IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No. 383/2017

In the matter between

Josiah Mduduzi Mahlangu Appellant

and

The State Respondent

Heard : 05 November 2018

Delivered : 25 February 2019

Coram : Munzhelele AJ, Nair AJ

JUDGMENT

MUNZHELELE AJ

[1] This is an appeal against conviction by Josiah Mduduzi Mahlangu, 'the Appellant' after leave to appeal was granted by the North Gauteng High Court. Appellant appeared in the Vereeniging Regional Court on the charges of

housebreaking with intent to rob and robbery with aggravating circumstances as intended in terms of section 1 of the Criminal Procedure Act 51 of 1977 read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[2] Throughout the proceedings the appellant was legally represented by Mr. Van der Berg. The appellant pleaded not guilty to both counts on the 2nd of July 2015 denying any involvement in the commission of the offences. Despite appellant's plea of not guilty, the magistrate found him guilty on both counts on the 16th of November 2015. Appellant was sentenced on count one to five years imprisonment and on count two to 12 years imprisonment. The two sentences were ordered to run concurrently. By operation of the law the appellant was deemed unfit to possess a firearm.

[3] The appellant brought an application for leave to appeal against the conviction and sentence to the Regional Magistrate and the application was denied. He petitioned the Judge President of the North Gauteng High Court in Pretoria for leave to appeal against convictions and sentence before Judge Nxumalo and Acting Judge Mahalelo who granted the leave to appeal only against the conviction on the 25th of April 2017. The appellant contended that the Regional Magistrate materially misdirected himself by convicting him without credible and reliable identification evidence.

[4] On the night of the 1st of March 2015 at around 01:34 am the house of Anna Kubane Baloyi was broken into. She heard the noise coming from the side of the kitchen. She peeped through the window and saw two men by the door. She quickly ran and hides in the bedroom together with her children. She was not able to identify the intruders. Some of the intruders went to the room where Given Baloyi was asleep and he was assaulted with a hammer on the head. He testified that he was not able to identify them because the room was too dark. Anna Kubane called her son Oscar Baloyi to come to the rescue, and her neighbours to call the police. Selina Baloyi was also present with her mother hiding in the bedroom. Both Anna Kubane and her daughter Selinah were not able to see who the intruders were. The police arrived and took statements of the witnesses. Anna Kubane went out of the room where she was

hiding. She found that the children's shoes, laptop, cell phones, TV, were scattered on the kitchen floor.

[5] Oscar Baloyi arrived together with his friends Ncube, Gonolo and Tsabelo. While entering the yard a light was seen with the figure that was jumping the fence. Lungane Ncube who went to investigate brought back the appellant. At that time the state witnesses were outside the kitchen, where there was a light. Ncube took the appellant to the state witnesses, where he was searched. The Toyota car keys and a Samsung cellular phone were found in the appellant's jacket. Cellular phone was generally identified to be that of Anna Kubane. The Toyota car keys were also identified to be for the old truck which was sold long time ago. There were no specific features which were mentioned by all the state witnesses including Thabo Baloyi in identifying these two items.

[6] The court a quo rejected the version of the appellant when he said that he was randomly picked up by Lungani Ncube on the street. There was however no evidence by Lungane on record that he indeed did not pick him up randomly along the street. The appellant testified that he was from the party. The court a quo rejected this version of the appellant without any evidence on record suggesting otherwise. The trial court overlooked the fact that the witness Anna Kubana said that people who came to her house were speaking Sesotho and the accused was a Zulu speaking person.

[7] The appellant's counsel, Mr van As in his appeal argued that the court a quo erred in making a finding that the appellant was identified, whereas there was no proper identification of the appellant in the state witnesses' evidence. He further argued that the court a quo erred in relying on the doctrine of common purpose to convict the appellant for robbery and house breaking offences. His other concern is that the person who apprehended the appellant was also not called to testify. The counsel further contended that the recovered items were not properly identified with specific features. It is therefore contended that the state did not prove its case beyond reasonable doubt.

[8] On the other hand counsel for the respondent, Mrs Marriot argued that the witness Anna Baloyi was able to recognise the appellant as a person who came to her house asking for her husband and Karabo a day before the incident. Counsel further argued that Selinah was also present when the search was conducted and cellular phone and Toyota car keys were recovered from the appellant. The counsel further contended that Oscar, Selinah and Thabo Baloyi identified the recovered items as belonging to the complainant. The counsel submitted that out of the totality of evidence, the only reasonable inference to be drawn is that the appellant was one of the housebreakers. Mrs Marriot further argued that the doctrine of recent possession permits the court to make the inference that the properties were taken during the commission of the offence and that the appellant was one of the perpetrators.

[9] It is trite law that a court of appeal should refrain from lightly interfering with the credibility findings of a trial court which are presumed to be correct. This is so because the trial court had the benefit of being steeped in the atmosphere of the trial, observing and hearing the evidence first-hand. The trial court is therefore "in the best position to determine where the truth lies. See *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e.

[10] Before considering whether or not the conviction of the appellant is supportable on the evidence adduced at the trial, it is necessary to reiterate the proper approach to be adopted when analysing the version of an accused in a criminal trial. It is trite law that there is no obligation upon an accused person, where the state bears the onus, to convince the court about his version. If his version is reasonably possible true he is entitled to his acquittal. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but, whether one subjectively believes him is not the test. As pointed out in many judgments of this court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true. See *Mulovhedzi v The State* (257/13) [2013] ZASCA 201 (2 December 2013) para 12; *S v V* 2000 (1) SACR 453 (SCA) at 455a-c.

[11] In this case at hand the state failed to call a witness who could have clarified the facts whether this appellant was the one who jumped the fence from Anna Kubane's place or not. Lungane was not dead or untraceable. Such failure to call a competent and compellable witness leads naturally to the inference that perhaps the state feared that such evidence would expose unfavourable facts. See *Ntsomi v Minister of law and order* 1990 (1) SA 512 (CPD) at 525E per Van Deventer AJ. The state was left with no evidence to link the appellant to the people who broke into the house of the complainant. The court a quo misdirected itself by relying on the common purpose in convicting the appellant. The state failed to discharge the onus to prove that appellant was part of the people who were in the house and as such he was entitled to an acquittal.

[12] It is of importance that I deal with the value of the evidence where a witness is confronted with the suspect by any person, a community or the police and then ask such a witness if this is the suspect or not. A witness will be prone to identify the person who is brought to him by the police or the community members as a culprit. For this reason it was important that an identification parade be held where the person can be identified while in the company of many others. A proper identification parade could have confirmed if indeed the appellant was the perpetrator with greater identified value. (See *S v T* 2005 (2) SACR 318 [E] at 322 para 12; *Madubedube* 1958 (1) SA 276 (0)).

[13] The court a quo found that the accused possessed the Toyota car keys and a Samsung cellular phone belonging to the complainant unlawfully. The court a quo rejected the testimony given by the accused that the Toyota car keys belonged to his sister's company where she works. As to why no investigation was conducted to verify the information provided by the appellant it is anyone's guess. The police were present and they heard what the appellant was saying. What they should have done was to follow up on the appellant's explanation to test its truthfulness. The appellant could not be blamed for the police's shady investigations of this case. The state had the opportunity and the means to verify the truth about the Toyota car keys, Samsung cell phone and party issue. The state failed to do so. It is the duty of the state to prove its

case beyond reasonable doubt; this duty should never be shifted to the appellant. See *Mothwa v The State* 2016 (2) SACR 489 (SCA) para11 by Mathopo JA.

[14] Regarding the cellular phone; the accused testified that the cellular phone was not found in his possession. The crucial issue is the identification of this phone. The court a quo found that the phone was identified by the state witnesses as belonging to Anna Kubane. All the witnesses who testified including Thabo who alleged that he bought the cellular phone, were not able to state specific feature in identifying the cellular phone except to say that they know it because it has scratches and that their niece use it. The state could reasonably be expected to have produced better evidence on identification of the cellular phone by way of obtaining information of ownership from the service provider. They could obtain further information of ownership from Rica (Regulation of Interception of Communication and Provision of Communication Related Information Act 70 of 2002). This identification by means of scratches was not enough to prove beyond reasonable doubt that the cellular phone belonged to the complainant.

[15] The finding by the court a quo that appellant was one of the robbers who stormed the complainant's house and robbed them, assaulted Given Karabo Baloyi with a hammer, while acting in common purpose was not supported by the evidence on record. The inference to be drawn should have been in line with the principles set out in R v Blom 1939 AD 188 at 202 for drawing an inference from proven facts namely; the inference sought to be drawn must be consistent with all proven fact. If it is not, then, the inference cannot be drawn. The proven facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. See Ngwenya v S (A41/2016)[2017] ZAGPPHC 302(27 June 2017) at para 21. The state failed to prove those facts upon which an inference could have been drawn.

[16] It is trite law that 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 to a fair trial enjoyed by every person in accordance with the Constitution, and in line with common law. When a court finds that the guilt of an accused has not been proven 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 the freedom and the dignity of the individual are properly protected and are respected. The convictions based on suspicions or speculation is the hall mark of a tyrannical system of law.' See S *v T* 2005 (2) SACR 318(E) para 37 Plasket J; See also *Phetoe v State* [1361/2016) 2018 ZA SCA 20 (16 March 2018) Mocumie JJA. In this case the court a quo convicted the appellant on suspicion of guilt as the state failed to prove its case beyond reasonable doubt.

[17] It is trite law that the appeal court may interfere with the findings of the court in respect of conviction in the following circumstances: (a) where there is a misdirection of facts or law. (b) Where reasons for its findings are shown by the record to be unsatisfactory or though satisfactory, it is shown that the learned judge overlooked other facts or probabilities. (c) Further, the misdirection must be shown to be material even though not every misdirection will enabled the Court of Appeal to disregard the findings of the trial court. See *R v Dlumayo and another* 1948 (2) SA 677 at 701-703; *Engelbrecht v The State* (CA 42/2016) [2016] NAHCMD 386 (9 December 2016) para 27. The appeal court will interfere with the findings of the court a quo because the court a quo has overlooked other facts and probabilities which are material to this case. The appeal against the conviction should succeed.

[18] In the circumstances, the following order is made:

1. The appeal is upheld.

2. Conviction and sentences are set aside.

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M.M. Munzhelele

Acting Judge of the High Court

I agree

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D.Nair

Acting Judge of the High Court

Appearance:-

For the Appellant : Adv Van As

Instructed by : Legal Aid of South Africa

For the respondent : Adv Marriot

Instructed by : Director of Public Prosecution