

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

CASE NO: A67/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 30 August 2023

In the matter between:

MOLOI, SELLO

APPELLANT

and

THE STATE

RESPONDENT

KARAM AJ et ALLY AJ

JUDGMENT

ALLY AJ

- [1] The Appellant was arraigned in the Regional Court Westonaria, on a charge of robbery with aggravating circumstances read with the provisions of Section 51(2)(a) Criminal Law Amendment Act 105 of 1997.

- [2] The Appellant pleaded not guilty and was ultimately found guilty as charged and sentenced to 15 (fifteen) years imprisonment.
- [3] This appeal comes before this Court because leave to appeal in respect of conviction only was granted by the Court *a quo*.
- [4] The Appellant was represented in this appeal by Adv. Y.J. Brits and Adv. K.T. Ngubane represented the State.
- [5] At the outset application was made for condonation for the late filing of Appellant's heads of argument. The State had filed a notice to have the appeal struck off the roll for failure of the Appellant to file heads of argument. The State did not proceed with this application to strike the matter from the roll. After hearing Counsel for the Appellant and the State not having opposed the application for condonation, the Court granted condonation in the interests of justice.
- [6] The first witness to be called by the State in support of the charge was the complainant, Mr Graham Isaac Groenewald.
- [7] The complainant testified that he had returned home from the bank. He locked his gate on entering the property and his motor vehicle was on idle. Whilst the motor vehicle was idling, he lifted his garage door, which was a flip garage door. At this time three people appeared with firearms. One was older and the two he estimated to be about 15 years old. He identified the eldest as being the Appellant.
- [8] The complainant further testified that all three people pointed firearms at him and they took his keys and money as well as his cellphone. He was asked for the location of his safe and he showed them the safe. The Appellant tried to open the safe with the house keys but could not open it and the Appellant hit him on his head with his fist. The complainant then told the Appellant that the safe keys were on his car keys outside. The Appellant sent one of the youngsters to fetch the keys. They opened the safe and took two boxes of 9 (nine) millimetre pistol ammunition.

- [9] The complainant testified further that the Appellant noticed another safe key on the car keys and wanted to know the location of this other safe. The complainant told him that it was in the main bedroom. They proceeded to the main bedroom and the Appellant slapped him again on the head. The Appellant opened the safe and took the Norinco firearm from the safe and threw the complainant onto the bed. The Appellant then found ties in the cupboard and bound the complainant's legs and arms behind his back.
- [10] The complainant testified further that at the time he was pushed on to the bed his neighbour started screaming in the street. He further testified that the assailants placed the Norinco in one of his T-shirts and ran out the house.
- [11] The Appellant and his accomplices then drove off with the complainant's car. The complainant testified that he was able to free himself from the tie that bound him and he noticed that the security company EPR chased after the assailants. Soon afterwards the South African Police Services also arrived on the scene.
- [12] The complainant stated that the police told him that his car was standing around the corner. He went to his car and he returned to his house with the police. The police started dusting for fingerprints at the house. The complainant also testified that the police dusted his car for fingerprints.
- [13] The complainant testified that the police told him that the fingerprints matched a person that was incarcerated in the Potchefstroom prison. He testified further that he had come to Court twice before and stated that he recognised the Appellant.
- [14] The State then called Sergeant Legia, a fingerprint expert, stationed at Krugersdorp. He testified that he lifted a fingerprint from the garage door in the presence of the complainant, the owner of the house. The fingerprint was found on the inside bottom of the aluminium garage door. He testified that the fingerprint was a match to the Appellant.
- [15] The State then called Mrs Elsabie Johanna Farmer to testify. She testified that on the morning of the incident she saw a person coming out with a bottle in his hand. She stated that her neighbour's car was idling at the time and

this person jumped into the car and sped off. She advised the security company in which direction her neighbour's car was driven and the security company car made a U-turn and went after the car. She also saw that one person climbed over the wall. Mrs Farmer was unable to identify any of the people that robbed the complainant.

- [16] The State closed its case after the testimony of Mrs Farmer.
- [17] The Appellant testified in his own defence.
- [18] The Appellant testified that he is self-employed and that he sells dashboard sprays, stain removers for furniture and scratch removers for motor vehicles. He testified that he sold these items in the street. Furthermore, he would also go to the suburbs and sell door to door.
- [19] The Appellant testified that during October 2013 he worked in Westonaria and worked at the municipality offices. The Appellant's explanation for coming from Soweto to Westonaria was that the competition in Soweto was too high.
- [20] The Appellant indicated that he recognised the complainant from the times that he, the Appellant, had appeared in Court and the case was postponed.
- [21] The Appellant's explanation for his fingerprint being found on the garage door was that he had been to the complainant's property where he had gained entry through an open gate. The Appellant testified that the burglar door to the house was closed but the door was open. He had knocked on the door but there was no answer. Music was being played in the house. He explained that because there was no answer, he went around to the garage and the garage door was slightly opened. He opened it slightly and tried to get the attention of the occupants in the house because he heard voices coming from inside the house.
- [22] The Appellant testified that because nobody answered in the house, he pulled the garage door down and left the property. On the day that he was at the complainant's property, he was working alone.

- [23] The Appellant testified that on his first appearance in Court regarding the robbery charge, the Investigating Officer showed him the complainant's property on their way to Court.
- [24] Sergeant Moatsi was then called to testify on behalf of the Defence. Sergeant Moatsi was the investigating officer and he testified that the complainant had drawn a cartoon sketch of the perpetrator and this sketch was of no assistance.
- [25] Sergeant Moatsi testified that the complainant could not give him a description of the perpetrator on the day of the robbery when he was interviewed. He further testified that he arranged for a 'professional' ID kit to be compiled but the complainant was not available.
- [26] The gist of the Appellant's case is that he did not rob the complainant and disputes the identification made by the complainant.
- [27] The Court *a quo* analysed the evidence in its totality and came to the conclusion that the State had proved its case beyond reasonable doubt.
- [28] This Court does not intend setting out all the grounds of appeal raised by the Appellant. The grounds of appeal form part of the record¹.
- [29] It is trite that a Court of Appeal is loathe to overturn a trial court's finding of fact, unless such findings are vitiated by a material misdirection or are shown from the record to be clearly wrong².
- [30] In this case, conduct by the presiding Magistrate in the Court *a quo*, that can only be described as very unfortunate, occurred. The presiding Magistrate revealed to the Appellant that he had gone to the scene of the crime and made certain remarks regarding the scene.
- [31] What is disconcerting is that the presiding Magistrate did not inform the legal representatives of the State and the Defence before going to the crime scene. In my view, this is a material misdirection.

¹ Record: pages 182 - 186

² S v Naidoo & Others 2003 (1) SACR 347 SCA @ para 26

- [32] The presiding Magistrate then used his knowledge of the crime scene to question the Appellant. Indeed, this is a flagrant entering into the arena, which is warned against³.
- [33] The question remains whether this material misdirection vitiates the proceedings *in toto*. In my view it does not. The material misdirection permits the Appeal Court to look at the evidence afresh and determine whether, irrespective of the material misdirection, the conviction can be upheld.
- [34] It must be remembered that the State alone, bears the onus of proving its case beyond reasonable doubt. An accused should be convicted if the Court finds not only that his version is improbable, but also that it is false beyond reasonable doubt. It is not necessary for a Court to believe an accused person in order to acquit him or her.⁴
- [35] The Appellant's version, as stated above is that he was present at the property on the day of the robbery but not at the time of the robbery. Accordingly, he testified that when he was at the property earlier, he had lifted the garage door which would explain his fingerprints. Mrs Farmer testified that when the complainant's motor vehicle was idling, the gate was open. The Appellant's version of the gate being open when he entered could thus be reasonably possibly true.
- [36] This Court needs to deal with the identification of the Appellant by the complainant. Complainant stated that he drew a sketch which the investigating officer described as a cartoon sketch. The complainant furthermore was not available to provide a professional identikit of the Appellant.
- [37] What was left to the Court *a quo* was therefore what can only be described as a dock identification and the fingerprint. The dock identification in this case was 5 [five] years later. The complainant's identification of the Appellant in the dock can be regarded as unreliable by reason of the time lapse of 5

³ S v Rall 1982 (1) SA 828 at 832 C-H

⁴ S v V 2000 (1) SACR 453 SCA; S v Schackell 2001 (2) SACR SCA 185 @ para 30

[five] years as well as the complainant's failure to describe the Appellant when he made his statement to the police save for the clothes of the suspect⁵.

- [38] When asked by the State what made him recognise the accused, the complainant stated:

"Well his features, especially his lips, I remember it".⁶

- [39] The complainant then mentions that he drew a sketch of the suspect. The sketch was dealt with above to the effect that the investigating officer could not make out anyone from the sketch and the complainant failed to provide a professional identikit.

- [40] The issue of the fingerprints, in my view, must be dealt with in accordance with the principles laid down in *R v Blom*: 1939 AD 188 at 202-203:

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) 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 a doubt whether the inference sought to be drawn is correct."

- [41] Taking into account the onus on the State to prove that the Appellant is the person that robbed the complainant, is the inference to be drawn from the presence of the fingerprint of the Appellant, the only reasonable inference that can be drawn, viz, that the Appellant was one of the perpetrators? Such an inference can only be drawn if the Appellant had had no explanation for the presence of the fingerprint.

- [42] Furthermore, the complainant testified that the perpetrators were all over the house and he pointed out where they were. The strange thing though is that the only fingerprint lifted from the crime scene is the one on the garage door.

⁵ Record: page 162

⁶ Caselines: Section 003 – 11 lines 10 and 11

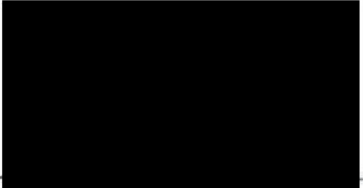
inference can only be drawn if the Appellant had had no explanation for the presence of the fingerprint.

[42] Furthermore, the complainant testified that the perpetrators were all over the house and he pointed out where they were. The strange thing though is that the only fingerprint lifted from the crime scene is the one on the garage door. Surely the Appellant's fingerprints would have been in the house itself where the Appellant was present. This factor, in my view, favours the Appellant's version as being reasonably possibly true.

[43] Following the reasoning set out above, I am of the view that the State has failed to prove beyond a reasonable doubt that the Appellant was the person who robbed the complainant on the day of the robbery. That being the case, the Appellant is entitled to his acquittal.

[43] Accordingly, I propose the following Order:

- a). The appeal against conviction is upheld;
- b). The conviction and accordingly the sentence is set aside.


G ALLY
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

I concur

W. KARAM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
JOHANNESBURG

Date of judgment: 30 August 2023

Appearances:

Counsel for the Appellant:

Adv. YJ Brits

Instructed by:

Legal Aid South Africa

yuleneb@legal-aid.co.za

Counsel for the Respondent:

Adv. KT Ngubane

kngubane@npa.gov.za

Instructed by:

**OFFICE OF THE DIRECTOR OF PUBLIC
PROSECUTIONS JOHANNESBURG**