



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

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

16.02.2015  
 DATE

M. D. Mphahlele  
 SIGNATURE

17/2/15  
 CASE NO: A753/2013

In the matter between:

**ANDRIES TEBOGO KGAFELA**

**Appellant**

And

**THE STATE**

**Respondent**

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**JUDGMENT**

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**PHATUDI AJ**

**[1] INTRODUCTION:**

The Appellant in this matter Andries Tebogo Kgalefa together with his co-accused, Jerry Sithole and Thato Charles Mothiba, had been

charged and convicted in the Regional Court, of Oberholzer, on two (2) counts of robbery with aggravating circumstances, and one (1) count of kidnapping. The three were however, acquitted on count four (4), which involved illegal possession of a firearm and ammunition. For their conduct, the accused were each sentenced to ten (10) years' imprisonment in respect of each of the counts for which they were found guilty. The sentences were ordered to run concurrently. They were at all material times assisted by a legal representative in the course of the trial to its conclusion.

The three accused, after conclusion of the trial, applied for leave to appeal against conviction and sentence. The application was, however, refused by the trial magistrate. The three accused subsequently petitioned the Judge President of this Division for leave to appeal both their convictions and sentences.

Accused 1, Andries Kgafela's ("the appellant") petition for leave to appeal, in particular, was confined to leave to appeal his conviction only, while accused 2 and 3 did not prosecute their appeals any further, and were also not represented when the appeal was argued. The petition in terms of Section 309c of the Criminal Procedure Act, 1977 ("the Act")<sup>1</sup>, for leave to appeal against accused 1, 2 and 3's convictions was granted by this court on 16 August 2013, while leave to appeal the sentences imposed was refused.

It was against this background that accused 1 ("the appellant") brought this appeal before this court for determination on whether he has been correctly convicted.

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<sup>1</sup> Act 51 of 1977, as amended

[2] SUMMARY OF THE MATERIAL FACTS:

This appeal concerns robbery with aggravating circumstances and kidnapping which allegedly took place at or near Carletonville on 13 August 2007. The appellant and his co – accused were arrested and charged with two counts of robbery with aggravating circumstances, and one count of kidnapping. They were all acquitted on the fourth count, namely, that of unlawful possession of a firearm and ammunition.

The state alleged that the complainant in count 1 Ms Maria Magdalena de Wit, who has since died, was the co-owner of a filling station known as Waters Edge Garage which is situated in Carletonville. The deceased was in the company of her employee, one Violet Musi, (complainant in counts 2 and 3) on their way to the bank. They travelled in a Toyota Corolla motor vehicle bearing registration RVJ 384 GP on the day in question. While so travelling, they were confronted by three assailants at a T-junction, and were pointed with a firearm. The three assailants feigned distribution of fliers or pamphlets out to members of the public at the said T-junction.

The deceased Ms de Wit, was forcefully pulled out of her motor vehicle which was hijacked at gun point. Ms Musi who was in the hijacked vehicle while kept hostage at gunpoint as the episode unfolded, was robbed of her possessions, namely, her cell-phone, earrings, a wrist watch and finger ring. The deceased's hand bag which contained some R4 000, 00 cash, driving license, bank

cards, including the hijacked motor vehicle valued at R188 000, 00, were also taken forcefully at gunpoint.

While they sped off from the hijacking spot, with Ms Musi still inside the vehicle, some members of the public, Messrs, M J Lombard and W C Van Der Merwe who witnessed the incident, pursued the hijackers in their respective vehicles. The robbers later ordered Ms Musi out of the vehicle, and then thereafter sped off. While being pursued, the driver of the Toyota Corolla failed to stop at the intersection and went through a red traffic light in Hendrick Potgieter Street.

It was at this stage that Inspector Dannie Smith and Ms Thembi Goodness Malope, (traffic officers) joined in the pursuit and cornered the robbers who were trapped in the Cal-de-sac at the Waterberg Street, Noord Heuwel, Krugersdorp. The robbers then alighted the hijacked vehicle and fled on foot. Inspector Malope who fired two warning shots, managed to capture one of the suspects, while the other two scaled a wall, as they were followed by Inspector Jones and Messrs, M J Lombard and W C Van Der Merwe. One of the two suspects was arrested and brought back to the scene, and handed over to Inspector Malutsi of SAPS, who then formally placed them under arrest and later detained them. The suspects were identified as accused 1 and 2.

The third suspect, was pointed out and implicated by the first and second accused. Inspector Smith arrested accused 3 who attempted to flee but ended up arrested on the same day as he tried to elude arrest.

Furthermore, the evidence of Inspector Van Wyk, the officer who lifted the finger-prints off the window of the hijacked motor vehicle, on the day of the offence, confirmed accused no. 2 as one of the assailants.

The evidence of Ms Musi, complainant in counts 2 and 3 respectively, corroborated the evidence of the police officers and the traffic officials in so far as the robbery that had taken place was concerned. The issue of kidnapping required no corroboration since it was a matter of direct evidence.

[3] THE DEFENCE'S CASE:

The appellants elected to testify in own defence. I will summarise the evidence of each accused *seriatim* as follows:

Appellant's evidence was that he was allegedly pushed out of a vehicle by two gentlemen. He did not describe them and gave no reason for being pushed out of the vehicle. He denied any involvement in the commission of the offences.

Accused 2, although he denied his participation in the commission of the offences, could not offer any reasonable or credible evidence as to why his finger-prints were lifted from the window of the hijacked vehicle. His initial version of the alleged assault by the police, navigated from the search the police conducted on him after he was brought to the vehicle. His evidence could therefore, not exculpate him from blame for want of merit.

As to accused 3, he was implicated by his co-accused 1 and 2 as being their co-perpetrator in the offences. He did not dispute that accused 1 and 2 had pointed him out.

The appellant's evidence, lacks merit and credibility, and the court *a quo* was therefore, correct in having rejected his version not only as false, but also improbable.

[4] ISSUES FOR DETERMINATION:

The issues before the court are, by and large, two-fold, namely:

- 4.1 Whether the appellant was properly or wrongly convicted and sentenced by the court *a quo*,
- 4.2 Whether the trial court was correct in finding that the identity of the appellant was properly proved and that he was linked to the commission of the offences.

It is trite that the onus to establish the accused's guilt requires proof by the state beyond reasonable doubt. Put differently, there is no obligation upon an accused person where the State bears the onus "to convince the court". If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable.

[5] FACTS WHICH ARE COMMON CAUSE:

These are:

- 5.1 The deceased Ms De Wit and Ms Violet Musi were robbed of their possessions on 13 August 2007.
- 5.2 The motor vehicle hijacked with registration RVJ 384 GP was driven by the deceased, who was the owner thereof.
- 5.3 Some of the items forcefully removed from Ms Musi were later recovered and handed back to her by Inspector Mostert, the investigating officer.
- 5.4 After pursuit by the police, the traffic officers and two members of the public, namely Messrs, M J Lombard and W C Van Der Merwe, two men were arrested at the scene of crime on the day in question.
- 5.5 Accused 2's finger-prints were lifted off the window of the hijacked vehicle under consideration.
- 5.6 The deceased was pulled out of the motor vehicle.
- 5.7 Ms Musi was also ordered out of the motor vehicle.
- 5.8 Inspector Malope fired a warning shot in the air and one man surrendered.

[6] THE LEGAL PRINCIPLES:

In S v Francis<sup>2</sup> the court held:

“This courts’ powers to interfere on appeal with the findings of fact of a trial court are limited... In the absence of any misdirection the trial court’s conclusion, including its acceptance of a witness evidence, is presumed correct. In order to succeed on appeal, the appellant must therefore convince the court appeal on adequate grounds that the trial court was wrong in accepting the witnesses evidence; a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial courts’ evaluation of oral testimony” (own emphasis)

None of the state witnesses who testified could have made errors of identity of the appellant, and his co-accused for their testimony was purely a matter of direct evidence. Needless to say, the finger prints lifted from the window of the vehicle concerned on the day, put the identity of accused 1 and 2 beyond doubt. The state witnesses evidence was on the other hand correctly found to be reasonable, honest, credible, reliable and probable in the circumstances.

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<sup>2</sup> 1991 (1) SACR 198 at pp 198-199



Equally trite, is the principle that a court does not have to be convinced that every detail of an accused version is reasonably possibly true in substance, but the court must decide the matter on the acceptance of the version and can only be rejected on the basis of inherent probabilities and that it cannot reasonably be true.

See also: S v Olawale<sup>3</sup>

It is generally accepted in our law that “a court is not entitled to convict, unless it is satisfied that not only the explanation is improbable, but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused’s version is reasonably possibly true, but whether one subjectively believes him, is not the test....the test is whether there is a reasonable possibility that the accused’s evidence may be true.”

See: S v V<sup>4</sup>

[7] Turning to the facts of this case, the following become noteworthy:

- Accused 2 was arrested on the same day with acc 1
- Inspector Malope’s evidence is clear. She saw the 3 occupants of the deceased’s motor vehicle coming out of the motor vehicle and running away. She fired a shot in the air and one man surrendered.

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<sup>3</sup> 2009 (JOL) 24335 (SCA)

<sup>4</sup> 2000 (1) SACR 453 (SCA) at 455 b - c

- Of the two who scaled the wall and ran away, one man was arrested and brought back to the scene.
- Finger prints were lifted from the window of the hijacked motor vehicle. The finger prints were proved to be those of accused 2. Having identified accused 2 by his finger prints, it now leaves us with one man who was arrested with accused 2, who according to Inspector Malope, was accused 1.
- While arguing appellant's case, Mr Prinsloo for the appellant conceded that the second man was indeed accused 1. The evidence at the disposal of the court demonstrate that accused 1 is the man who surrendered when Inspector Malope fired a shot in the air.

[8] The evidence against the appellant is overwhelming. His version has properly been proved to be improbable and beyond doubt false. It was therefore correctly rejected by the court *a quo*. Applying the principles referred to above to the facts of the case, the State clearly has, beyond reasonable doubt proved that appellant was one of the assailants on the day in question. The trial court, in my view, correctly convicted him. The evidence at the disposal of the court demonstrates that the appellant's appeal against conviction should fail.

In the result the order that I propose is as follows:

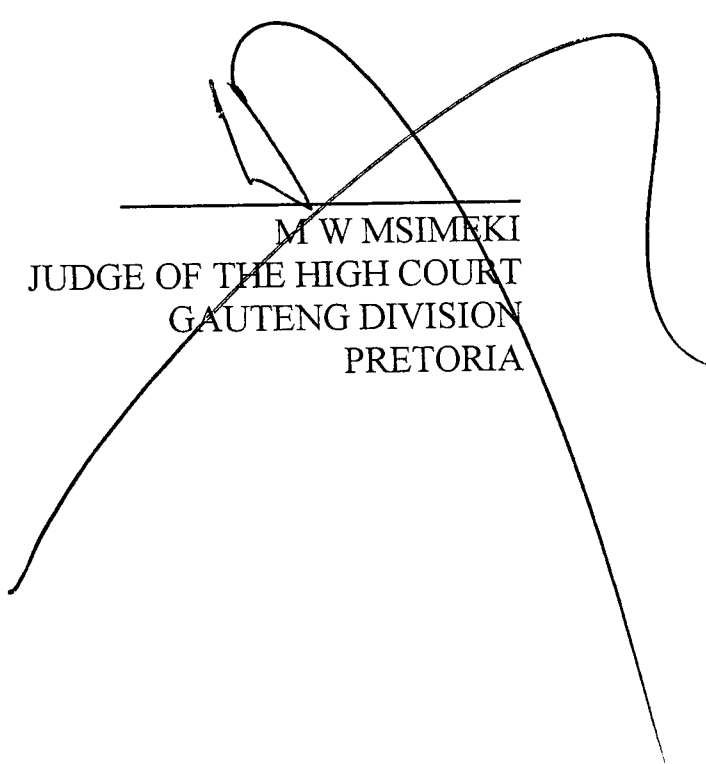
COURT ORDER:

1. The appeal against conviction is dismissed.



M.G PHATUDI  
ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION  
PRETORIA

I concur



M W MSIMEKI  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION  
PRETORIA

And it is so ordered