the garage and he kept on blaming Tshepo. Denying any knowledge himself. The cross-examination focused on his guilt. Again I did not take detailed notes. Mr Prosecutor anything that you can fill us in on? you have got the docket.

PROSECUTOR: On why he had then became the person who acted a debt collector on behalf of....

COURT: Tshepo

PROSECUTOR: Settle that was the focus of the cross-examination and then that is basically the assertion.

COURT: Good Mr Maquina (sic) had been given the notes and anything you from yourself to add

APPELLANT: Nothing your worship

COURT: Yes I am listening

[SPEAKING SIMULTANEOUSLY]

APPELLANT: [indistinct]

COURT: That is now with regard to [indistinct]

[SPEAKING SIMULTANEOUSLY]

APPELLANT: Your worship, Tshepo cannot....[indistinct] and lie to the court and say that he was send (sic) to collect the money for me.....[indistinct]

COURT: Yes that was to Tshepo on your behalf by your lawyer. Do you confirm that.

APPELLANT: He said that said.....[indistinct]

COURT: Yes anything else to add

APPELLANT: That is when he was asked by the court why did he not go to the police station. He then said that he Mr [indistinct]

COURT: Ja. Anything else.

APPELLANT: [Indistinct]

COURT: Good the court then - the state asked for a conviction and the appellant's lawyer asked for acquittal. I cannot remember the details....."

[14] And then further on, on page 81, the learned magistrate remarked as follows: "Well, I do not have notes of my judgement, but what I do remember is the court, quite clearly - it was quite clear to the court that both you and Tshepo were in it together. He was present throughout the incident. The court accepted the evidence of Gustav Joseph Tshabalala, the complainant, as well as the evidence of Puleng Masisi."

[15] He did mention on page 81 rules 3 – 4 that he accepted the evidence of the complainant, but the reason why it was accepted, remains a mystery. Tshepo materially contradicted the complainant's evidence. This fact was ignored. We are of the opinion that the complainant was not a credible witness.

[16] The court a quo continues: "With regards to the arrest, as I said Tshepo does not impress me much, but the fact of the matter is you were with Tshepo, during the whole ordeal, the robbery. You trying to blame the complainant and Tshepo was unsuccessful. Your plea explanation and the particulars was rebutted by the state witness and the fact that are before the court (sic). Your version was rejected as false and you were accordingly convicted."

[17] It is not clear on what basis the evidence of the appellant, or his extensive plea explanation which was the only clear version on record of what happened from the

defence's perspective, was rejected. The attempt to reconstruct his evidence during the trial, came to nothing and nothing fruitful could be gained from it.

[18] It appears that after the reconstruction referred to above, there was another attempt to reconstruct the reconstruction, but the learned magistrate declared in a letter on page 194 of the record dated 16 September 2020 that he could not take the matter any further as he had no recollection of it, which also applied to the rest of the parties.

[19] The appellant appears to have noted his application for leave to appeal timeously. The delay was caused mainly by the incomplete record. The appellant was sentenced 19 May 2016 and only managed to have his appeal heard on 15 May 2023. This led to an unfortunate delay of 7 years.

[20] What we ultimately have before us, is the best record available to adjudicate the appeal. Although there are missing parts, one can ultimately judge whether the conviction and sentence are sustainable.

[21] It appears from the Heads of Argument of the State, that the evidence of Tshepo Manamela is lost. The learned magistrate did mention that Tshepo admitted that he owed the complainant R1 000.00. According to the plea explanation of the appellant, he stopped next to the vehicle of the complaint. Tshepo got out and into the vehicle of the complainant where they had a discussion. If these facts are considered, the evidence of the complainant that Tshepo was not present and that he does not know him, is untrue. It was also ignored that the complainant conceded during cross-examination that he got into the vehicle with Tshepo, Xolani and the appellant, whereas he previously denied that Tshepo was present.

[22] Since the trial magistrate found that the fingers of guilt pointed to Tshepo who was a state witness, it is impossible to imagine that the version of the appellant is not reasonably possibly true. Tsepo was a state witness and his evidence conflicted with that of the complainant. The State's version was contradictory, unreliable, and untrustworthy.

[23] If regard is had to the record that is available and the reconstructed part thereof, the appellant was incorrectly convicted.

[24] The application for leave to appeal against the conviction and sentence is also lost. There is only a remark by the learned magistrate that he had granted the applicant leave to appeal the sentence. The conviction is therefore not part of the appeal. We are of the opinion that, in view of the weaknesses in the State's case, leave to appeal against the conviction should also have been granted. The question is whether the injustices that did occur, can be remedied. The proper solution appears to be the use of our inherent jurisdiction. To act otherwise, would prejudice the appellant and bring the Justice System into disrepute. Adv Ehlers for the Respondent was informed of our intention, and he agreed that we have that option. We thank him that he was prepared to address us on the merits of the matter on short notice.

[25] In *Toubie v S* [2012] 4 ALLSA 290 {SCA} the Court endorsed the inherent powers of the SCA, and so of the superior courts, when it stated the following:

"The intention is for a Court of Appeal to dispense justice. An appeal court cannot close its eyes to a patent injustice simply because the injustice is not a subject of appeal. "

[26] Courts should do everything in their power to prevent appeals from being finalized as soon as practicable. The unacceptable delays in the finalizing of appeals, have not escaped the attentions of the courts. In *S v Ramulifho* 2013 (1) SACR 388 (SCA) the appellant spent two years awaiting trial and ten years waiting for the appeal to be heard. Various role players at various stages of the appeal process caused the delay. The Supreme Court of Appeal expressed its concern over these unacceptable delays and commented as follows: "[17] *The judicial officer and every other official involved in the legal process whereby a person is deprived of his freedom are obliged to ensure that that process obtains the full stamp of approval of the law as quickly as possible, and the impression must never be created that our courts and judicial officials are indifferent to the freedom of the individual.*"

[27] As a result of the view we take in this matter, it is not necessary to consider the appeal against sentence.

[28] We make the following order:

The conviction and sentence are set aside

**PJ JOHNSON A.J.
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**

I agree and it is so ordered,

**T THUPAATLASE A.J.
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**

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Heard on: 15 May 2023

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