



**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 number: A290/2017

In the matter between:

NKOSINATHI PHILLIP MAGADLELA

1st Appellant

SABATA CLEMENT MATHIJOA

2nd Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, J *et* CHESIWE, J

HEARD ON: 27 AUGUST 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 20 SEPTEMBER 2018

- [1] The appellants were charged together before a district magistrate sitting in Kroonstad on two (2) counts of housebreaking with intent to commit a crime unknown to the state and one count of

malicious damage to property. They were both found guilty on two (2) counts of housebreaking with intent to commit a crime unknown to the state and sentenced to three (3) years imprisonment on each count. In terms of section 103 of Act 60 of 2000 they were declared unfit to possess firearms. Leave to appeal against both convictions and sentences was initially denied by the district magistrate but granted by members of this court on petition.

- [2] The facts are briefly as follows: On 29 October 2016 at around 2H00am Paballo a security guard at a tavern situated at 13142 Snake Park, Maokeng, Kroonstad heard someone breaking the main gate and subsequently opening it. He went to stand behind the window to investigate. He observed two (2) male persons approaching the building. One was wearing a balaclava and another, a bandana. One was having in his possession a tool colloquially called a bobbejaan spanner and a screwdriver. They proceeded to break the window where he was standing with these tools.
- [3] They opened the window and stood staring at each other. He poked them and enquired what was the purpose of their visit there. They did not proffer any response.
- [4] He could identify the two (2) because he saw them earlier in the day. Even though they hid their faces, he could identify them with the clothes they were wearing. One was wearing an overall and the other mission cover. The one wearing a bandana even pulled it down at the time the window was broken. This was the second appellant.
- [5] He informed the owner of the tavern who came over to assist. They left in his bakkie to look for the two (2) and met them in the

street. The second appellant voluntarily entered their bakkie and the first appellant just left the scene. He was arrested by the angry community members the next day.

- [6] Cross-examination revealed that although the lights were off in the tavern, the television set was on. There were also lights outside the tavern which were on. In addition the second appellant had injured his leg and was limping at the time.
- [7] In the early hours of the same day Ditaba Joseph Motaung heard a window breaking at his house situated at 13130 Snake Park, Maokeng, Kroonstad. His premises is only three (3) houses from the tavern referred to in the preceding paragraphs. He went to investigate and opened the door leaving the steel burglar proof door locked. He observed two (2) men running away and he contacted the police for assistance. Typically they did not arrive citing lack of resources.
- [9] As a member of the Community Policing Forum he organized patrollers to look for the first appellant. They confronted and apprehended him that for the crimes he had committed with his friend (referring to the second appellant). They paraded him in front of the community members who were extremely agitated and wanted to attack him. He was saved from their wrath. He was shown the place he had broken into.
- [10] He was able to recognize them because they were known to him. It was also not the first time they tried to gain forced entry into his house. The first appellant was wearing a brown “hoody” and “yellow machine cover”. The second appellant was in a full brown overall. They were in possession of two (2) big pliers usually used to cut big iron rods and pipes. He could also recognize their body features.

- [11] Under cross-examination he conceded that there was a marked difference between the so-called bobbejaan spanner and pliers. He also did not see any screwdriver(s) in their possession. The whole incident happened in a short time. At the time he went to investigate he was not wearing his spectacles. On the issue of the adequacy of the lighting he relied on the floodlight that was positioned about 250-300 meters away from his house.
- [12] The evidence of both appellants in the trial court boiled down to bare denial. They testified that they were mistakenly identified as they were nowhere near the scenes of crime. They were simply being falsely implicated in the matter that they had no knowledge about it.
- [13] The appeal turns on the issue of identification. It is accepted that such evidence must be approached with caution particularly where there is a single witness because of the inherent dangers. The key aspect is that the observation of the person identifying another must not only be credible but reliable as well. This approach laid in the often quoted **S v Mthethwa**¹ has been followed in our courts for decades and it is still good law.
- [14] In evaluating the evidence before him, the district magistrate remarked that the complainants identified the applicants because they knew them. He also referred to their clothing and was satisfied that indeed the appellants were the same people who attempted to break into the premises of the complainants. He alluded to the fact that the complainant Victor Kganuoe met the appellants later that morning in the street and this was overwhelmingly convincing that they were the perpetrators of the

¹ 1972(3) SA 766 (AD) at 768 A-C

offense that early morning of 29 October 2017. He concluded by saying the following:

“In this circumstances with this manner of identification with²clothing and the face of accused nr. 2 at both crime scenes and accused nr. 1 later in the street it is too much to say it is a coincidence and that they the 2 witnesses try to frame these two people.”

[15] According to the witnesses the two (2) people had their faces masked with a balaclava and bandana respectively. None gave a detailed account or description relating to the appellants' voice, face, build or gait. The witness Victor Kganuoe stated the fact that the second appellant was limping because he had sustained an injury on his leg. It remains unexplained which one was affected by the injury. It was not tested to any significant extent the issue around the lighting and visibility. I find it insufficient that the light provided by a television set and a floodlight which is far away can be deemed to be adequate for one to make a proper observation. Similarly, there is no evidence to suggest that the complainants had sufficient time to observe and conclude that the appellants were their assailants on the day.

[16] This leaves the state case with one aspect namely clothing. The description about the clothing of the appellants is very generic. There is nothing distinctly unique to their clothing which can lead one to conclude that it was them. These items could have been worn by any person in the vicinity on that day. The description given by Paballo on clothing is that "one of them was wearing an

² Page 68 line 8 -12 of the Record.

overall, the other one was wearing a mission cover, they were just faced simple”.³ it is unclear as to who specifically was he referring to.

[17] The description provided by the witness Ditaba Motaung was that “accused number 1 was wearing a coat that has hoody it was brown in colour and he was wearing a yellow machine cover. Accused number 2 was wearing a full overall that is brown in colour”⁴. Both these descriptions are unhelpful. It is therefore my considered opinion that the state did not prove its case beyond reasonable doubt. The learned district magistrate committed a misdirection in convicting the appellants based on the evidence discussed above.

[18] For all these reasons, I make the following order:-

18.1 The appeal is allowed and the convictions and sentences are set aside.

MA MATHEBULA, J

I concur

³ Page 5 line 18 to 20 of the Record

⁴ Page 32 line 13 to 16 of the Record

S CHESIWE, J

On behalf of appellant:
Instructed by:

Adv. P. Van der Merwe
Justice Centre
Bloemfontein

On behalf of respondent:
Instructed by:

Adv. M. M. Moroka
Director of Public Prosecutions
Bloemfontein