



DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 07/05/2010


SIGNATURE

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

CASE NUMBER: A973/09
DATE: 07/05/2010

SIFISO SIBUSISO MTHOMBENI
1st APPELLANT

FRANKLIN GLADWIN FISHER
2nd APPELLANT
V

THE STATE
RESPONDENT

Judgment:
Mabuse AJ

JUDGMENT

1. On 23 July 2009, the Regional Court sitting in Benoni, convicted the two appellants of two counts of robbery with aggravating circumstances as contemplated in Section 1 of Act 51 of 1997 ("the CPA).
2. The State had alleged, in count 1, that on or upon 3 October 2008 and at Daveyton, in the Regional Division of Gauteng, the two appellants unlawfully and intentionally assaulted one Thapelo Thulare and did there and then with the use of force and violence take from his possession a Nokia 3410 cellphone to the value of R350.00, his property or the property then in his lawful possession, aggravating circumstances being present in that the appellants used firearms in the commission of the said offence.

3. In count 2, the State's allegations against the appellants were that on the date, place and under the same circumstances and manner as in count 1, the two appellants robbed one Ntokozo Godile of an E250 Samsung cellphone, her property or property then in her lawful possession.
4. The two appellants pleaded not guilty to the abovementioned charges and, through their legal representatives, chose to make no plea explanations in terms of the provisions of section 115 of the CPA. Despite their pleas, the court a quo convicted them accordingly and sentenced them each to twenty years imprisonment, ten years on each count and ordered their sentences to run concurrently. The appellants feel hard done by their abovementioned convictions and now appeal in pursuance of leave to appeal against such convictions only having been granted by the court a quo.
5. The charges against the appellants arise from an incident that took place on 3 October 2008 in a street in Daveyton, when the two complainants were robbed of their cellphones by two thugs at gunpoint while they were walking in the street. According to the evidence of the two State witnesses, one of these two assailants approached the first complainant Thapelo Thulare (Thapelo) and demanded a cellphone from him.
6. He asked this man what he was doing but the assailant simply ignored him and searched him and fished out of his pocket a cellphone and a key which he threw away on the ground while he made away with the cellphone. Thapelo was able through streetlights and moonlight to recognise his assailant as the first appellant. According to his evidence, he knew him very well; he had known him for sixteen years while they stayed in the same street and also attended the same school.
7. While one assailant approached Thapelo, the other one approached Ntokozo Ngodile("Ntokozo") the second complainant. Thapelo does not know what this second assailant, whom he described as a coloured and whose face he saw briefly, did to Ntokozo. Ntokozo herself confirmed that the person who

approached her was somewhat coloured. The court described this person as an albino or as a person having an albino traits. She testified that these two people fled when a motor vehicle appeared with its lights on, illuminating the area where the complainants were robbed. The following day Ntokozo was called to the police station where she was shown people in the back of a police van and she was told that those were the two people who had been arrested in connection with their robbery the previous day.

9. She had known the first appellant for some time before the incident. She used to see him but did not know his name. Neither of these two assailants had covered his face or head.
10. Both appellants denied that they were involved in the commission of the above offences, the first appellant testifying that he was at a party from 19h00 in the evening of the day of the incident to 04h00 the following day and the second appellant testifying that he was at his home with one Themba at all material times.
11. In order to counter the evidence of Thapelo that he attended the same school at the same time with him, the first appellant led the evidence of his father, one Sipho Mthunzi, who contradicted Thapelo's evidence. According to his testimony, the First Appellant did not attend Siphumelelo Primary School, as testified by Thapelo, but attended Dumehelezi Primary School and on graduating from Dumehelezi Primary School proceeded to Davey Secondary School. His evidence corroborated Thapelo's evidence that in the time during which the offences with which the appellants have been charged were committed, the first appellant was staying at house no 1622 Dungeni Street, Daveyton.
12. The second complainant corroborated Thapelo that whilst walking they were accosted by two males. She too described the second person as being "coloured" in appearance. The court's observation was that the second person (the second appellant) was "albino" in complexion. Neither of the two

persons had anything on their heads. She testified that she had known him “for months” having seen him especially on week-ends.

13. In the course of her evidence the second complainant broke down in tears. No efforts by the bench to console her were made. The court adjourned. On resumption the attorney representing the accused sought leave to withdraw from the case on her clients’ instructions. On resumption on another day the accused were represented by Attorney Ms Bungee. The trial Magistrate set the proceedings in motion by remarking as follows:

“Court: Well, all right fair enough, you knew as far as I am concerned I made a note she finished testifying. She said the coloured man is accused 2?

Prosecutor: Yes it was before.

Miss Bungee: So maybe just cross-examination then Your Worship.

Court: You now have to cross-exam (sic).....

Court: Okay, I will be the safety net.

EVIDENCE FOR THE STATE (CONTINUED)

NTOKOZO PROMISE NGODILE: d.s.s”

The cross-examination of the witness then commenced. It, the cross-examination was perfunctory and concentrated on the proposition that if the accused had not been pointed out in the police van as the people who had robbed her and her boyfriend of the cellphones she would not have been able to identify them.

The Magistrate’s summary of the evidence confirms that no further evidence was led by the State when Ms Bungee took over the defence of the accused.

14. The court a quo accepted the evidence of the State and rejected the evidence of both appellants. It was satisfied that the state had proved its case against both appellants beyond reasonable doubt. Accordingly, it proceeded to convict the two appellants as charged. It is these convictions that the two appellants contest.
15. The Appellant’s grounds of appeal, though not prepared by a legally trained mind, have been fully set out in their applications for leave to appeal. I will

accept that the appellants, as well as their counsels, are satisfied with the grounds of appeal so set out in their application for leave to appeal in the absence of any attempt to amend them. In a word, the First Appellant's grounds of appeal are directed at his identity and the fairness of the trial. About identity he complains that, although one of the State witnesses knew him for at least 16 years, he failed to report the case against him on 3 August 2008 but instead chose to summon the assistance of his friends to look for him and arrest him. According to him, the failure of such a victim to lay a charge at the local Police Station immediately after the incident had taken place indicates uncertainty as to the identity of the assailants. Furthermore he decries the investigating officer's failure to hold an identification parade in order to establish whether or not the complainants would have been able to point out the people they claimed had robbed them of their belongings, but instead called the complainants to the Police Station after their arrest and allowed them to identify him from the back of the stationary police van at the Police Station.

16. Save for the grounds that one of the State witnesses knew the first appellant for 16 years, the grounds of appeal on which the second appellant relies are similar to the First Appellant's grounds of appeal.
17. The approach that this court should adopt in this matter has been succinctly set out in *Rex v Dhlumayo And Another* 1948 (2) SA 677 AD by Greenberg J A, as he then was. The learned author A Kruger captured the summation of the approach aptly when he stated the following in Hiemstra's Criminal Procedure pages 30-45:

"The Court of Appeal must bear in mind that the trial Court saw the witnesses in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The Court of Appeal will only reject the trial court's assessment of the evidence if it is convinced that the assessment is wrong. If the trial court is in doubt, the trial court's judgment must remain in place. (See S v Robinson 1968 (1) SA 660 A at 667 g-e). The Court of Appeal does not zealously look for points upon which to contradict the trial court's conclusions

and the fact that something has not been mentioned does not necessarily mean that it has been overlooked.”

18. It is not the duty of this court to substitute the judgment of the court a quo with its own judgment. The Appeal Tribunal must decide the appeal on the facts before it as contained within the four corners of the record of appeal. The duty of this court is to establish, from the record of appeal, firstly, whether or not the court a quo has misdirected itself on the facts of the case or the law; secondly, to satisfy itself that the court a quo's assessment of the evidence was not wrong. Based on the authority of *Pillay v Krishna And Another* 1946 AD 946 p.951, a duty lies on the appellants to satisfy the court that the court a quo misdirected itself in so far as the facts of the case or the law are concerned and that the court a quo's analysis of the evidence was wrong.
19. Although in his heads of argument counsel for the First Appellant submitted that the State did not prove its case beyond reasonable doubt, he conceded, however, during argument that in respect of the First Appellant the State had indeed proved its case beyond reasonable doubt. In view of his apostasy there would ordinarily be no longer any issue between the State and First Appellant.
20. The trial Magistrate accepted the evidence of the two complainants and rejected the alibi of the appellants. The issue to be determined is whether the trial court misdirected itself in arriving at that conclusion. When a person who has been charged with an offence raises an alibi as a defence, no duty lies upon such a person to prove his alibi.

“The legal position with regard to an alibi is that there is no onus on the accused person to establish it, and if it might be reasonably possibly true, he must be acquitted.” See *R v Hlongwane* 1959 (3) SA 337 A at 340 H as per Holmes J.

Accordingly, the approach that the court a quo should have adopted would have been to find that the State had a duty to disprove the alibi of the accused. Instead, the court a quo, in its judgment remarked as follows:

"Now why I say, not only we listened to the bail application tapes which Ms Bungee confirmed there was no mention of any alibi, but why the Court says that both accused offers in effect the defence of an alibi except for the fact that they are supporting each other, is that accused 1 claims that the night of 3 October till 04:00/05:00 the next morning he was at this Sissy's party.

And accused 2 claims he was in the company of Themba whom he does not know where he stays but no effort was made and no effort was requested to trace him. Of course there can never be a negative inference if people do not call witnesses but that does not discourages the discussion about human nature and what a person will do if that indeed was the case.

Now Mr Nthombeni, there he was being arrested, being assaulted and he claims that he could not tell the people who assaulted him he also maintains as he claimed he could not tell the police contrary to what it is known that he gets the opportunity to speak as he did all along since his appearance in this court. He claimed he did not get opportunity to say anything with his appearance 7 October. Mr Bungee confirmed that the accused never told her about an alibi, neither of them. As a matter of fact the first time this alibi was raised was in cross-examination of Mr Thulare. Just remember the bail application was held 12 November 2008 just over a month after their arrest and the alibi was only raised as far as accused 1 is concerned about three and a half months after his arrest. That does not make sense.

It is the most instinctive reaction if you did not want to tell the people who assaulted you, maybe you told the police or you told the Court or at least you will tell your attorney who you had a week after your arrest on 11 October. As far as Mr Nthombeni is concerned stating that to Mr Nthlaleng at the time, "I have an alibi not only do I have an alibi I have witnesses".

Mr Nthombeni accused 1 mentioned three people present, his friend Sissy, Jabu and Sifiso. If an alibi is not raised against this background with ample opportunity there is only reasonable inference, it is a lie it is not true. You have to remember that Ms Bungee's efforts or her services were so much appreciated by the accused that they recalled her.

Consistently during the course of these proceedings, whenever there was a request for a consultation it was granted and I cannot believe that the accused will certainly or his family would not immediately have gone to the

police, come to the Court, speak to the Prosecutor, speak to the Court and has said that, "But listen wait a bit I have got" even his family, "We have got information, we have got people who can corroborate the fact that at the time 22:00 on 3 October, our son could not have committed the robbery", nothing like this was done. Mr Nthombeni preferred to remain in custody and the same holds to a lesser extent true for accused 2. Why did he not tell Ms Bungee, Ms Naidoo, Mr Nthlaleng, about the fact that he was with Themba and the first time we heard about that, in effect the first time we heard about that is in effect when accused 2 testified but he has got his friend Themba.

Most certainly if he informed anybody or his attorney some efforts would have been made to have traced them by this past eight months and 19 days. Accused 2 only testified yesterday 22 July 2009. Again, as far as this Court is concerned, the only reasonable inference in view of the fact that there could be no justification who would like to remain in jail when you have got a defence, such a defence they can corroborate it, is that these two alibi defence are false.

Now we still have to deal with the question of credibility but the fact of the matter is the authority is clear, if a defence of an alibi if proved to be false, it is considered as if the accused did testify at all. So the version of the two accused are rejected as false."

The approach by the trial Court was clearly wrong and it misdirected itself on that issue. With regards to factual finding on the identification of the culprits the trial Court observed as follows at page 92 lines 4-7 the following:

"Looking at the totality of the picture, this court believes that the State has proved the guilt of the two accused as being the perpetrators who robbed Mr Thulare and Ms Ngodile on 3 October 2008 beyond reasonable doubt."

21. The issue that arises is whether this conclusion by the trial court accords with the evidence. Both complainants were found to be reliable witnesses on their identification of the first appellant. Both testified that they knew the first appellant for a number of years, in respect of the first complainant, and for a shorter time in respect of the second complainant. The complainants had been accosted within close proximity of a high-mast light. The confrontation had

not been a fleeting one and the culprit/s had made no effort to conceal their identities. The first appellant's defence or an alibi has to be considered against this backdrop and the question posed wither it can be reasonably possibly true. The trial Magistrate rejected it. Did she misdirect herself in arriving at that conclusion? The reply, in my view, is a resounding "NO". It is my considered view that the State proved that the first appellant committed the offence in count one and that there is no merit in the appeal on this count.

With regard to the conviction of the second appellant on count no. 1 there is no evidence that the second appellant participated in the robbery of the complainant on count one. He did not assist in any way. None of the requirements for common purpose were remotely established against the second appellant (*State v Mgedezi* 1989(1) SA 687(A)). The accused in no way contributed 'actually or physically' to the robbery of the first complainant (*S v Maxaba en Andere* 1981(1) SA 1148(A) and neither can it be said that he was an accomplice. In my view the conviction of the second appellant on count 1 cannot stand.

With regards to count two there is no evidence that the first appellant did anything to the second complainant. Even if the first complainant's evidence is accepted that the second appellant went up to the second complainant there is no evidence firstly, that the second appellant did anything to the second complainant. The trial Magistrate clearly misdirected herself with regard to the evidence on this count as neither of the State witnesses testified that the second complainant was robbed. The question put to the second complainant by Ms Bungee cannot be considered as having constituted an admission of the robbery having been committed. The trial Magistrate clearly lost track of the facts in the second count. The trial court misdirected itself on this issue and this court is entitled to interfere in the finding of the court *a quo*.

22. I would accordingly propose the following order that:

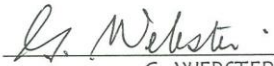
1. The first appellant's appeal against the conviction and sentence on count one (1) be dismissed;

2. the first appellant's appeal against the conviction and sentence on count two (2) be upheld;
3. the appeal by the second appellant on the conviction and sentence on both counts one (1) and two (2) be upheld.



R.M. MABUSE
ACTING JUDGE OF
THE HIGH COURT

I agree and it is so ordered.



G. WEBSTER
JUDGE OF THE HIGH COURT

Appearances:

Appellant's Counsel:

Adv. PM Mositsa

Respondent's Counsel:

Adv. KM Mashile

Date Heard:

16 April 2010

Date of Judgment:

7 May 2010