



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No.: A342/16

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

27/03/2018
DATE

[Signature]
SIGNATURE

In the matter between:

PETER PHASWANE RAMALEPE
ROMEO MUDE NDOU

1st Appellant

2nd Appellant

and

THE STATE

Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] The appellants were convicted of robbery with aggravating circumstances in the Pretoria Regional court. They were each sentenced to 15 years imprisonment.

[2] The Supreme Court of Appeal granted both appellants leave to appeal against conviction and sentence.

[3] In brief the state's case is that on 7 February 2012 at or around Haarnhof Street, Villiera, the appellants robbed Mrs Nel of her motor vehicle, a green Hyundai Atos after threatening her with a firearm.

[4] Mrs Nel testified that on the day in question at around 16h00, she went to visit a certain Mrs Grobler. After stopping in front of Mrs Grobler's garage and was about to get out of her vehicle, she was approached by three men, one of whom had a firearm. One of her assailants hit her on her head and cheek with a firearm. She pretended to faint and was dragged out of her vehicle and thrown on the pavement. Her assailants sped off in her vehicle. Mrs Nel further testified that her assailants did not take her handbag in which was her cell phone which she used to phone her husband. Mrs Nel admitted that she was not in position to identify any of her assailants except that one of them was wearing a white t-shirt with blue stripes.

[5] Mrs Charmaine Coetzee, a witness to the robbery testified that she was nearby the place where the incident occurred. She corroborated Mrs Nel's evidence as to how the robbery occurred. She also could not identify Mrs Nel's assailants

save to say that they were wearing bermudas. Furthermore, Mrs Coetzee testified that she was walking behind the suspects and could not see their faces.

- [6] The next witness called by the State is constable Romeo Motumi Kgotsi who testified that at around 16h15, he and constable Shebambo when on patrol on the boundary of Mamelodi and Villiera they received from radio control information about the hijacking of a light green Atos vehicle. When they spotted the vehicle, they tried to stop the vehicle and were forced to make a U-turn and chased it until the vehicle stopped and the vehicles' two occupants started running away. By that time they had called for backup. Constable Kgotsi testified that he managed to apprehend first appellant and second appellant was arrested by other officers who had responded to his request for back-up. Constable Kgotsi further testified that at the time the pursued vehicle stopped, he was able to identify its occupants as they had followed the suspect vehicle until it stopped. According to constable Kgotsi, on their arrest first appellant was wearing jeans and a second appellant, jeans and a blue t-shirt. Furthermore, constable Kgotsi testified that they did not see a third assailant nor was a firearm found when the appellants were arrested. Further, it was constable Kgotsi's evidence that in the area where the appellants were arrested, there were no other people.

[7] The appellants testified that on the day of their arrest they were walking in the street on their way to a football practice at a nearby stadium. They denied involvement in the hijacking of Mrs Nel's vehicle or her assault.

[8] The issue in this appeal is whether the identities of Mrs Nel's attackers were proven beyond a reasonable doubt.

[9] On the issue of identity, the Appellate Division as it then was, in *S v Mthethwa*¹, Holmes JA stated that:

"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 also be tested. This depends on various factors, such as the 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, built, 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 particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities."

[10] The evidence of the complainant, Mrs Nel and Mrs Coetzee is that they could not identify Mrs Nel's assailants except that there were three and to describe

¹ 1972(3) SA 766(A) at 768A-C.

what they were wearing. According to Mrs Nel, one was wearing a white and blue striped t-shirt and according to Mrs Coetzee they were wearing bermudas. Even if one were to accept that Mrs Nel, due to the fact that she was being assaulted and could not have been expected to observe the complete clothing the attackers were wearing, it is inexplicable why when the police arrested the appellants, they were found wearing jeans, let alone the colours of the t-shirts they were wearing which are different from the t-shirt described by Mrs Nel. Furthermore, Both Mrs Nel and Mrs Coetzee testified that Mrs Nel's attackers were three. Constables Kgotsi testified that when they spotted the stolen vehicle, they immediately gave chase until it stopped and its occupants ran out. There is no explanation as to what happened to the third suspect. It is improbable, as surmised by the court *a quo* that the third suspect could have been dropped off along the way as constable Kgotsi had testified that the only time the stolen vehicle stopped was when the occupants ran off. Furthermore, no firearm, as testified to by Mrs Nel and Mrs Coetzee was found on either of the appellants or in the vehicle.

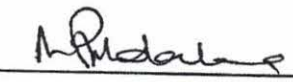
- [11] Taking into account the above factors, I am of the view that the appellants' version that they were on their way to a football practice and were not involved in the assault and robbery is reasonably possibly true. What is disturbing about the investigation of this matter is the fact that the police did not uplift fingerprints from the vehicle in order to verify if either of the appellants were in the said vehicle. I am of the view that the court *a quo* misdirected itself in relying on the evidence of the police officer on the identities of Mrs Nel's attackers in view of the contradictory evidence of Mrs Nel and Mrs Coetzee in this regard. I am furthermore of the view that the State did not prove beyond a reasonable doubt that the appellants were indeed Mrs Nel's attackers. I am satisfied that this court ought to interfere with the decision to convict the appellants on the charges preferred against them.

[12] In the result the following order is made:

1. The appeal against conviction and sentence is upheld.
2. The order of the court *a quo* on conviction is set aside and substituted by the following order:
'The appellants are acquitted on all charges'.


NP MNGQIBISA-THUSI
Judge of the High Court

I agree


MP MDALANA-MAYISELA
Acting Judge of the High Court

Appearances

For Appellants: Adv Pruis

Instructed by: Legal Aid South Africa

For Respondent: Adv Van As

Instructed by: Director of Public Prosecutions