



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: A60/2016

In the appeal of:

MOLEFI SEKHOPA

Appellant

and

THE STATE

Respondent

CORAM:

LEKALE, J *et* MURRAY, AJ

HEARD ON:

13 JUNE 2016

JUDGMENT BY:

MURRAY, AJ

DELIVERED ON:

30 JUNE 2016

- [1] On 24 November 2010 in the Regional Court, Bloemfontein, the Appellant and his co-accused, Patric Lichaba, were convicted of Robbery with Aggravating Circumstances read with ss 51(2), 52A and 52B of the Criminal Law Amendment Act, Act 105 of 1997, and

of contravention of s 2 read with ss 1 and 3, and of s 36 read with ss 1, 39(1)(h), 39(2) and 40, of the Arms and Ammunition Act, Act 60 of 2000, for possession of an unlicensed firearm and ammunition, respectively. They were sentenced to an effective 12 years' imprisonment each. On 19 January 2011 the trial court granted the Appellant leave to appeal against his conviction.

[2] The appeal serves before this court only now since parts of the recording in the trial were lost, wherefore sections of the record had to be reconstructed from the Magistrate's notes. Even the judgment had to be reconstructed since it had been delivered *ex tempore* and there was no trace of its recording.

[3] The Appellant, as Accused 2, had legal representation for the duration of the trial. In the appeal Mr J Makhene of Legal Aid South Africa appeared for him and Ms Lesie-Shale of the Office of the Director of Public Prosecutions for the Respondent. The State supported his conviction.

[4] The Appellant avers that his conviction cannot stand, however, because the trial court erred in finding that the only eyewitness, Ms Margaret Jacobi, correctly and reliably identified him. He avers

that the Court did not properly consider the cautionary rule applicable to her evidence as a single witness and erred in finding that there was corroboration for her evidence. He avers, furthermore, that the Court erred in rejecting his version and in finding that the State had proved its case beyond a reasonable doubt.

[5] The Appellant pleaded not guilty and gave no plea explanation. He claimed to have been walking home from work on the day of the robbery when he was apprehended by the police for no apparent reason and accused of having broken into a store that he knew nothing about. He averred that he was mistakenly identified as one of the robbers.

[6] The background facts, in a nutshell, are that on 3 July 2008 Ms Magdalena Jacobi and Ms Dikeledi Makateng were at work in the Hospital Park Store in Bloemfontein when three men entered the store at around 11h15. One locked the door from the inside and remained there, the second one walked into the kitchen and threatened Ms Makateng with a knife, telling her to kneel down and not look at their faces, and the third walked around the counter,

pointed a small hand-gun at Ms Jacobi and told her to sit on the floor while he tried to open the cash register. When he did not succeed, she opened it for him and gave him all the telephone cards from the drawer, as well. She saw him empty the contents of her handbag (cell-phones, credit cards, cash, etc) into a pink shopping-bag with the cash from the till and the phone-cards. The man with the knife also took her rings and watch. Ms Makateng's cell phone, earrings and bus-tickets also disappeared, but neither of them saw that happen.

- [7] The man with the gun then ordered Ms Jacobi to join her colleague on the kitchen floor where the one with the knife tied her hands with some shoelaces, while the gunman ordered Ms Makateng to come and open the second till in which the phone-card and lotto money were kept. When she could not do so, he ordered Ms Jacobi to come back and open it. At that stage two customers tried to enter the store and she shouted at them not to come in, lifting her tied hands to show them that something was wrong. They left and raised the alarm at the hairdresser and the AAA Meat Market and when several people responded, the three men fled on foot.

[8] The gunman was the last to leave, still carrying the pink bag with the stolen items. Two Meat Market employees chased him. They caught him almost immediately and handed him to the police, who brought him back to the store. He still had the small silver gun and the pink bag with him, as well as the money, phone cards, cell phones and Ms Jacobi's other possessions.

[9] The other two men split from the gunman while the Meat Market employees were chasing them. About an hour and a half later the police picked up the Appellant (Accused 2) and brought him to the store, as well. There the two pursuers and Ms Jacobi identified him as one of the assailants. He was arrested and charged.

[10] It is trite that because of the fallibility of human observation, courts need to treat evidence of identification with caution. In *S v Mthetwa*¹, the Supreme Court of Appeal warned that:

"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 lighting, visibility and eyesight, the proximity of the witness; his opportunity for observation, both as to

¹ 1972(3) SA 766 (A) at 768A - C

time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, 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 as much of them as are applicable in a 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."

- [11] Ms Jacobi easily identified Accused 1 as the man with the gun and also pointed him out in court. She testified that she knew him and recognised his face on 3 July 2008 because he had been in the store regularly, and was there as recently as the Wednesday before the robbery to buy Lotto tickets from her. She also had ample opportunity to recognise and observe him during the robbery while she was sitting behind the counter, when she was assisting him with the two cash registers and when she watched him emptying the contents of her handbag into the pink bag with the money and phone cards which were all recovered upon his arrest.

[12] Her identification of the Appellant is a different story altogether, however. In her police statement she stated that she would be unable to identify Accused 1's two accomplices. On her evidence she had never seen either of them before. She could not remember the man with the knife very well, but averred that the Appellant was the third robber who had remained standing at the door and that she recognised his face. She testified that although he had his back to her most of the time, he continuously looked

over his shoulder to where she was standing behind the counter, only three to four metres away. Yet on her own evidence on the gunman's orders she was sitting on the floor with her back to the counter and then on her knees in the kitchen, except when she was opening the cash register and attempting to open the second one under threat of the gun. As was submitted on behalf of the Appellant, she could therefore have had very little opportunity to observe the man at the door's face.

[13] When the Appellant was brought to the store after the robbery and she was asked to identify him, he was the only person in the back of the police van. On her own evidence she had to go back three or four times to look at him. Although she averred that she

recognised him the second time around, she still, on her own evidence, had to ask Ms Makateng if she was sure it was the man who had been in the store in order to establish that they were identifying the right person. She averred that they discussed it and that Ms Makateng also said *"but it is the man who had stood by the door"*.

- [14] Ms Makateng, on the contrary, according to the Magistrate's reconstructed notes, testified that she never looked at the men's faces and would not be able to recognise or identify either of them.

The typed part of the record that was available reflects that she testified that she was not even sure how many people had been in the store – she heard two. She knelt on the kitchen floor and crawled from the kitchen to the second till that she had been ordered to open where she remained on her knees behind the counter. She testified that she only got up when Ms Jacoby screamed as the men walked out with her bag, but the men had their backs to her and she never saw any of their faces. On her own evidence, and contrary to what Ms Jacobi had said, she was unable to identify either Accused 1 or the Appellant when the police brought them to the store. This accords with the

Appellant's averment that 'the black lady' said she could not identify him.

[15] Insp Havenga of the SAPS Dog Unit testified that he was driving in the direction in which the robbers had fled. Although he said that he gave a description of the two persons who were still at large to the other police units, he could not remember either the description or the colour of their clothing since "*there was total chaos*".

[16] Sgt du Plessis of the SAPS who apprehended the Appellant, confirmed that they had received no specific description of the two robbers they were to pursue, or of their clothing, other than that

they were two young black males. In a side street in Hospital Park he saw two people who fitted that description and who split up, with one crossing to the other side of the street, when they saw the police. Sgt du Plessis said he found that suspicious, even though the men were not running away from the van. By the time he had turned the van around at the top of the street, the suspects were no longer in sight. A little later he saw the Appellant on another street, apprehended him, searched him and found nothing, but took him to the scene of the robbery for identification.

[17] Insp Havenga conceded that he was *"not 100% sure"* that the person he eventually picked up was indeed one of the two persons they had initially pursued. According to him *"it could be them, it could not be them"*. He averred, however, that the Appellant was positively identified by the two employees from AAA Meat Market who had apprehended Accused 1 and by Ms Jacobi, all of whom had gone to look at him where he was sitting all alone in the back of the police van.

[18] Contrary to Insp Havenga's averment, however, the relevant Meat Market employee testified that by the time they arrived on the scene, the three robbers had already fled around a corner and when they ran after them, the three split up, with two running off in another direction, while they pursued only Accused 1. It is most improbable, therefore, that they could have seen more than the backs of the two fleeing robbers, which accorded with Sgt du Plessis' evidence that the only description they had received was that of *"two young black men"*.

[19] The Appellant's version was that he was walking home with a co-worker shortly after lunch on 3 July 2008 and just as they split up, a police van stopped in front of him and uniformed policemen with

drawn guns told him to stop. After searching him, they put him in the back of the van and took him to a place where two ladies, one white, one black, looked at him in the van. The black lady then told the police that the Appellant was not one of the men who had entered the store, while the white lady said nothing. A little later the police put Accused 1, whom he allegedly did not know, in the van with him and drove them to the police station where they were both locked up.

- [20] Despite stating that she simply could not remember what she had said in her *ex tempore* judgment, on the reconstructed version the Magistrate held the Appellant to have contradicted himself and to have departed from his instructions to the extent that she rejected his evidence as so improbable as to be not reasonably possibly true. In her judgment in the application for leave to appeal she stated that, although she was certain that she had correctly concluded his guilt from the evidence, another court might come to a different conclusion since his identification depended solely on Ms Jacobi's evidence, for which the Magistrate found corroboration in the evidence of Insp du Plessis.

[21] As is clear from paragraphs [12] and [13] above, Ms Jacobi's evidence is shaky, to say the least. In all probability she would have been so pre-occupied with the two robbers threatening her with a knife and a gun, that she would hardly have paid attention to the person who was just standing at the door, most of the time with his back to her. On her own evidence for the greater part of the incident, she sat behind the counter only looking over her shoulder from time to time to watch the gunman struggle with the cash register. There is no evidence that in that time she was able to observe the man at the door. The rest of the time she was kneeling on the kitchen floor with Ms Makateng, watched over by the man with the knife. Back in the store, still at gunpoint, she had to hit the second till with her fists in her attempts to open it. It is hardly likely that she would in that time have paid any attention to the man at the door. Immediately thereafter the three men fled. Nothing in her evidence, in my view, therefore supports the finding that her identification of the Appellant was reliable "*because she had ample time to observe*" him as the trial court found.

[22] Nor do I find any corroboration for her evidence in that of Sgt du Plessis, as the trial court did. Even though he averred that Ms Jacobi had positively identified the Appellant at the police van, it is

clear from her own evidence that she was so unsure of having identified the right person that she had to ask for confirmation from Ms Makateng who testified that she never saw their faces and could not identify them, and had to go back three or four times, after having '*recognised his face*' only on the second time around even though it was less than two hours after the robbery.

[23] The Supreme Court of Appeal made it clear in *S v Charzen*² that where identification is in dispute, the reliability of the identification must be beyond a reasonable doubt:

"... 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 the evidence of identification upon a witness' recollection of a person's appearance can be 'dangerously unreliable', and must be approached with caution."

[24] Even though the trial court found Ms Jacobi to have been a credible witness, I cannot agree that her evidence was reliable or complied with the criteria set out in *Mthetwa*³. She was, practically

² 2006(2) SACR 143 (SCA) at [11] at 374

³ *Supra*, at 768A-C

speaking, a single witness on whose evidence the trial court on its own version relied for the Appellant's guilty verdict. Her evidence therefore required cautious scrutiny. As stated in *S v Sithole*⁴:

"where a conviction depends on that evidence alone, a court must quite obviously be satisfied that the witness is truthful. What perhaps is more important, though, is that there must be no reasonable doubt that the witness is not mistaken. In our view that will generally require something more than the mere assertion by the witness that he has correctly identified the culprit, if the inherent risk of error is to be guarded against."

[25] In my view it is clear from the evidence that there is more than a reasonable doubt that Ms Jacoby correctly identified the Appellant. On her own version she is not sure that he is the man who was in the store during the robbery. Even Sgt du Plessis is not sure that he has arrested the right man.

[26] There is no physical evidence linking the Appellant to the robbery and confirming the identification. Unlike Accused 1, he was not found in possession of any of the stolen items or of the gun, the knife, or the ammunition. His fingerprints were not found on the scene, there was no description of his features or his clothing,

⁴ 1999 (1) SACR 585 (W) at 591E - F

other than that he was young and black, and he was 'identified' while he was the only person in the back of the police van. And as was stated in *Charzen*⁵:

"There was no physical evidence: not a fingerprint, not a recovered cellphone, nor wallet nor purse ... nothing to connect the accused to the crime and thus provide a measure of assurance against the pitfalls of subjective identification. The greatest test of guilt must lie in such evidence, rather than in identification on its own..."

[27] In the absence of evidence reliable beyond a reasonable doubt as to his identity and consequently of his participation in the robbery, I am of the view that the Appellant's conviction on the charge of Robbery with Aggravating circumstances cannot stand and has to be set aside.

[28] Regarding the charge of unlawful possession of a gun and ammunition, there is no such evidence either. In *S v Nkosi*⁶ the court held that there can be joint possession of a gun (or ammunition, for that matter) involving the entire group of assailants, or a common purpose between the members of the

⁵ *Supra*, at [19] at 375

⁶ 1998(1) SASV 284 (WPA) at 286 h-i

group to possess the gun, if the State has established facts from which a court can infer that:

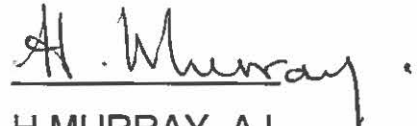
“the group had the intention (*animus*) to exercise possession of the gun through the actual detentor, and the actual detentor had the intention to hold the gun on behalf of the group”.

[29] In the present case the State cannot be said to have produced such evidence. Accused 1 and the Appellant denied that they knew each other. The gun was seen and found only in Accused 1's possession. The Appellant's fingerprints were not found on the gun, either. Although Accused 1 on the evidence was properly and reliably identified, the same cannot be said for the Appellant. And in the absence of conclusive evidence that the Appellant was indeed one of the persons who had been involved in the robbery, there could be no finding that Accused 1 had held the gun or the ammunition on his behalf or that the two of them had had a common intention (See: *S v Mbuli*)⁷ to possess the gun or the ammunition. The Appellant's convictions of the unlawful possession of a firearm and ammunition therefore cannot stand either.

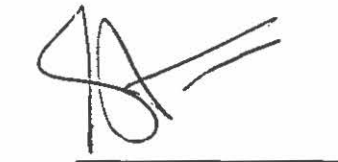
⁷ 2003 (1) SACR 97 (SCA) at [71]

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The appeal succeeds and the Appellant's conviction on counts 1, 2 and 3 is set aside.


H MURRAY, AJ

I concur.


L J LEKALE, J

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