



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CA&R: 348/2017

In the matter between:-

VUYANI MAHASHE

First Appellant

KHAYALETHU AUGUSTINE BULA

Second Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

BANDS J:

[1] The appellants were convicted of robbery with aggravating circumstances and sentenced to 10 years' imprisonment, respectively. Leave to appeal against their convictions was granted by this court, on petition.

[2] It is not in dispute that an armed robbery took place at approximately 17h00, on 9 December 2012 at the complainant's business, situated in Voortrekker Street, Jamestown, which was colloquially referred to as the "Chinese shop" in evidence. Across the road from the complainant's business, diagonally to the right, is the Impala petrol station.¹ From where the petrol pumps are positioned, the entrance to the shop, which is some 35 meters away, is visible.

[3] The appellants' convictions rest on the strength of their identification by two eyewitnesses; the complainant, Mr Yan, and a petrol attendant, one Mr Hlantlalala, who was on duty at the time of the robbery. Accordingly, the validity of the convictions turns on whether the appellants were reliably identified as the perpetrators. Given the fallibility of eye-witness identifications, evidence of this nature is traditionally approached with caution. The positive assurance with which an honest witness will sometimes swear to the identification of an accused person is no guarantee of the correctness of that evidence.² It is for this reason that the court, in considering such evidence, must be satisfied that the witness making the identification is not only honest, but also reliable.

[4] In testing the reliability of his/her observation, it is incumbent upon the court to take into account various factors. In respect thereof, Holmes JA stated as follows in *S v Mthetwa* 1972 (3) 766 (A) 768A-B:

"...lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the

¹ If standing facing the business.

² *R v Masemang* 1950 (2) SA 488 (A) at p 493; *S v Ngcina* 2007 (1) SACR 19 (SCA).

accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities...."

[5] Whilst the appellants' counsel initially sought to argue that the evidence of both eyewitnesses fell to be attacked on the basis of credibility and reliability, he readily conceded, during argument before us, that the reliability of Hlantlalala, insofar as it related to the first appellant, could not be impugned. If regard is had to the lighting and visibility on the day in question; the proximity of Hlantlalala to the first appellant prior to and throughout the incident; and his opportunity for observation, both as to time and situation, this concession was properly made. This is immediately apparent from the facts at hand, which are set out in detail in the judgment of the trial court, and to which I turn to, in brief.

[6] The uncontested evidence of Hlantlalala was that on the day of the incident he was approached by the first appellant, whilst on duty at the Impala petrol station. He described the first appellant's mood as talkative and jovial. The two men exchanged pleasantries regarding their clan name, which they shared, and spoke openly about the first appellant's reason for visiting Jamestown;³ his chosen trade; and that he and his romantic partner, Ms Shasha ("Shasha") were involved in a quarrel pertaining to his ex-girlfriend; all of which was corroborated by the evidence of Shasha.

³ To visit his romantic partner, at the relevant time, who resided in the house next door to the complainant's business.

[7] According to Hlantalala, the first appellant, during their exchange, commented that he wanted to rob the Chinese internationals (referring to the business of the complainant), which comment he perceived, at that stage, to be a joke. At some point, during their engagement, which persisted for approximately one hour,⁴ Hlantalala noticed the second appellant alighting from a “Twizza truck”, carrying a bag on his shoulder. The second appellant approached Hlantalala and requested the key to the men’s toilets. He returned wearing a hooded top, at which point he enquired from Hlantalala whether the surveillance cameras on the premises had taken note of him on his arrival. Their entire engagement lasted approximately 3 to 4 four minutes.

[8] When interrogated, under cross-examination, as to the reliability of his identification of the second appellant, Hlantalala testified that in contrast to the demeanour of the first appellant, he perceived the second appellant to be unfriendly and very serious. This frightened him, causing him take closer note of the second appellant’s features. At that stage, Hlantalala realised that there was truth in respect of the first appellant’s prior stated intention to commit an offence.

[9] Hlantalala watched as the appellants approached the complainant’s business. The first appellant entered first, followed by the second appellant. After approximately 4 minutes, the men exited the business through the same doorway, carrying a container that resembled a green lunch tin with a yellow lid. He cannot recall whose possession the tin was in. The appellants left the scene in the complainant’s vehicle, with the complainant trailing behind them on foot for a short

⁴ With the first appellant moving between the petrol station and Shasha’s residence.

distance. This evidence was largely corroborated by that of the complainant. It was further undisputed that: (i) the incident took place in broad daylight; (ii) that Hlantalala's view of the complainant's business was unobstructed during the incident; and (iii) that the complainant's vehicle was retrieved from the road *en route* to Dordrecht, this being to where the first appellant was travelling.

[10] Whilst the first appellant, by his own admission, placed himself at the petrol station on the day in question, he *inter alia* denied that: (i) his engagement with Hlantalala lasted for an hour, contending it to be much shorter; (ii) that he was still in Jamestown at the time of the commission of the offence, alleging to have left around 13h00; (iii) that he entered the business of the complainant; and (iv) that he saw the second appellant on the day of the incident. To the contrary, the second appellant, whilst admitting that he and the first appellant have a relationship, denied having been in Jamestown on 9 December 2012, relying on the defence of an *alibi*, his brother. Notwithstanding the first appellant's initial denial regarding his whereabouts post 13h00, he later, when presented with cellphone evidence to the contrary, placing him in Jamestown until 18h28, conceded to still being in town at the time of the commission of the offence.

[11] I am satisfied that the identification parade during which the appellants were identified by Hlantalala, was carried out in accordance with the correct procedure and from his own recollection. Whilst much made of certain perceived procedural irregularities by the appellants' legal representatives in the trial court, this argument was not persisted with at any great length before us.

[12] As foreshadowed above, the attack on the identificatory evidence of Hlantalala, in respect of the first appellant, is not that it was unreliable, but instead that it was not credible. This argument, taken to its logical conclusion, implies that Hlantalala falsely implicated the first appellant intentionally. On a consideration of the record of proceedings, there is simply no basis to support such an argument. In respect of the second appellant, the main thrust of the argument is that of mistaken identity. Given the nature of the second appellant's defence, there was no cross-examination of any import to elicit information to cast doubt on Hlantalala's evidence as to his powers of observation.

[13] Once the second appellant's defence of an *alibi* is rejected, which I am of the view that the trial court correctly did, there exists no evidence to counter the evidence of Hlantalala and the complainant, which place the second appellant at the scene of the crime on the day in question, together with the first appellant. It was argued on behalf of the second appellant that there was no compelling reason for the rejection of his alibi's evidence "*that the second appellant was with him and his family at the time of the robbery*". I disagree. The main import of the evidence was that he recalled the day in question as he and the second appellant usually spend Sundays together. This is a generalised statement and does little to assist the second appellant in this instance.

[14] Where an accused person relies on an *alibi* as a defence, it is for the prosecution to establish, on the basis of the evidence viewed in its totality, that such evidence cannot be reasonably possibly true. I am satisfied that the prosecution overcame this hurdle in the present matter. It is well established that an appeal

court will not lightly interfere with a trial court's findings on matters of credibility⁵ and fact⁶ and should only intervene if it is convinced that they were wrong.⁷

⁵ The trial court, having had the benefit of observing the witnesses when testifying, is best placed to make credibility findings.

Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA) paragraph [5] held:

"On the central issue, . . .there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness – box, (ii) his bias, latent and blatant, (iii) the internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra-curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

⁶ The Constitutional Court in *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 stated as follows at paragraph [45]:

[15] The magistrate correctly proceeded from the stance that the evidence is to be assessed in its totality, regard being had to both the credibility and reliability of the witnesses. The magistrate, in dealing with the evidence of the eyewitnesses, assessed them as honest witnesses, with their evidence being probable; reliable; and credible. There is no basis upon which to interfere with the trial court's findings in this regard. On the other hand, the evidence on behalf of the appellants and that of the second appellant's *alibi* was rejected for the reasons set out in the trial court's judgment. I cannot fault these further findings.

[16] In light of the aforesaid, and regard being had to the standard of proof in criminal proceedings, I am satisfied that the prosecution proved its case against the appellants beyond a reasonable doubt and accordingly the appeal must fail.

[17] In the premises, the following order is issued:

1. The appeal against conviction is dismissed.

"It is undesirable for this court to second-guess the well-reasoned factual findings of the trial court. Only under certain circumstances may an appellate court interfere with the factual findings of a trial court. What constitutes those circumstances are a demonstrable and material misdirection and a finding that is clearly wrong. Otherwise trial courts are best placed to make such findings."

⁷ *City of Cape Town v Mtyido* (1272/2022) [2023] ZASCA 163 (1 December 2023); *Lottering v S* 2020 (2) SACR 629 (WCC).

I BANDS

JUDGE OF THE HIGH COURT

BROOKS J:

I agree.

R BROOKS

JUDGE OF THE HIGH COURT

Date heard: 17 July 2023

Judgment granted: 20 February 2024

For the appellants: DP Geldenhuys

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