



Reportable:	YES	NO
Circulate to Judges:	YES	NO
Circulate to Magistrates:	YES	NO

HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: **CA&R 99/16**

Heard: **05-12-2016**

Delivered: **15-12-2016**

In the matter between:

SHANE GREGORY ANTHONY

Appellant

v

THE STATE

Respondent

Coram: Kgomo JP et Williams J

JUDGMENT ON APPEAL

KGOMO JP

[1] The appellant (who was accused 2) was arraigned with two others (accused 1 and 3) before Regional Magistrate (Mr D Schneider), in Kimberley, on two counts. The allegations against them were:

- 1.1 That, in Count 1, they attempted to rob Hencor Dairies using a dangerous weapon (a firearm) on 28 July 2009. The provisions of s 1 of the Criminal Procedure Act (the CPA), 51 of 1977, were invoked.
- 1.2 That, in Count 2, between the period 23-28 July 2009 they broke into the house of Mr David Edward Benjamin and stole

therefrom his licenced Noringo Pistol, that was confiscated from Accused 1 during the botched robbery in Count 1.

- [2] The appellant was convicted as charged in respect of the Attempted Robbery but acquitted for the Housebreaking charge. Accused 3 was discharged at the close of the state case, in terms of s 174 of the CPA. Accused 1, whose s 174 of the CPA application was turned down, decamped and was still a fugitive from justice at the end of the trial. The appeal against both the conviction and the sentence is with the leave of the trial Court.

- [3] The appellant elected not to set out the basis of his defence. His counsel at the trial who also argued his appeal before us, Adv I J Nel, by way of a plea-explanation intimated that the appellant denies all the allegations against him. During the trial it emerged that the appellant suggests that he was falsely implicated by Mr Tello Molefe, a registered and paid police informer. In testifying the appellant also, somewhat, raises an alibi to the effect that he was elsewhere when the alleged attempted robbery unfolded.

- [4] At the commencement of his evidence Molefe, or more correctly the state, did not disclose that he was an informer nor that he was a so-called accomplice. He was therefore not warned in terms of s 204 of the CPA and did not, accordingly, enjoy any immunity from prosecution. When his informer cover was blown under cross-examination Molefe found himself in an invidious position and initially, ill-advisedly, denied his informer status. He ultimately conceded this to be so (the true state of affairs) which also explains why he was never charged with appellant and his fellow participants mentioned above.

- [5] Senior state counsel, Adv JJ Cloete, who is very experienced and fair-minded observed in his written heads that (translated):

“7.3 This matter has been handled in a clumsy manner by the police. Molefe should have been treated as an ‘agent’ from the inception of the investigation in accordance with the provisions of s 252A of the Criminal Procedure Act, 51 of 1977. His evidence should also have been presented in that manner (by the prosecution) before court. He should not have been placed in the invidious position which inevitably caused him to suppress what his true role was.

7.4 In any event, notwithstanding the fact that his evidence must be treated with caution on this basis, and also because of his (initial) untruth, there are still adequate circumstances or guarantees reducing the risk of a wrong conviction. These guarantees are located in the objective facts, corroborating evidence and the probabilities.”

[6] The submission in para 7.4 accords with what was stated in **S v Artman and Another** 1968 (3) SA 339 (A) at 340H-341D where Holmes JA stated:

“I pause here to observe that there is no rule of law requiring corroboration in criminal cases: [See sec. 208 of the CPA]. There is a cautionary rule of practice, in regard to the testimony of accomplices, --- , and young children, in terms of which trial courts must:

- (a) Warn themselves of the dangers inherent in their evidence.*
- (b) **Require some safeguard reducing the risk of wrong conviction. The safeguard need not consist of corroboration, but if corroboration is relied upon as the safeguard, it must go the length of implicating the accused in the commission of the crime.** See S v Hlapezula, 1965 (4) SA 439 (AD) at p. 440D - H, and R v Manda, 1951 (3) SA 158 (AD) at pp. 162E to 163E.”*

The Court went on later to say:

"I would add that, while there is always need for this test in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense."

THE EVIDENCE OF TELLO MOLEFE.

- [7] Molefe testified that on or about 28 July 2009 the appellant phoned him and requested that they meet at Shoprite, Barkly Road, Galeshewe, because he has a task that he wishes Molefe to perform. They duly met at the nominated venue. The appellant drove a distinctively painted (or coloured) green "Golf 3". The appellant invited him into the vehicle and informed him that he wanted to interest him in a robbery that he was planning.

- [8] Molefe (as passenger) drove with the appellant towards Homelite and stopped along the road. The appellant phoned. A man that he later knew as Rahim (it is common cause his correct name is Rashid) emerged from a nearby yellow house. The two had a conversation but away from Molefe. The appellant asked him to wait for him where he stood outside the vehicle whilst he and Rashid drove off. The two later re-emerged from the same house. Rashid occupied the front passenger seat. The appellant asked Rashid where the bag was to which Rashid replied that he had forgotten it and fetched it from the same yellow house, which appears to be his as he moved in and out of it. It was a black bag. He produced a firearm from it, a 9mm.

- [9] The appellant dropped them off on a corner next to the "Moslem Church", meaning a mosque. He drove about 60 meters away where it was arranged they would rejoin him after the robbery. The appellant had informed them that a van would deliver money to

Hancor Dairies, situated next to the mosque. They had to rob it. They went round to survey the situation at Hancor Dairies and retreated therefrom having done so. The police then surprised and arrested them. The appellant then sped off. The firearm was confiscated from Rashid by the police.

[10] The arrangement was that Rashid would use or point the firearm at the transit money carriers. Molefe would remove the money bag from the van and the appellant would drive the getaway car. According to Molefe he did not know the third person, accused 3, who was discharged at the close of the state case.

[11] Molefe says he at no stage saw the silver van that they were expected to rob. Because his arrest was not genuine, but a mere pretence, Molefe was subsequently set free.

THE EVIDENCE OF SGT JOHN PHINDILE TOISI.

[12] Mr Toisi is a sergeant in the South African Police Service (SAPS). He is attached to the Criminal Intelligence Gathering Unit (CIGU). He confirmed that Molefe was a registered informer and he was Molefe's handler. During the afternoon of 28 July 2009 Molefe reported to him that a robbery was being planned at Hancor Dairies that same afternoon and that he was due to meet the conspirators later at Shoprite, Barkly Road, Kimberley. A description of the appellant's vehicle, a green Golf 3, was supplied.

[13] Sgt Toisi drove to Shoprite, Barkley Road, in an unmarked police vehicle to look incognito. He spotted the described vehicle in the parking lot with a single occupant. He then kept observation on what was going to unfold. After waiting for about 15 minutes he noticed Molefe approaching on foot and headed for the Golf 3 and got into its backseat. After about 10 minutes they drove in the direction of Homelite. Sgt Toitsi tailed them unobtrusively.

[14] The vehicle stopped opposite a yellowish house, clearly the same house described by Molefe. Molefe alighted. Rashid emerged from that house and approached the vehicle empty handed. Rashid returned to the house, surely his house, and thereafter departed with the appellant leaving Molefe behind. In the meantime Sgt Toisi had driven past Rashid's house not to raise any suspicion. In due course he was joined by his colleague, Const David Lani. Molefe used his isolation and reported telephonically that he had not noticed any firearm in the possession of the plotters. Sgt Toisi nevertheless summoned backup.

[15] The appellant returned from wherever he went to and picked up Molefe. Rashid then re-emerged from his house carrying a black bag and occupied the front passenger's seat. It appears that the appellant had not fully briefed Molefe on where exactly the robbery would take place, maybe for tactical reasons. However, they ended up at Hancor Dairies. Molefe signalled to Toisi that everything was on course. Toisi then communicated with the backup police, of the Dog Unit, to pounce and intercept the would-be robbers, which they did. The 9mm firearm stolen from the premises of Mr David Benjamin was found in possession of Rashid, a common cause factor.

[16] Sgt Toisi says he looked around for the green Golf but it was nowhere to be seen.

THE EVIDENCE OF PETRUS ERASMUS SERFONTEIN.

[17] Mr Serfontein is the owner of Hancor Dairies which is situated at Number 22, St Augustine Way, West End, Kimberley.

[18] The appellant was well known to him. He regularly refuelled at Bagbro Motors, a Shell Garage, which is also owned by Hancor Dairies. He knew the appellant's vehicle. It was a Volkswagen Golf. It has unmistakable fancy mag wheels (shiny and black). The

colour was a distinctive green. On its front windscreen was imprinted the words "John Black" prominently.

[19] Serfontein had a meeting at Quick Spar with its manager at around 18h00 on 28 July 2009. Quick Spar is adjacent to Hancor Dairies. He noticed the appellant's vehicle next to the mosque with two occupants. He recognized the appellant who was behind the steering wheel. He was unable to identify the appellant's passenger. He passed next to them, a distance of 4 or 5 meters.

[20] Less than 30 minutes into his meeting with the manager of Quick Spar the manager of Hancor Dairies and Bagbro, Mr Guy Smook, who is also his brother-in-law, phoned him concerning police activity at Hancor Dairies. On his arrival he found that two men, unknown to him, had been arrested on an allegation of an attempt to rob Hancor Dairies or the transported money. The appellant and his vehicle had disappeared from where he had seen them shortly before.

THE EVIDENCE OF GUY SMOOK.

[21] Mr Smook stays close to Hancor Dairies, St Augustine Way. In fact he stays only a few houses away in the same street. It had been his responsibility for the past two years (before 28 July 2009) to cash-up (check the money) after the morning and late afternoon shifts and lock it up in a safe. He personally transported the money consisting predominantly of cash (over 80%) from Bagbro Motors to Hancor Dairies. The money transit usually took place between 17h00 and 19h00, depending on the amount of the cash takings, how busy the business for the day was and other circumstances. Hancor Dairies produced dairy products and processed fruit juices. Their transactions were also predominantly conducted on a cash basis. He usually transported between R40 000.00 and R100 000.00 per trip.

- [22] Smook knew the appellant and the vehicle he drove. In addition to the description already given Smook says the “John Black” stuck on the windscreen is reflected on a small banner in handwritten form. He saw this vehicle parked next to the mosque the previous day (27/07/2009) with two occupants inside. He can’t say who they were nor whether the appellant was Moslem or had gone to worship. He did not notice this vehicle in the vicinity of Hancor Dairies on 28 July 2009.
- [23] Both Serfontein and Smook were oblivious of the fact that an operation was in progress to thwart the robbery allegedly planned for Hancor Dairies.
- [24] There is no need to deal with the evidence of the other arresting officers as it is largely common cause and does not contribute materially to the outcome of the case.

THE EVIDENCE OF THE APPELLANT: SHANE GREGORY ANTHONY.

- [25] The appellant testified that a few days before 28 July 2009 he phoned Molefe, the informer, to demand that Molefe pay him the R500.00 for the magwheels that the appellant sold to him two months before. On 28 July 2009 he noticed four or five missed calls emanating from Molefe on his phone. He returned the calls whereupon Molefe suggested that they meet at Shoprite, Barkly Road, where he would settle the debt. Appellant says he was accompanied by “*my vriend, beskuldigde 1 [Rashid].*” Who had been at his (appellant’s) home. He drove his own vehicle, “*groen Volkswagen 3.*”
- [26] At Shoprite, Barkley Road, while waiting for Molefe he or Rashid (he could not recollect) bought napkins and baby milk, *inter alia*, for his child. Appellant again phoned Molefe who then arrived shortly. They drove to and stopped at Bloemanda where Molefe said he

would collect the money from his uncle. Molefe left the car for the money and reported on his return that his uncle was at West End. Molefe carried a bag and said it contained his gym-outfit, he wanted to work out or exercise afterwards.

[27] On their way to West End a tyre suffered a puncture. They replaced the wheel with the spare one. Molefe was agitated and said his uncle just communicated that he wanted to leave. This to me suggests, if the appellant is to be believed, that Molefe and his uncle, so-called, had telephonic contact. At *“St Augustine Straat se hoek het [Molefe] gesê --- ek moet hier stop, hom oom bly daar.”* Because his girlfriend pestered him with telephone calls he asked Rashid to receive the money from Molefe and that he will collect it from him on his return. Like a courier the appellant dispatched the articles to his girlfriend at Roodepan. He says he went *“terug Homevalley toe”* to his friend where he waited for a call from Rashid that he be collected. This Homevalley friend is not his girlfriend to whom he delivered the baby articles.

[28] Appellant says first his girlfriend and later the police phoned him that he was wanted in connection with an attempted robbery. He submitted himself to the Transvaal Road Police Station, Kimberley, where he was arrested and charged. If the appellant was not already on the run for the abortive robbery it then becomes curious why he did not just wait at his girlfriend's home for Rashid's telephone call. More credibly he should have collected Molefe and Rashid outright where he allegedly dumped them.

EVALUATION OF THE EVIDENCE

[29] Having regard to the summary, the distilled salient features, of the evidence sketched hereinbefore and the assessment of the evidence as a whole the question arises whether the Regional Magistrate misdirected himself in any material respect. Of cardinal importance are these remarks in his judgment (translated):

"It cannot be gainsaid that there are certain untruths in the evidence-in-chief of Molefe. I have traversed his evidence meticulously with a magnifying lens pertaining to the contradictions in his evidence. It is clear to me that the inconsistencies revolve essentially 100% around his responsibilities or functions as an informer. If those aspects are for the time being left out of the reckoning then it becomes evident that Molefe related a version to the Court which, in my view, does not exercise credulity to its outer limits."

I agree. This is why.

[30] Molefe concealed the fact that he was an informer. However, when he was confronted with his statement made to the police, in which he was transparent and frank about his informer status, he readily acknowledged his indiscretion on the aspect. The Magistrate then later proceeded (also translated):

"The question arises naturally, what precisely went on in the mind of the witness, Molefe, when he (so) testified. Did he not realise that he would be confronted with his statement, a statement wherein he unequivocally declared that he is an informer. It is difficult to speculate on the motivation. I imagine, in the circumstances, that there is only one inference to be drawn from the facts. This is, when Molefe stood in the witness box, with a packed gallery and the accused confronting him, his courage had deserted him. He at that moment decided not to disclose his informer status to the Court.

Apart from this remissness Molefe's evidence is exceedingly credible. I consider in the circumstances, that his evidence cannot, without more, be rejected in that he ostensibly merely endeavoured to protect his informer status."

[31] Let us now examine the cogency of the Magistrate's expressions:

- 31.1 It is common cause that Molefe and the appellant knew each other very well to the extent that they had exchanged cellphone numbers before this incident;
- 31.2 It is common cause that they arranged telephonically to meet at Shoprite, Barkly Road; leaving aside for the moment who initiated the call and what the purpose of the proposed meeting was;
- 31.3 It is common cause that pursuant to the telephonic discussion in para 31.2 (above) Molefe and the appellant met and that the latter was in the company of Rashid (accused 1 who decamped during the trial);
- 31.4 It is common cause that the party of three (named in para 31.3) drove to Hancor Dairies in the very distinctive green Volkswagen Golf 3 belonging to and driven by the appellant;
- 31.5 It is common cause that the appellant dropped off Molefe and Rashid next to Hancor Dairies and drove off. This is so irrespective of why they were left there and why the appellant left and where he went to;
- 31.6 It is common cause, whether on the version of Molefe and Sgt Toisi or that of the appellant, a black bag, irrespective of what it contained, was introduced into the appellant's car with which they drove around; and
- 31.7 It is common cause or not disputed or it was proven that a 9mm firearm was confiscated from Rashid (whom appellant called his friend and with whom he came) next to Hancor Dairies. This firearm belonged to Mr Edward David Benjamin whose house was burgled a few days before 28 July 2009 and the weapon stolen therefrom.

WHY THE APPELLANTS VERSION MAKES NO SENSE AND IS ULTIMATELY FALSE.

- [32] The defence denies that a conspiracy to rob Hancor Dairies, or any other target for that matter, was hatched and was in the process of

execution. The appellant, in his entire evidence does not accuse Molefe, the informer, of staging the robbery for any informer's reward or to get the appellant into trouble. Any suggestion to that effect would, in any event, lack a foundation. If that was Molefe's scheme he would have ensured that the appellant remained on the scene of crime and not in the getaway car, out of sight.

[33] Molefe, on his and Sgt Toisi account, notified Sgt Toisi on the spur of the moment, shortly before 16h00, when Toisi was already on his way home after he knocked off duty about the planned robbery. The point made is that if Molefe initiated a money-making scheme he would have consulted timeously with Sgt Toisi and only then lured the appellant into a trap.

[34] The appellant states that he discovered several missed calls from Molefe on his cellphone. When he returned the call Molefe informed him that he has the R500.00 that he (Molefe) owed the appellant for magwheels he bought. If this was so common sense dictates, even for someone who is slow in the uptake, that Molefe should have taken the money to the appellant or *vice versa*. After all, appellant claims, they had transacted before and were in telephonic contact. The round-tripping, therefore, away from their respective homes, to Shoprite (Barkly Road), then to Molefe's uncle's home at Bloemanda (which turned out not to be his home) and culminating at Molefe's uncle's actual home, which per chance was in close proximity to Hancor Dairies, also in St Augustine Way, is puerile and "*hogwash*".

[35] The appellant states that before they reached Molefe's uncle's "*actual home*" his uncle phoned and warned him that they must hurry up as he is due to leave for an engagement elsewhere. What this implies is that:

35.1 Molefe and his uncle were in telephonic contact and that the Bloemanda trip could have been avoided;

- 35.2 Secondly, Molefe's uncle knew about the R500.00 he had to advance to Molefe and had the money;
- 35.3 All that Molefe had to do was to collect the money from his uncle, because this is where appellant drove them to; release his impatient uncle, and settle his debt with the appellant. This scenario therefore makes the appellant's excuse that he was pressured by his girlfriend to deliver the baby items, even for a henpecked man, irritatingly hollow. The simple truth is that the appellant fled from the crime scene.
- 35.4 According to the appellant having delivered the baby items in Roodepan, far away from Molefe's uncle's home, he did not return to collect his companions and his money. Instead he undertook another trip to another friend at Homevalley. His explanation? He wanted Rashid to phone him to collect them. The truth is that he was on the run.
- 35.5 The alleged first trip to Molefe's uncles home at Bloemanda (that turned out not be be his home) was merely brought in as a ruse by the appellant to shift the blame to Molefe that he brought the firearm in the black bag, which he claimed carried his gym outfit. The evidence by Molefe and Sgt Toisi is overwhelming that Rashid brought the firearm from his home (the yellow house). The appellant knew about it because, according to Molefe, when Rashid came empty handed to the vehicle the appellant sent him back to collect the bag with the firearm that was in due course found in Rashid's possession. Toisi also observed the second trip to the yellow house.
- 35.6 It was common cause that (the now known armed) Rashid and Molefe did not know each other and that Rashid was brought along by his friend, the appellant. The appellant delivered his armed friend next to Hancor Dairies while he waited in the getaway car. Serfontein, the owner of Hancor Dairies, saw appellant and another person at this strategic

location hardly 30 minutes before the would-be robbers were intercepted.

[36] The appellant, apart from the evidence of Molefe and Serfontein, also places himself on the scene. His alibi, if his defence can be read to be such, is “*gone with the wind*”. See: **S v Mlati** 1984 (4) SA 629 (A) at 632 A-D; and 640E-I; **S v Thebus and Another** 2003 (2) SACR 319 (CC) from 349c-354b (paras 59-78); **S v Shabalala** 1986 (4) SA 734 (A) at 736C-D. See also Full Bench Judgment **Steward v S** (CA&R83/15) ZANCH 18 (9 September 2016) at paras 42-45.

[37] The proper approach in the evaluation of evidence in a criminal trial has been enunciated in this manner by Heher AJA in **S v Chabalala** 2003 (1) SACR 134 (SCA) at 139i-140b (para 15):

“[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.”

See also **S v Trainor** 2003 (1) SACR 35 (SCA) at 41b-c.

[38] The Regional Court's approach is correct and his reasoning is sound. He has not misdirected himself in any material respect. This being the case we, as a court of appeal cannot intervene. The appeal must fail.

ON SENTENCE.

[39] The Magistrate has blotted his copy book by also granting leave to appeal on sentence. He sentenced the appellant to 10 (ten) years imprisonment, 5 (five) years of which was suspended for 5 (five) years on certain conditions.

[40] The appellant has previously been sentenced to 9 (nine) years whereof 3 (three) years were suspended for 5 (five) years on certain conditions for a robbery he committed on 09 April 2000. Judgment on appeal in that case was delivered on 10 March 2004.

[41] Mr Nel, for the appellant, fairly conceded that he cannot argue that the sentence was shockingly excessive. In my view appellant was lucky to have had five years of the ten suspended.

[42] I make the following order:

The appeal on both the conviction and sentence is dismissed.

F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

I concur.

C C WILLIAMS

JUDGE

Northern Cape High Court, Kimberley

Counsel:

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