

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: A 397/2008

In the matter between:

1/4/2011

DONALD MABOTJA

FIRST APPELLANT

JOHAN THS

~~EDOLAKA~~ ~~WHICHEVER IS NOT APPLICABLE~~

SECOND APPELLANT

and

THE STATE

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

RESPONDENT

2011-01-01
DATE

SIGNATURE

JUDGMENT

MAVUNDLA J.,

[1] The appellants, were convicted at the Regional court Polokwane on 4 April 2006 on a count of robbery committed on 18 October 2004 in that they unlawfully and intentionally assaulted Mr. Moses Ledwaba and with force and at gun point took his property or property in his lawful possession, to wit a Toyota Corolla motor vehicle with registration number DHT 411N and 2 cell phones and an amount of R3000, 00. They were both sentenced to 8 years imprisonment and it was further ordered that they are, respectively, unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

- [2] The appellants are approaching this court on appeal against conviction after they were granted leave to appeal respectively.
- [3] Both appellants, who were dully represented during the trial pleaded not guilty to the charges and chose to exercise their right of silence and did not disclose their defence.
- [4] The conviction of the appellants is a sequel to certain events that occurred on 18 October 2007 and described by Mr. Moses Ledwaba, and Ms Lu Wang. They were accosted by two men armed while they were sitting in a car and robbed at gunpoint of the items referred to in the charge sheet. Besides these two witnesses, the State also led the evidence of the following witnesses, Mr. Andrew Seemela, a taxi driver, who said that he witnessed the two robbers running away, Inspector Isaac Rammala and Sergeant Ramphele Ismail Maditsi both of whom are police officers and arrested the appellants.
- [5] According to Mr. Ledwaba on the 18 October 2007 he was in the company of Ms Wang, in a Toyota motor vehicle that he

was driving. They had parked along the road when they were accosted by the appellants who, at gun point, robbed Ms Wang of an amount of R3000. 00 and her cell phone. They also robbed Mr. Ledwaba of his Alcatel cell phone and the Toyota motor vehicle. The vehicle belonged to Ms Wang but he was the driver thereof at the time. He first saw the appellants when they were already at the window of their motor vehicle. After robbing them the two appellants ran away. He saw the two appellants again on the same day when they were brought back to the scene by the police. He confirmed to the police that the two were the same people who robbed them earlier.

[6] Mr. Seemela's evidence was that on 18 October 2004 he was driving in his Kombi when he saw two people running out of a motor vehicle that had gotten stuck in sand. On approaching this motor vehicle he found a Chinese lady. In passing, I should comment that it is unfortunate that the Magistrate allowed the witnesses to continue referring to Ms Wang as the Chinese lady even when that description was no longer warranted. It is necessary that courts should move away from unnecessary

race discretions. When Mr. Seemela gave chase after the two fleeing men, one produced a firearm and pointed it at him. He went back to Ms Wang and the motor vehicle. Police came and he gave them description of the clothes the fleeing persons were wearing. In his evidence, he said that the one who pointed him with a firearm was the first appellant. The first appellant was wearing brown pair of trouser. The second appellant was wearing a short cream white Bemuda pair of trouser, and a T-shirt the colour whereof he cannot recall. He said that the fleeing persons were the appellants. He accompanied the police into some camp where the second appellant was found hiding in a tree with a black bag with money. The first appellant was found hiding in a hole. He was certain that the latter was the one who pointed him with a firearm but nothing was found on his arrest.

- [7] Inspector Rammala's of the South African Police Service testified that he saw the first appellant running in some direction. He gave chase and arrested him and took him back

to the scene of crime where he was identified by Ms Wang as one of her robbers.

[8] Ms Wang's evidence was that the two appellants robbed them and ran into what she described as a jungle. The two appellants were subsequently arrested by the police. She identified the two appellants by their height. First appellant was short and the second appellant taller. It was not very long after the robbery when she saw them again already arrested by the police.

[9] The evidence of Sergeant Madisti was that on the day in question he went to the direction pointed out to him by community members. He did not specify who exactly pointed the direction to him. He found second appellant with a bag with money and an Alcatel cell phone. He arrested him and took him back to the scene of crime where Ms Wang identified the cell phone. The taxi driver (Mr. Seemela) and the man who was with Ms Wang identified the second appellant. It is not clear whether the second cell phone was recovered.

[10] The first appellant's version was that, whilst walking in a field, he saw a police van coming towards him at a fast speed. He decided to run away. He then ran in circles to avoid being run down by the speeding police van. He was ordered to stop, which he did. He was then arrested. He denied any knowledge or involvement in the robbery.

[11] The second appellant's version was that, whilst he was on his way home, the police stopped him and inquired from him what he had done and asked him about guns. When he said he knew nothing thereof they assaulted him. They took him to a place where there was a gathering of people. Seeing that he was in a van, he had no knowledge of what then happened there. He did not know why he was arrested and only came to learn thereof at the police station.

[12] The magistrate evaluated the evidence. In rejecting the version of the appellants, the magistrate had regard to the fact that the description of the clothes they were wearing was given to the police. The police, armed with the description of the clothing,

were lead to the direction towards which the mean, reportedly, had run. Both appellants were found hiding. A black bag with money and cell phones belonging to the complainants was recovered from the second appellant. The magistrate found the version of both appellants not reasonably possibly true and rejected it as false.

[13] It is trite that the State must prove the guilt of the appellants beyond reasonable doubt, but not beyond any shadow of doubt.¹

[14] Criticism was levelled at the State witness. It was pointed out that there were discrepancies in their evidence, such as to who was arrested first. It further should be borne in mind that the witnesses testified two years after the event. Such discrepancies are not material in my view. They do not call for the entire State evidence to be thrown out through the window, *vide S v Mkhle*².

¹ *Vide S v Mafiri* 2003 (2) SACR 121 (SCA) at 125c-d; *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182b-c.

² 1990(1) SACR 95 (A).

[15] Both appellants deny that they were at the scene of the crime.

Their version is akin to an alibi. I am alive to the fact that they dispute identity. I am satisfied that they were correctly identified by the respective State witness, in different circumstances.

[16] It is trite that the trial court need not look at the evidence of the accused in isolation, thereafter look at the evidence of the State witnesses. It must look at the totality of the evidence that is before it, and have regard to the impressions it has of the witnesses. If it finds that the version of the appellant is not reasonably possibly true, in the totality of the evidence before it, it must reject the accused person's version and accept that of the State (vide *S v Van Aswegen*³). The finding of the complainant's items with the second appellant, the positive identification of both appellants and their hiding leave no room for their alibis. Their versions cannot be reasonably possibly true.

³ 2001 (2) SACR 97 (SCA).

[17] I am in agreement with the Magistrate's finding that the appellants were positively identified, his rejection of their versions and his conclusion that their guilt **had** been proven beyond reasonable doubt. (Vide *S v Nsele*⁴). In the result I am of the view that the conviction of the appellants by the magistrate cannot be disturbed and that it must be confirmed.

[18] The appeal was against conviction only. Consequently I recommend that the following order be made:

1. That the appeal of both appellants is dismissed;
2. That the conviction of both appellants is confirmed.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree and it is so ordered

⁴ *supra* at 182d-h.

A handwritten signature in dark ink, appearing to be 'J. M. N. POSWA', written over a horizontal line.

J. M. N. POSWA

JUDGE OF THE HIGH COURT

Delivered on 31 APRIL 2011.