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REPUBLIC OF SOUTH AFRICA



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

Case Number: A24/2023

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES

REVISED

09/11/23

In the matter between:

TSHUMA, ORESIMO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

BRITZ, AJ

- [1] The appellant appeared with three co-accused in the regional court for the regional division of Gauteng, sitting at Alexandra on four counts of robbery with aggravating circumstances as well as two counts of possession of unlicensed fire-arms. The appellant was initially accused 4 in the regional court, but by the time the trial commenced he had moved up to the position of accused number 2 following the withdrawal of the charges against the original accused 2 and the demise of the original accused 3. The appellant and his co-accused were both legally represented through-out the trial.
- [2] Despite pleading not guilty to all the charges against him, the appellant was convicted on 11/12/2014 of all 4 counts of robbery as well as 1 count of possession of an unlicensed fire arm in contravention of s 4(1)(f)(iv) of Act 60 of 2000. All 4 the robbery counts were taken together for purpose of sentence and the appellant was sentenced on 11/12/2014 to 18 years imprisonment in respect thereof and a further 5 years imprisonment in respect of the fire arm charge. The effective term of imprisonment was therefore 23 years.
- [3] The appellant brought an application for leave to appeal his convictions and sentences. This application was however dismissed by the learned regional magistrate.
- [4] Aggrieved by the result in the regional court the appellant approached this Court for leave to appeal on petition. This Court granted leave to appeal to the appellant in respect of both his convictions and sentences, hence the appeal before us.
- [5] The evidence in the matter can be summarised as follows: On 09/07/2013 at around midnight Alexandra Clarke ('Clarke'), Daniel du Preez ('du Preez'), Linda Morland ('Morland') and Craig van de Leur ('van de Leur') were all at house [...] , Glen Austin, Midrand where they were celebrating Clarke's birthday. Van de Leur had already gone to bed, while Clarke and Du Preez were in the kitchen busy cleaning up. Morland was sitting outside scrolling through music on her laptop. She was suddenly hit with an unknown object on the back of her head. When she turned around she came face to face with several black men who forced her up and into the house. At least two of the

men were armed with firearms. They demanded that Morland show them the safe and firearms in the house.

- [6] The commotion in the house caught the attention of Clarke and Du Preez who went to investigate. They found Morland and the group of about 6 intruders in the lounge. Accused number 1, who worked as a security guard for Morland's family, was amongst the intruders, although it did not look as if he was participating. The intruders forced Morland and Clarke under the table in the lounge and hit Du Preez on the head with a heavy object causing him to fall to his knees. All along the intruders demanded from Morland to show them the safe. She kept on acting as if she knew nothing about a safe on the premises. Clarke became scared for their lives and told the intruders where the safe was located.
- [7] In the meantime some of the intruders broke from the main group and went deeper into the house where they discovered Van de Leur in bed. They instructed him to get up and lay in the passage. After being told the location of the safe, the intruders instructed Du Preez to lay down next to Van de Leur in the passage, while two of them took Morland to the main bedroom and Clarke to the main bathroom, where the safe was located. While the intruder who was with Clarke tried to open the drawer in which the safe was hidden, the one who was with Morland made her lay on the floor while he took jewellery from her dressing table and sniffed on bottles of perfume on the dressing table.
- [8] At some point Morland realized she was alone in the bedroom. She got up, got hold of her fire arm and walked to the passage where she saw Van de Leur and Du Preez lying down. She fired shots in the direction of the ceiling of the passage. Some of the intruders in the front of the house retaliated by firing back at Morland. Van de Leur went and hid in a bathroom where he found accused 1 sitting. The intruder who was with Clarke approached Morland from the back, hit her on the hand and disarmed her. The intruders fled the scene with cash, jewellery, some cellphones and Morland's husband's fire-arm. Other electronic equipment the intruders gathered while moving through the house was left behind.

- [9] When the scene became quiet Du Preez got up and ran to his house, which was nearby, where he requested his friend to call the police. Back in the lounge at the crime scene Clarke picked up an unknown cellphone from next to a couch. The cellphone started ringing and she handed it to accused 1 to answer. Accused 1 did not answer the phone but kept it with him.
- [10] Shortly afterwards, the police arrived on the scene. Constable Chauke who attended at the scene started taking statements from the complainants. He had already taken a statement from accused 1, who, at that stage, was not yet a suspect, when Clarke informed him of the incident with the unknown cellphone. Chauke questioned accused 1 about the cellphone and accused 1 produced the phone and handed it to Chauke. Chauke dialled accused 1's telephone number, which he obtained from the statement he had taken, using the phone which was handed to him. Accused 1's details appeared on the unknown phone leading Chauke to question accused 1 about it. Accused 1 admitted knowing one of the intruders and volunteered to point out the intruder's residence to the police.
- [11] Captain Chetty and Warrant Officer Reddy who were driving patrols in the vicinity of the crime scene responded to a call from Chauke and also attended at the scene. On hearing what accused 1 had to say regarding the cellphone they decided to get together a task team to go with accused 1 to point out the residence of the owner of the cellphone. Accused 1 led them to a shack in Mayibuye, Tembisa.
- [12] Graham Lombard ('Lombard') testified that he is a Sergeant in the SAPS stationed at Midrand. He was part of the task team assembled to react on the information given by accused 1. When accused 1 pointed out the shack of the intruder which was known to him, Lombard entered the shack and found three men sitting on beds. He discovered two firearms on two of the men and also two Blackberry cellphones laying on the ground next to the door on the inside of the shack. The one firearm was a Remington pistol and the other a .22 calibre short Beretta. The Beretta was found tucked into the jeans of the appellant. The serial number of the Beretta was obliterated. The exhibits were booked into SAP 13/ 262. All three suspects found inside the shack were arrested.

- [13] Craig van de Leur did not testify during the trial, but his statement to the police was handed in as exhibit A, by consent. In his statement he describes his observations of the robbery and indicates that he would not be able to identify any of the perpetrators.
- [14] The prosecutor handed in, as exhibit B, a certified copy of Midrand SAP 13/263. The register reflects that the following items were handed in: two forensic bags, one containing a Remington pistol, magazine and six rounds, and the other containing two Blackberry cellphones and a cellphone battery. The items were allegedly found by Captain Chetty in possession of suspects not mentioned in the register at an address in Tembisa and registered in a docket, Midrand Cas 283/03/2013 which was opened for the offence of Possession of Suspected Stolen Property. It was further alleged in the register that the items belonged to one Mrs L A Moreland of 170 Modderfontein Road, President Park and that the two cellphones were later released to the owner thereof, one Craig van de Leur.
- [15] Captain Chetty was not called to testify. Warrant Officer Reddy passed away during the course of the trial. Certain portions of his statement with regards to the incident was read into the record by the prosecutor with consent of the defence. The statement was handed in as exhibit D. In the statement Reddy confirmed the interaction with Chauke and accused 1 as well as the pointing out made by accused 1. He stated that at the shack pointed out by accused 1 Sergeants Milborrow and Noffke went into the shack. Milborrow came out and reported that he recovered two firearms – a Pietro Beretta and a Remington pistol – as well as two Blackberry cellphones. These exhibits were booked into SAP 13/ 162 and 163 of 2013 under docket Rabie Ridge Cas 163/03/2013.
- [16] The last piece of evidence for the State was the ballistics report deposited to by Warrant Officer Moloto. He stated under Midrand Cas 252/03/2013 that he received the following exhibits: a .22 long rifle Beretta semi-automatic pistol, five cartridges for said pistol, a Remington semi-automatic pistol and six cartridges for said pistol. He examined the exhibits and noted his findings in his report which was handed in as exhibit E.

[17] Both accused 1 and the appellant testified during the trial and gave exculpatory versions.

[18] The issues raised in this appeal are the following:

- (a) The identity of the appellant as one of the robbers was not proved beyond a reasonable doubt.
- (b) It was not proved that the appellant was found in possession of any firearm or anything else that can link him to the robbery of the complainants.
- (c) The trial court erred in fixing a non-parole period in terms of s 276B of the Criminal Procedure Act on the sentences it imposed.

[19] It is well established that a court of appeal is not at liberty to substitute its views for that of the trial court. The rule when dealing with appeals was stated in *S v Leve*¹ as follows:

‘The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise the right to appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court’s finding of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of the evidence reveals that those findings were patently wrong. The trial court’s findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in a better position to determine where the truth lies.’

[20] The first question to be answered in this appeal is this: Did the State prove beyond a reasonable doubt that the appellant was one of the persons who entered the house of Linda Morland and robbed her and the other complainants of their property?

[21] It is trite that evidence on the identification of an accused must be approached with caution in mind. The correct approach was stated as follows by the Appellate Division (as it then was) in *S v Mthetwa*:²

¹ 2011 (1) SACR 87 (E)

'Because of the fallibility of human observation evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest; the reliability of his observation must be tested depending on various factors such as: 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 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 the evidence by or on behalf of the accused.'

[22] From the evidence of all the complainants it is clear that they were all taken by surprise when the robbery occurred. The robbery occurred in the middle of the night after they were all winding down after the celebrations of the day. Although the lighting inside the house was very good, the scene was very mobile and the chances for observation very minimal. To that end Van de Leur stated clearly in his statement to the police that he would not be able to identify any of the perpetrators. Alexandra Clarke and Linda Morland stated that they thought the appellant was one of the perpetrators. They both however conceded that there was nothing specific about the features of the appellant which they could remember and that they could therefore not be sure that their identification was reliable.

[23] The only witness who made any real attempt to convince the trial court of the appellant's identification was Du Preez. He tried to give credence to this identification by basing it on the eyes of the appellant. He was however unable to say what about the appellant's eyes made him sure of the reliability of his identification. He further confirmed that he was hit hard on the head with a heavy object at the start of the ordeal to the extent that he lost his balance and fell to his knees. He testified that the appellant spent very little time with him, but went to another room, which was out of his sight, with Morland and Clarke while he was made to lay in the passage with Van de Leur.

[24] In my view the trial court was correct not to place sufficient weight for a conviction on the identification testimony of the complainants, but to rather look

² 1972 (3) SA 766 (A)

elsewhere in the evidence for corroboration of their identification. The respondent also admirably conceded in paragraph 11 of its heads of argument that the 'evidence with regard to identity is questionable.'

[25] The respondent however supported the conviction based on the alleged discovery of the firearms and Blackberry cellphones. This then brings us to the next question to be answered: Did the State prove beyond a reasonable doubt that any firearm or other object was found in possession of the appellant, linking him to the robbery?

[26] The only witness to testify during the trial regarding the discovery of the firearms and Blackberry cellphones was Sergeant Lombard. Lombard was a single witness. As in the case of evidence of identification, it is well established that the evidence of a single witness is approached by our courts with caution in mind, due to the inherent danger there-in. Without replacing the exercise of common sense with caution, the evidence of a single witness can only be accepted if it is clear and satisfactory in all material respects, or if there is corroboration for it or some other safeguards that would eliminate the risk of a wrong conviction.³

[27] At first glance it appears as if Lombard's testimony was straight-forward and without incident. However, a more thorough reading of the record leaves much cause for concern regarding his testimony: It appears that while testifying Lombard had his statement open before him and reading from it.⁴ There was no basis laid for this witness to be in possession of his statement and/or to refresh his memory from his statement. As his testimony progressed it became quite apparent that Lombard had no independent recollection of the incident and that he could only testify as to what was written down in his statement. In my view the trial court committed a serious irregularity by allowing Lombard to be in possession of his statement and to read from it without there having been a basis laid for it. In these circumstances very little weight, if any, can be attached to Lombard's testimony.

³ S v Artmann 1968 (3) SA 339 (A); S v Sauls and Others 1981 (3) SA 172 (A)

⁴ CaseLines 003-9 from line 20 and also 003-10 line 14.

[28] The trouble with Lombard's testimony does not end with what was said above. His testimony is contradicted in material respects by the statement of Reddy that was handed in by the prosecutor as an exhibit. According to Reddy Sergeants Milborrow and Noffke went inside the shack. Nothing is said about Lombard being on the scene and what his involvement was. Reddy further identified Milborrow as the person who discovered the firearms and Blackberry cellphones and who handed these exhibits to Captain Chetty. In his own testimony Lombard did not mention whether he went into the shack with other police officers, and if so who these officers were. He also did not say what he personally did with the exhibits he alleged to have recovered in the shack. There is therefore no evidence on record of a proper chain of custody in relation to the exhibits. To exacerbate this problem even further, Reddy also contradicted Lombard as to the SAP 13 numbers and docket Cas number under which these exhibits were later booked in at the police station.

[29] From the above it is clear that the State presented the trial court with two mutually excluding versions as to the recovery and chain of custody in respect of the exhibits. There was no explanation given for this state of affairs and neither the prosecutor nor the learned Regional Magistrate dealt with this issue. There were no reasons advanced as to why Lombard's version was preferred to that of Reddy.

[30] This brings me to the next question: Can the evidence relating to the cellphones strengthen Lombard's testimony to the extent of eliminating the risk of a wrong conviction and thereby justify the convictions of the appellant?

[31] In bolstering their argument for a conviction the State relied on the doctrine of recent possession in respect of the two Blackberry cellphones discovered inside the shack where the appellant was arrested. This doctrine allows for the drawing of inferences regarding liability of an accused. The Supreme Court of Appeal explained it as follows in *Mothwa v The State*⁵:

'The doctrine of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in

⁵ (124/15) [2015] ZASCA 143

the commission of an offence and in certain instances was also party to the initial offence. The court must be satisfied that (a) the accused was found in possession of the property; (b) the item was recently stolen.'

- [32] The evidence tendered by the State in relation to the cellphones was that both cellphones were found inside the shack, laying on the ground next to the door. From this evidence it is clear that none of the occupants of the shack was found in physical possession of any of the cellphones. There is also no evidence that any of the occupants exercised any measure of control over these cellphones. It can, in my view, therefore, not be said that any of the occupants was found in possession of the cellphones.
- [33] This finding, coupled with the contradictory versions regarding the discovery of the cellphones and the lack of proof of a chain of custody in respect of the exhibits call for a conclusion that it cannot be said that the evidence in respect of the cellphones strengthened Lombard's testimony and eliminated the risk of a wrong conviction. For the reasons furnished above I am unable to find that Lombard's testimony was clear and satisfactory in all material respects, or corroborated.
- [34] The failure of the learned regional magistrate to deal with the contradictory versions presented by the prosecutor regarding the exhibits resulted in there having been no factual basis for him to draw any inference therefrom. In the circumstances he misdirected himself when he used the cellphone evidence as corroboration for Du Preez's identification of the appellant as one of the perpetrators of the robbery.
- [35] It is trite that the State bore the onus of proving the guilt of the appellant beyond a reasonable doubt. There was no onus on the appellant to prove his innocence or the credibility of his version.⁶ The appellant's version remained throughout the trial a denial of all the allegations levelled against him. He did not falter during cross-examination, but maintained his version. I am not convinced that it can be said that the version of the appellant was so improbable that it cannot be reasonably possibly true.

⁶ S v Shackell 2001 92) SACR 185 (SCA)

[36] It is true that it can be argued that there is a strong suspicion that the appellant was involved in the commission of the robbery. However, our law demands much more than a suspicion to justify a conviction. This principle was stated as follows by Plasket J in *S v T*⁷ and quoted with approval by the Supreme Court of Appeal in *S v Phetoe*⁸:

'The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond reasonable doubt. This high standard of proof – universally required in civilised systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not a part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which freedom and the dignity of the individual are properly protected and respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to.'

[37] For the reasons stated herein I am not satisfied that the State discharged the onus that rested on it. It follows therefore that the appeal should succeed.

[38] In the result I would make the following orders:

- (a) The appeal succeeds in respect of all counts the appellant was convicted of.
- (b) The convictions and sentences in respect of all counts are set aside.

⁷ 2005 (2) SACR 318 (E)

⁸ 2018 (1) SACR 593 (SCA)

W J BRITZ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

I agree, and it is so ordered.

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JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Appearances:

For the Appellant: S Hlazo
Legal Aid South Africa

For the Respondent: P T Mpekana
Director of Public Prosecutions, Johannesburg

Date of hearing: 28/08/2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via *e-mail, by being uploaded to CaseLines and by*. *The date and time for hand-down is deemed to be 15h00 on 9 November 2023.*