



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR350/2016

In the matter between:

S MADONDO

Appellant

and

THE STATE

Respondent

Coram: Koen J (Chetty J concurring)

Heard: 22 November 2016

Delivered: 8 December 2016

ORDER

1. The appellant's appeal against conviction succeeds.
 2. The conviction of the appellant of robbery with aggravating circumstances, and the sentence imposed by the court *a quo* in respect of the appellant (Accused 1 in the court *a quo*), are set aside and substituted with a finding of 'Not Guilty'.
-

J U D G M E N T

KOEN J

[1] The appellant, who was accused 1 in the court *a quo*, was convicted of robbery with aggravating circumstances. Following his conviction he was sentenced to fifteen (15) years imprisonment of which three (3) years were suspended for five (5) years on condition that he was not again convicted of robbery with aggravating circumstances committed during the period of suspension. Leave to appeal against conviction and sentence was refused by the court *a quo* but following a petition to this Court, leave to appeal against conviction was granted.

[2] It is not in dispute that on 6 May 2015 and at or near the Slovo area, Edendale, Plessislaer, the complainant, Mfundo Ngenwa, was confronted by three assailants, one armed with a firearm and another with a knife, which resulted in his Samsung cellular phone valued at R1 400.00 and a wallet being taken from him forcibly. He identified accused 2 as one of his assailants, as he was known to him since 2010 when he moved into the area. The other two assailants he did not know. What was in dispute before the court *a quo* was whether the appellant was one of these two assailants.

[3] The robbery occurred whilst the complainant was on his way from his parental home to his place of residence at approximately 8.30pm. He was confronted by accused 2 who grabbed him by his clothing from behind, placed a knife against his neck and demanded the cell phone. Accused 2 removed the complainant's wallet whilst one of the other two co-assailants, not the one who was armed with a firearm, removed the cell phone from the complainant's hand. The complainant managed to run away to his home where he reported that he had been robbed.

[4] The area where the complainant was robbed was on a footpath below a road. There are street lights on the road, at a distance of some 8 or 9 metres from where the robbery occurred. According to the complainant the incident took 'less than 10 minutes', or 'about 10 minutes'. He was able to provide a description of the clothing worn by accused 2 and that of the assailant who was armed with the firearm, but was unable to give a description of the clothing worn by the assailant who removed his cell phone. He also did not provide a description of this assailant to those to whom he reported the robbery at his home, nor did he mention it initially in his evidence-in-chief. Towards the end of his evidence-in-chief he testified that during the robbery he saw the faces of the appellant and accused 2, but then immediately qualified it by saying that, '... I did not see their faces clearly they were holding me.'

[5] The complainant does not know the appellant, nor does he know his name. He had not seen the faces of his assailants 'clearly'. At best he would have observed his attackers with the limited illumination emanating from the street lights some 8 to 9 metres away. At the time of the robbery it was already dark. The assailant who removed his cell phone however had to come sufficiently close to him to remove it from his hand. The event must however have been a very emotional and traumatising one which would no doubt have affected his powers of observation and recall. It might be that the opportunity to observe was not brief, being estimated at approximately 10 minutes, but this estimation might itself be open to doubt as the robbery described by the complainant was unlikely to be of such a long duration. The harrowing nature thereof probably made it feel much longer than it actually was.

[6] There were various community members present at the complainant's home as one of his family members had passed away. He did not give any description of his assailants to any of the members or the community, as one might expect if there was a particular distinctive identifying characteristic unique to his assailants, such as for example a very light or very dark complexion, or a distinctive hairstyle such as for example dreadlocks.

[7] Unfortunately the members of the community, who numbered somewhere between twenty to thirty persons, then decided to take the investigation into their own hands rather than leaving it to the police. Their reasons for doing so are irrelevant. These community members and the family of the complainant went out to look for the perpetrators or suspects. At approximately 22h30 they came across accused 2. They started assaulting accused 2 (a knife was allegedly found on his person, although it was never produced in court or as an exhibit). Accused 2 denied any involvement in the robbery at first, but having been promised 'a hiding', allegedly said something to the community members present where after he then led them to the home allegedly 'of the one who had been with him when they committed the robbery'. It is not in dispute that accused 2 and these various community members arrived at the home of the appellant shortly after midnight. At the home of the appellant, the complainant saw the appellant whom he said he recognised as the one who had robbed him of his cell phone 'by his dreadlocks as well as his complexion'.

[8] No previous description along those lines had been provided to any law enforcement agency or even the members of the community. Later during his evidence the complainant said that he had given that description to the investigating officer, but when the investigating officer was called to testify, this aspect was not even raised with him by the prosecution. No interrogation as to the nature of the dreadlocks followed, for example whether the locks covered his entire head, or were only at the back of his head. Nor was there any investigation of the complexion by which the appellant was allegedly recognised, particularly whether it was a dark complexion or a light complexion, or whatever.

[9] The basis for the complainant's identification of the appellant is summarised in a statement towards the end of his evidence in chief where he said that he identified the appellant by his 'complexion and dreadlocks and the fact that accused 2 also took us to him, to accused 1' (my emphasis). That statement is significant because it introduces the real danger that the seemingly positive identification of the appellant might have been caused or

influenced (possibly exclusively) by the conduct of accused 2 leading the complainant and the others to the appellant as a co- assailant. The position would obviously have been different if the complainant had right from the outset reported to the community that one assailant had dreadlocks and that there was something unique about his complexion (whatever that may be). But more importantly also, accused 2 did not proceed to the home of the appellant freely and voluntarily.

[10] It was as a result of an assault on accused 2, that the crowd was led to the home of the appellant. Whatever was communicated by accused 2 to the community and resulted in them ending up at the home of the appellant, effectively pointing out the appellant as allegedly one of his co-perpetrators, was on any version not done freely and voluntarily. The assault also subsequently extended to the appellant. The nature and extent of the assault might be exaggerated in the evidence, but whatever the exact severity of the injuries, they did require hospitalisation, if for no other reason than at least as part of police procedure to have detainees who had been assaulted examined by a medical practitioner. The evidence of the arresting officer, Constable Sithole was that when he went off duty at 6 a.m. the next morning, the appellant and accused 2 were still at hospital in connection with their injuries.

[11] The learned magistrate, who had the benefit of observing the complainant, was impressed with his honesty and demeanour and believed on the evidence, some of which is briefly outlined above, that the opportunity for observation and identification of the appellant was adequate to ensure the reliability of his identification. She also appreciated that the complainant was a single witness and that his evidence would have to be approached with caution.

[12] The danger in accepting the evidence of a single witness on identification, even one honest and believed to have had a sufficient opportunity to make a relatively reliable identification, always lies in the possibility of a genuine mistake, or the witness coming to believe, because of

the particular prevailing circumstances, that the perpetrator to whom certain indicators might wrongly point, in fact being a co-perpetrator.

[13] The complainant, although not injured in the robbery, experienced a very traumatic event. He was not able to clearly recall the faces, could not describe the clothing of the appellant at all, did not know the appellant by name or by appearance, and was led to the home of the appellant by an involuntary pointing out by accused 2 following an assault. The learned magistrate in considering the complainant's evidence concluded that 'what, however, stood out for him was the facial structure and complexion of accused 1 as well as the fact that he had dreadlocks.' There was no evidence that the identification of the appellant was in any way influenced by 'the facial structure' of the appellant. It is in my view more likely that the primary or determining factor resulting in the identification of the appellant as a co-perpetrator was, as the complainant himself stated, 'the fact that accused 2 also took us to him, to accused 1'.

[14] With the suggestion that the person to whom accused 2 was taking them being a co-perpetrator, the real possibility arises that when faced with a person with dreadlocks, that this person could be mistaken for the assailant who had robbed him of his cell phone, who might also have had dreadlocks. It would have been easy for the complainant to have referred to the fact that when the robbery took place and during the approximate 10 minutes that it lasted, he noticed that the person who took the cell phone from him had dreadlocks and had a particular complexion. None of that happened.

[15] I would also have expected that when he reported the robbery to his family and the members of the community, that such unique identifying features, at least in so far as the dreadlocks are concerned, would immediately have been communicated by him to them to assist in their search of the perpetrators. However none of that happened. That remains surprising and a disconcerting feature of this case, and the complainant's evidence.

[16] More important also is the inadmissibility of the evidence that resulted in accused 2 and the community arriving at the home of the appellant, which seemingly played a major part in the complainant concluding that the appellant was one of his assailants. That conduct of accused 2, whether it was accompanied by any oral statement by accused 2 or not, has the effect of an extracurial admission by a co-accused against the appellant – see *S v Litako and others* 2014 (2) SACR 431 (SCA). Accordingly, that evidence was in my view inadmissible, even apart from the fact that it was not made freely and voluntarily. That evidence therefore clearly must be disregarded.

[17] All that then remains on the evidence regarding the identification of the appellant, are his 'dreadlocks' and 'complexion'. In the absence of these having being explored to establish any unique quality or nature thereof, doubt remains as to whether the identification of the appellant was reliable beyond the possibility of a mistake based on observations made under the difficult circumstances which prevailed at the time of the robbery. The version of the appellant had been that he was not involved in the robbery. That version cannot be said not to be reasonably possibly true. The learned magistrate was critical of his failure to have called his family to support him on that score. However, his family members were present when the community members came to his home with accused 2 after midnight. I did not understand the evidence to be that they were necessarily around to be able to vouch for his whereabouts at 8.30 pm on that day. The appellant furthermore bore no onus of proving his alibi or any defence. The onus remained throughout on the state

[18] There are also other disquieting features of the complainant's evidence. He readily conceded that both Accused 2 and the appellant were assaulted by a variety of sjamboks and sticks, yet when the arresting officer came upon them and detained accused 2 and the appellant, his response to a question as to whether the community was armed was a simple 'no'. He however confirmed that the appellant and accused 2 'had been beaten up on their faces'. He was not handed any knife or weapons.

[19] It is unfortunate that the community had taken the investigation upon themselves. The complainant conceded that he could have approached the police and reported the matter to the police. Had he done so, he could have given a proper description of his attackers, specifically with reference to the appellant, by describing his complexion and dreadlocks, if these were indeed identifying features he had noted. Investigations by the police with accused 2, who was known by name to the complainant, could then have resulted in the arrest of the appellant who could then have been part of a properly convened identification parade. If then positively identified by the complainant from amongst a random collection of men of similar build and appearance, the identification would have carried considerably more probative weight, as opposed to an identification with reference to vague features following an inadmissible pointing out and extracurial admission.

[20] The appellant is entitled to the benefit of the doubt which in my view there must be regarding the reliability of the complainant's 'identification', and whether it can be said beyond a reasonable doubt that could not have been a 'mistake' that the appellant had indeed been involved in the robbery. There was no other evidence, such as being found in possession of the stolen cell phone, or any other safeguard, to ensure the reliability of the single evidence of the complainant on identification.

[21] The appeal must accordingly succeed. The conviction and sentence imposed by the court *a quo* in respect of the appellant are set aside and substituted with a finding of 'not guilty'.

KOEN J

CHETTY J

Appearances

For the Applicant:
Instructed by:
Tel.: 033 394 2190

MS P ANDREWS
Legal Aid

For the Respondent:
Instructed by:
Tel.: 033 845 4400

MS S SENEKAL
The DPP