



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A202/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 08 January 2021

In the matter between:

MONYEKI EZEKIEL THOBILE

Appellant

And

THE STATE

Respondent

JUDGMENT

MOTHA AJ

Introduction

1. The Appellant was charged (as accused 1) in the Mamelodi Regional Court on a charge of robbery with aggravating circumstances read with the provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 as amended. It was alleged that the Appellant unlawfully and intentionally assaulted Robertus Jordaan (the complainant) and took his cellphone, hands free cellphone car kit and a wallet with its contents. It was further alleged that the aggravating circumstances were that the accused inflicted grievous bodily harm to the complainant.
2. The Appellant was represented by Ms. Smith and he pleaded not guilty to the charge.
3. He was found guilty and sentenced to 15 years' imprisonment in terms of Section 51(2) (a) of Act 105 of 1997. He applied for leave to appeal on both conviction and sentence and was granted leave on conviction only.

THE FACTS

4. The State called three key witnesses.

Evidence by Mr. Robertus Ronald Jordaan (the complainant)

5. The complainant testified that he is a DSTV installer and operates in the areas of Pretoria, Tshwane and Centurion. On 3 June 2015 at approximately 10h00 and 10h30 he was driving his Toyota Tazz in Mamelodi trying to locate a house in which he was going to do an installation.
6. He was on his cellular telephone trying to call the client when suddenly heard someone shouting at him to stop, which he did. He rolled down his car window and two men approached him. One went to the passenger's side of his vehicle and the other one to the driver's side.
7. The one at the driver's side grabbed his cellphone, which was in his hand, and a struggle ensued. The assailant then stabbed the complainant's leg with a knife, took his phone and ran away.
8. The assailant on the passenger's side opened the door and stole the complainant's hands-free cell phone kit and his shoulder bag which contained his wallet with all his bank cards and about R30.00 to R60.00.
9. The assailant went through the bag and took the wallet and then threw it away and ran away. The complainant got out of the car and noticed that a lot of people were standing around and looking. He was then assisted by someone who took him to the clinic. The police also arrived at the scene. He neither can identify the

assailants nor remember anything about them that would distinguish them and thus he could not identify the appellant or his co-accused. He was scared and in shock and could only recall that he was attacked and robbed by two people. He insisted that he only saw two assailants.

Evidence by Mr. France Lephako

10. France Lephako (Lephako) testified that he has stayed in Mamelodi East for the past 30 (thirty) years and he testified that at the time of the incident he had known the Appellant for 10 (ten) years. He stated that he only knew the Appellant by his surname Mojeke and he also testified that he knew the Appellant's co-accused.
11. He confirmed that the incident happened at 10h30 in the morning. He was standing at the gate of his premises when he observed the incident as it unfolded. He was standing at or about 30 to 50 meters from where the incident happened and nothing blocked his view. He testified that a white man, who was driving slowly and clearly looking for an address.
12. According to Lephako, the Appellant, his co-accused and his friends were standing at a Spaza shop. He then saw the Appellant and his co-accused approach the complainant's vehicle.

13. He testified that the Appellant went to the driver's side of the vehicle while his co-accused went to the passenger's side. He saw the Appellant taking out something that looked like a knife, which he used to stab the driver on the thigh and he also saw him grab the phone from the hand of the complainant. However, the driver refused to let go of the phone.
14. According to him, the Appellant's co-accused went to the passenger's side, opened the door and took a bag and a cell phone kit on the passenger's seat. One of the Appellant's friends then approached the driver's side and assisted with wrestling the phone out of the driver's hand. He did not know this third person. The third person grabbed the phone from the driver's hand and then the Appellant and his co-accused all ran away.
15. He then approached the car and saw the driver bleeding from the thigh. He called the police. Lephako stated that he could not tell where the knife came from but he saw the complainant being stabbed. He could not give the description of the knife.
16. Under cross examination he testified that he had seen about were about 5 (five) men (including the Appellant) who were gathered at the spaza shop before the incident occurred. He also testified that three out of the five participated in the robbery. He stated that the spaza shop was about to 30 (thirty) to 50 (fifty) meters from his house. It was put to him that the Appellant's version was that he

was at the spaza shop buying cigarettes at the time of the incident and that he only knows about the incident because of what he was told by Baleseng (his co-accused) – Lephako was adamant that he had seen the Appellant participate in the robbery and denied the Appellant's version.

Evidence by Lesley Oupa Morima

17. Mr. Lesley Oupa Morima (Morima) testified that he stays 4 – 5 meters from where the incident occurred. He stated that he knows the second state witness France Lephako as they stay in the same street about 10 to 15 metres away from each other. On the day in question he was in his yard, fixing his car which was close to his gate - there is a speed hump opposite his gate and that is where the incident took place. He testified that he saw one Baleseng (the Appellant's co-accused) and another man, Mpho, running towards the car driven by the complainant. He saw the Appellant's co-accused taking a bag from the back seat on the passenger's side of the motor vehicle and throw some papers on the ground near his gate. He shouted at him saying he must not put the items near his gate. His evidence was that it was Mpho who went to the driver's side of the vehicle, stabbed the complainant and take his phone.¹
18. Then, he testified, they ran away after telling him to mind his business. When asked by the Prosecutor if he saw or noticed the Appellant at that particular time,

¹ Which he said was in the complainant's pocket

Morima responded by saying "No he was not there". Morima was pressed by both the prosecutor during cross-examination, and the court as to whether he had seen the Appellant at the scene of the crime on that day and despite rigorous cross-examination, he remained adamant that he had not seen the Appellant there on that day.

19. In fact, under cross examination he confirmed that the incident happened in front of his gate. He further stated that the spaza shop was back opposite of his house at a corner house in the same street and from where he was working on his car he could see the spaza shop.
20. He testified that the motor vehicle was attacked by Baliseng, Mpho and three other people he did not know. He again reiterated that he did not see the Appellant. He mentioned that the complainant was throttled and his car's ignition switched off before they searched his car. He stated that the complainant was stabbed by Mpho who ran past him holding a knife. He was able to describe the size of the knife and stated that it was self- made knife with a grinded steel. He mentioned that the papers that were thrown out of the bag were picked up by Lephako near his gate.
21. When questioned by the Court he still insisted that the vehicle was attacked by 5 (five) people. And that the cell phone was taken from the pocket of the

complainant's shirt. Under cross-examination from the Prosecutor he stated that he did not see when the phone was taken.

Evidence by the Investigating Officer (Oupa Pahlane)

22. In short the Investigating Officer testified he was only able to trace the Appellant after he utilized the services of a paid informer. He then arrested the Appellant on 16 June 2015.

23. The state then proceeded to close its case.

Evidence by the Appellant

24. Appellant stated that on 3 June 2015 he was on his way to work at SNS. He was employed as a driver of small taxis at SNS. As he was on his way to work his co-accused stopped him and asked for a cigarette. He did not have any cigarettes in his possession but he had money so that he could buy loose cigarettes. So he went to the spaza shop. As he was still busy buying cigarettes he heard a noise: someone was saying something like "*do not injure him, do not hurt him*". On his way out of the spaza shop he saw his co-accused (Baliseng) running towards him saying that a white man had just been robbed and they should help chase

the person who robbed this white man and so they chased after them but they could not catch the robbers.

25. He then turned back and went to the scene, as he described it, it was already chaos. Realizing that he was late for work, he proceeded to his work place.

Evidence of Baliseng Masemola (the co-accused)

26. He testified that he was on his way to work when he met up with the Appellant and asked him for a cigarette. As the Appellant did not have any on him, he went to the spaza shop to buy. While he was waiting for the Appellant he saw a motor vehicle driven by the complainant and he was asked for directions. His evidence was that while he was busy trying to give the complainant directions, Mpho came, pushed him away from the driver's side of the vehicle and attacked the complainant. It was his evidence that Mpho was the one who attacked the complainant by stabbing him with a knife, and robbed the complainant. His evidence was that another person was at the passenger side of the vehicle, opened the door and took the complainant's bag.

27. He testified that the 2 robbers then ran away and he asked the Appellant to help him chase the two robbers. He also denied any involvement in the crime.

Judgment and the Law

28. The Magistrate found the Appellant guilty of robbery with aggravating circumstances. The court briefly summarized the evidence as presented by all witnesses and correctly pointed out that it was dealing with the evidence of a single witness.
29. Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on a single evidence of any competent witness. It is trite that the evidence of a single competent credible and reliable witness is sufficient to secure a conviction provided a witness was clear and satisfactory in all material respects.²
30. Even so, a trial court must always be alive to the dangers inherent in the acceptance of the evidence of a single witness and strive for the safeguard of some factor reducing the risk of a wrong conviction, for example some form of corroborating evidence.³
31. The correct approach to the application of the so-called 'cautionary rule' was set out by Diemont JA in **S v Sauls and Another**⁴ where he said the following:
- "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy and whether, despite the fact that there are*

² Racks vs Mokwana 1932 OPD 79 at page 18

³ E v W 1949 (3) SA 772 (AD) at 778- 9

⁴ 1981 (3) SA 172 (A) at 180E-G

shortcomings or defects or contradictions in the testimony, he is satisfied that the truth had been told."

32. The principles applicable to an appeal on the merits and the approach to be followed by the court of appeal were articulated in **S v Francis**⁵ where the following remarks were made:

"The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence - a reasonable doubt will not suffice to interfere with its findings.

Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

33. The ultimate test still remains proof beyond reasonable doubt. In the judgment the court *a quo* stated that it had to remind itself

"...that the incident involved a moving scene and that both accused placed themselves within the vicinity of the robbery incident, albeit the spaza shop, yet Mr. Morima failed to see the accused 1 even at the spaza shop, Court was

⁵ 1991 (1) SACR 198 (A) at pages 198J-199A

further aware that the mere fact that there are contradictions as you were approach with caution and evaluated holistically.”⁶

34. The court found that the powers of observation of Lephako were superior to that of Morima. However, I cannot agree with this conclusion. Firstly, Lephako was 30 - 50 meters away from the incident whereas Morima was 4 – 5 meters away. Secondly, Morima could describe the knife used to stab the complainant and thus he appears to have better powers of observation. Thirdly, the Appellant’s co-accused corroborates both Morima’s version and the Appellant’s version that Appellant was not one of the perpetrators of the crime.
35. In my respectful view, this demonstrates the material misdirection on the part of the Magistrate which will entitle this court of appeal to set aside his findings⁷.
36. In **S v Van Der Meyden**⁸ the court set out the manner in which evidence should be assessed when it stated that:
- “The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. (See, for example R v Difford 1937 AD 370 especially at 373, 383).*
- These are not separate and independent tests, but the expression of the same*

⁶ See the record at page 163

⁷ A court will be slow to interfere with the findings of the court of first instance and will do so only in the presence of a material misdirection

⁸ 1999 (2) SA 79 (WLD) at page 80 G-J and 81 A-B

test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so, only if there is at the same time no reasonable possibility that innocent explanation which has been put forward, might be true. The two are inseparable, each being the logical corollary of the other."

37. There were a number of material contradictions: some were pointed out by the Counsel for the Appellant. To name but a few of these contradictions:

- 37.1 according to the complainant, two people robbed him. However, according to Lephako three people approached the complainant's vehicle and according to Morima, five people were involved;
- 37.2 according to Lephako, the Appellant was the person on the driver's side of the window, however, according to Morima, Mpho was the person who went to the driver's side;
- 37.3 according to the complainant, his cellphone was taken by the person who stabbed him. However, according to Lephako the cellphone was taken by a third person who joined to assist the Appellant. According to Morima, the cellphone was taken by Mpho from the pocket of the complainant's shirt. The Appellant's co-accused confirmed that it was Mpho who had taken the cellphone.
- 37.4 according to Morima, the Appellant was not at the scene and the complainant was stabbed by Mpho with a knife which he saw and described. However, according to Lephako the Appellant was at the

scene and stabbed the complainant; however, he did not see the knife, he only saw the stabbing motion;

37.5 according to Morima, the complainant was throttled and he saw blood coming out of his ear and also the thigh. The complainant never mentioned being throttled and bleeding from the ear.

38. The principal of our law regarding inconsistencies and contradictions was clearly explained in **S v Mkhle**⁹. The court in that authority had this to say:

“Contradictions per se do not lead to the rejection of the witness’ evidence. As Nicholas J, as he then was, observed in S v Oosthuizen 1982(3) SA 571 T at 576 B-C, they may simply be indicative of an error ... Not every error made by the witness affect his credibility: In each case the trier of facts has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of the witness’ evidence.”

39. The court found that the complainant was an honest witness who conceded aspects which were not favourable to his case, for example he conceded that he was unable to identify any of the assailants. I am in full agreement with this assessment. The court furthermore found that Lephako’s testimony was also clear and not exaggerated. The court did not address the issue of how far

⁹ 1990(1) SACR 95 (A) at page 98

Lephako was standing from the scene, especially since we were told that this was “a moving scene” with people gathering around.

40. With regard to Morima the court said the following:

“Mr. Morema had weak points as well as strong points, despite that, the court found him overall that he was consistent on pertinent aspects, he was consistent in the fact that accused 2 was not helping the complainant but he was part of the incident.”

41. However, in my view, where the court *a quo* erred was in not assessing the corroborating elements of the evidence of Morema, the Appellant and Masemola, all of which put Mpho at the scene of the incident, which point to Mpho as the one who stabbed the complainant and who robbed him of his phone.

42. The court looked at the Appellant's testimony and concluded that he was a poor witness and only introduced his alibi later in his version. However, the legal position with regard to alibi is that there is no onus on the accused to establish it and if it might be reasonably possibly true he must be acquitted.¹⁰

“But it is important to point out that in applying this test, the alibi does not have to be considered in isolation ... The correct approach is to consider the alibi in

¹⁰ R v Hlongwane 1959 (3) SA 337 (AD) at pages 340B - 341A

the light of the totality of the evidence in this case, and the court's impression of the witnesses."

43. In **Rex v Bea**¹¹ it was held that:

"If on the evidence there is a reasonable possibility that everything alibi evidence is true; it means that there's a same possibility that he had not committed the crime."

44. Viewing the totality of evidence with regard to the Appellant's alibi, I cannot discount the probability of the events unfolding in accordance with his version. It is trite that when evaluating or assessing the evidence it is imperative to evaluate all of such evidence and consider it holistically¹². This being so I cannot find that the Appellant's explanation is false beyond reasonable doubt.

45. This remains a substantive principle of criminal law and it is capsulated in the well-known decision of **R v Difford**¹³:

"It is not disputed on behalf of the defence that in the absence of some explanation the court will be entitled to convict the accused. It is not the question throwing any onus on the accused, but in these circumstances it would be a conclusion which the court could draw if no explanation were given. It is equally

¹¹ 1952 (4) SA 514 at page 521

¹² S v Chabalala 2003 (1) SACR 134 (SCA)

¹³ 1937 AD 370 at page 373

clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, he is entitled to his acquittal..."

46. In this case the Appellant does not have to place any evidence before court as it is not his duty to prove his innocence but that of the state to prove his guilt beyond reasonable doubt. This principle was highlighted by Brand AJA in **S v Shackell**¹⁴.

"It is trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof of a criminal case, a court does not have to be convinced that every detail of an accused version is true. If the accused version is reasonable possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused version against the inherent probabilities, but it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonable possibly be true."

¹⁴ 2001 (4) SA 1 (SCA) par 30

47. In my respect view the Regional Court Magistrate erred in holding that the State had discharged its onus and should, instead, have found that the Appellant's version was reasonable possible true. This being so, he should have been acquitted of the charge of robbery with aggravating circumstances.

Order

48. In the circumstances the conviction and sentence must be set aside and the order I make is the following:

48.1 the appeal against conviction is upheld.

48.2 the order of the court *a quo* is set aside and replaced with the following:

"The Accused number 1 is acquitted on the charge of robbery with aggravating circumstances."


MOTH A J

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree


NEUKIRCHER J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 25 November 2020

Date of judgment: 08 January 2021

Hearing conducted via videoconferencing

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 08 January 2021.

Appearances:

For the Appellant: Ms. M.B. Moloi

(Instructed by Moloi Attorneys)

For the Respondent: Adv. D.S. Ngobeni

(Instructed by Office of the Director of Public Prosecution)