



IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal No: A273/2018

In the matter between:

MANDLA MHLONGO
OUPA SHADRACK SITHOLE

1st Appellant
2nd Appellant

And

THE STATE

Respondent

CORAM: CHESIWE, J *et* MOENG, AJ

JUDGMENT BY: MOENG, AJ

HEARD ON: 16 SEPTEMBER 2019

DELIVERED ON: 19 SEPTEMBER 2019

[1] The appellants, together with two other accused persons, were convicted in the Welkom Regional Court on three counts of robbery with aggravating circumstances, one count of contravention of

section 3 (possession of an unlicensed firearm), and another count of contravention of section 90 (unlawful possession of ammunition) of the Firearms Control Act 60 Of 2000.

- [2] They were sentenced to 15 years imprisonment on each of the robbery counts, 15 years imprisonment on the possession of an unlicensed firearm count and three years' imprisonment on the unlawful possession of ammunition count. The trial court ordered the sentences imposed on the possession of a firearm and ammunition counts to run concurrent with the sentences imposed on the robbery counts. An effective term of 45 years imprisonment was therefore imposed on each accused person.
- [3] Both appellants petitioned the Judge President of this Court after the trial court refused their applications for leave to appeal their convictions and sentences. The first appellant's petition against conviction was refused and he was granted leave to appeal his sentence only, whereas the second appellant was granted leave to appeal both his conviction and sentence.
- [4] The grounds of appeal pertaining to the second appellant's conviction are in a nutshell that the trial court erred in concluding that the State witnesses proved his identity beyond reasonable doubt. In regard to sentence, both appellants submitted that an effective term of 45 years imprisonment is strikingly inappropriate as it is disproportionate to the facts in aggravation and mitigation.

- [5] I will for practical considerations first deal with the second appellants appeal against conviction and sentence, and thereafter deal with the first appellant's appeal against his sentence.
- [6] The second appellant's appeal centres on the issue of his identity. The evidence presented by the State during the trial suggested that the second appellant, in the company of other perpetrators, robbed the complainants as alleged in the charge sheet. The robbery was not in dispute but the second appellant raised an alibi and denied that he was on the scene of the crime.
- [7] The alibi therefore called into question the State's evidence concerning his identity. An alibi is not a kind of special defence which has to be proved by the defence (See **R v Biya** 1952 (4) SA 514 (AD). The State must prove that the accused committed the crime and it must therefore disprove the alibi. The correct approach is to consider the alibi in the light of the totality of the evidence. As was stated in **R v Biya** supra, ' . . . if *on all the evidence* there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime'.
- [8] In **R v Masemang** 1950 (2) SA 488 (A) 493 Van den Heever JA relied on his own experience in stating that even an honest witness quite often makes a positive identification of the wrong person. The Court should be alive to the inherent and natural desire of victims of crime to have retribution and in so doing, may identify the wrong person.

[9] In **R v Shekelele** 1953 (1) SA 636 (T) at 638G Dowling J said that ‘an acquaintance with the history of criminal trials revealed that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence’. The judge believed that a bald assertion that the crime was committed by the accused is insufficient.

[10] Most recently, Cameron JA held in **Charzen and Another v S** 2006 (2) SACR 143 (SCA) that:

“But, as our courts have emphasised again and again, in matters of identification honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness’s recollection of a person’s appearance can be ‘dangerously unreliable’, and must be approached with caution. This case illustrates the risks.”

[11] Mr Van Rensburg, counsel for the second appellant painstakingly highlighted each and every conceivable contradiction and discrepancy in the evidence of the three State witnesses in his heads of argument. He maintained during the appeal deliberations that these discrepancies were fatal to the State’s case regarding the second appellant’s identity. Mr Bontes, counsel for the respondent, acknowledged that there were contradictions but submitted that these contradictions, viewed in the totality of the evidence, were not material.

- [12] The evidence the State relied on to prove the guilt of the second appellant during the trial was the following: On the day of the incident, the first State witness, Hester Hanekom, was from town on her way to their farm, accompanied by the second state witness Ester Fourie and a minor child. The third state witness, Adri Conradie, was also on the farm accompanied by another child who was asleep in the bedroom. Shortly after their arrival on the farm, three men accosted them in the house.
- [13] The second appellant was identified as one of the men. He was, according to Hanekom, the one who pushed Fourie into the kitchen. Hanekom testified that the second appellant also threatened to kill the child who was crying and the dogs that were barking. She says the second appellant is the one who took Conradie into the bedroom to open the safe and brought the child who had been sleeping in the bedroom to her. She described him as the one who was light in complexion. It is common cause that she also pointed him out at the identity parade.
- [14] Contrary to this evidence, she testified during cross examination that the person who pushed Fourie into the kitchen, who threatened to kill the child and who brought the child from the bedroom, wore a face mask or so called balaclava and he was dark in complexion. It was not in dispute that the second appellant was light in complexion. Hanekom testified that she initially thought that the second appellant was one of their farmworkers whom he resembled.
- [15] Fourie in turn testified that she has poor eyesight and she cannot see properly without her glasses. Her glasses fell off her face during the

robbery. The only description she could give of the second appellant was that he had “evil eyes”. She indicated in examination in chief that she will not be able to point the robbers out, but despite this, she pointed the second appellant out. After having taken more than 20 minutes to observe the participants in the identity parade, she pointed two innocent persons out. It was striking that she said “na die voorval het ons bespiegel... ek weet nie ons sal maar wag vir die DNA”. They were clearly uncertain about the identity of the perpetrators.

[16] Contrary to what Hanekom said, Fourie stated that the second appellant was the one who was dressed in police uniform and that he did not accompany Conradie to the safe but kept her guard. It is at that stage that she realised that he had “evil eyes”. Conradie in turn testified that the second appellant accompanied her to the safe contrary to what Fourie said. It was not clear whether the second appellant or accused 4 resembled one of the farm workers.

[17] Apart from these contradictions, there were a number of other contradictions in relation to the other perpetrators which had a bearing on the identification of the second appellant which I do not deem necessary to highlight in this judgment.

[18] I can similarly not ignore the fact that the identification of the second appellant was made while the witnesses were extremely traumatised. Hanekom testified that “...Dit was so deurmekaar en ons was bang, want hulle het heeltyd gese hulle gaan ons doodmaak”. Innocent persons were pointed out at the identity parade by all three witnesses. Hanekom intimated that the one innocent person demanded to search the house. She however later admitted that she made a mistake.

- [19] The witnesses were clearly confused and this points to the unreliability of their observations. This is reflected in the words of Hanekom “onthou net, dit is, dit is deurmekaar in so ‘n situasie. Jy sien mense. Die volgende oomblik het een ‘n balaklava op. dan is daar niks. Dan kom daar ander in”
- [20] It should be noted that unlike the other two accused persons who were in the get-away car and the one who was arrested close to the stolen items, there was no other admissible evidence against the second appellant, except the say so of the three witnesses. The fact that the second appellant was pointed out by his co accused was disputed during the trial. The only feature which the second appellant was identified with was his light complexion. This is admittedly not a reliable method of identification. The second appellant in turn gave a credible account of his whereabouts when the robbery took place and his version was corroborated by two other witnesses.
- [21] Viewed in the totality of the evidence, I am satisfied that the identification of the second appellant was not reliable. All the discrepancies in the State case, in my view, ought to have created doubt in the mind of the magistrate. Such doubt should have been exercised in his favour.
- [22] I will now deal with the appeal on sentence of the first appellant. It is common cause that the offences in all the counts flow from the same criminal conduct. Count one to three relates to the robbery of three complainants on the same day and during the same incident. We are bound to take the cumulative effect of the sentences into account.

What has to be prevented is for the appellant to undergo an unjustifiably severe sentence for the same criminal conduct.

[23] Ms Kruger submitted that considering the personal circumstances of the appellant, an effective term of 25 years imprisonment ought to have been imposed. Mr Bontes, counsel for the respondent contended that the magistrate did not misdirect himself as he found no substantial and compelling circumstances existing. He however conceded that we may interfere in as far as the cumulative effect of the sentences is concerned. He suggested an effective term of 25 years imprisonment.

[24] After having considered the above, I am of the view that there were indeed no substantial and compelling circumstances that warranted a deviation from the prescribed minimum sentences. I am however of the view that an effective term of 45 years imprisonment is shockingly disproportionate to the crimes. The seriousness of the crimes does however still warrant a long term of imprisonment under the circumstances.

[25] In the result I make the following order:

- a. The first appellant's appeal against sentence is upheld to the extent indicated below;
 - i. The sentences imposed on count, three, four and five are to run concurrent with the sentences imposed on count one and two.

- ii. A further five years imprisonment imposed on count two is to run concurrent with the sentence imposed on count one;
 - iii. An effective term of 25 years imprisonment is therefore imposed.
 - iv. The sentence is antedated to 30 March 2017.
- b. The second appellant's appeal against his conviction and sentence is upheld;
- c. The second appellant's conviction and sentence is set aside.

L.B.J. MOENG, AJ

I concur.

S. CHESIWE, J

On behalf of the 1 st appellant:	Ms S Kruger Bloemfontein Justice Centre BLOEMFONTEIN
On behalf of the 2 nd appellant:	Adv. TB Van Rensburg Jacques Groenewald Attorneys KROONSTAD
On behalf of the respondent:	Adv. DW Bontes Director of Public Prosecutions: Free State BLOEMFONTEIN.

