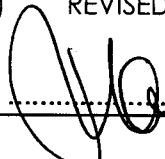


REPUBLIC OF SOUTH AFRICA



GAUTENG DIVISION, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	
19/8/2015	

19/8/15
CASE NO: A 9/2014

In the matter between:

Stephen Mfakazeni Mabaso

1st Appellant

Zibhekele Dlamini

2nd Appellant

Siboniso Buthelezi

3rd Appellant

AND

The State

Respondent

JUDGMENT

MAKUME J

[1] The three appellants were convicted in the Regional Court Benoni on the following counts:

1.1 Count 1 – Robbery with aggravating circumstances. Only the 3rd Appellant Siboniso Buthelazi was convicted on this count and sentenced to 10 years imprisonment.

1.2 Counts 3 and 4 possession of a firearm without a licence as well as possession of ammunition. On these two counts the second Appellant Zibhekele Dlamini was convicted and sentenced to an effective term of imprisonment.

1.3 Counts 5 & 6 unlawful possession of a firearm and ammunition. The 1st Appellant Stephen Mfakazeni Mabaso was convicted and sentenced to an effective term of imprisonment for 10 years.

[2] All three appellants were granted leave to appeal against conviction only by the trial court. The 3rd Appellant challenged his conviction in count 1 on the basis that Mr Suleiman the only witness on this count was not a satisfactorily witness in all material respects. Mr Suleiman testified how he was confronted by three men in his shop on the night of 18th July 2010 and that 3rd Appellant was one of them. He could not identify the other two who were armed.

[3] The 1st and 2nd Appellant's conviction arises out of their arrest by Warrant Officer Lebisi on the 20th August 2010. Warrant Officer Lebisi testified that he found both of them in a room at Actonville Hostel in possession of firearms and ammunition. These are the offences on counts 3, 4, 5 and 6.

- [4] 1st and 2nd Appellants challenged their conviction on various grounds. Firstly it is argued that the evidence of Warrant Officer Lebisi was riddled with inconsistency, Secondly that the state failed to call Constable Mangena who was present during the arrest to corroborate the version of Lebisi as to where the firearms and ammunition were found and lastly but not the least that the firearms were not in their possession but were discovered under the bed in Shezi's room and not on their persons. It was argued that the trial court should have found that the Appellant's versions were reasonably possibly true and should have been acquitted.
- [5] The issue in dispute in Count 1 is identity. The 3rd Appellant places himself on the scene of the robbery not as a participant but as an innocent customer who had come to buy a soft drink and then witnessed the robbery.
- [6] The complainant Mr Suleimann stuck to his version under cross examination that he knows the 3rd Appellant for more than a year prior to the incident, 3rd Appellant was not only a regular customer at his shop he also used to wash cars not far from his shop. This was not denied by the 3rd Appellant.
- [7] Mr Suleiman told the court that 3rd Appellant came in to buy airtime for R5.00 and then two men who were armed came in and robbed him. The two handed the money taken from his till to 3rd Appellant where after all three fled the scene together in the direction of the Railway Station. The version of 3rd Appellant as to what he was doing in the shop was never

put to the witness neither was it disputed that 3rd Appellant and Suleiman knew each other.

[8] I am satisfied that the Magistrate correctly found that Mr Suleiman correctly identified 3rd Appellant. His shop in which the incident took place was well lit with electricity. He had ample opportunity to notice what 3rd Appellant was doing in the shop.

[9] The 3rd Appellant confirmed in his evidence that a robbery took place in the shop of Mr Suleiman. He denied that he was a participant. His version that he had come to buy a bottle of coke when the incident happened was correctly rejected by the Magistrate. He was part of the three men who robbed the complainant he received money and fled the scene.

[10] The 3rd Appellant's conduct after this incident is indicative of his guilt because he stopped coming to wash cars where he used to prior to the incident which explains why he was only arrested about a month later. I accordingly hold the view that the appeal by the 3rd Appellant against conviction falls to be dismissed.

[11] Warrant Officer Lebisi was cross examined extensively on the arrest of not only the 3rd Appellant but also on the events that unfolded in the room at Actionville Hostel where 1st and 2nd Appellant were arrested.

[12] It was not disputed that the firearms and ammunition were found in the room in which not only 1st and 2nd Appellants were present. Evidence is that besides them there was a Mr Shezi the owner of the room who fled the scene as well as two other men one of them being Mr Sipho Mnyando who testified as a defence witness.

[13] Warrant Officer Lebisi says that he found the firearms and ammunition mentioned in counts 3, 4, 5 and 6 on the persons of 1st and 2nd Appellant. The 1st and 2nd Appellants say the firearms were found under the mattress in Shezi's room. Their witness Sipho Mnyando contradicts both of them in a crucial and material aspect for he said that he saw the three firearms on the floor after they had been searched by the police. He does not know where the firearms came from.

[14] It was put to Warrant Officer Libisi under cross examination that the Appellants would testify that as soon as he Lebisi entered the room with his colleagues accompanied by 3rd Appellant that Shezi took out his firearm and put it on top of his bed he was then handcuffed but managed to run away through the door . That version was contradicted by 1st Appellant who testified that the police came in and arrested Shezi and after they had handcuffed him he ran away and shot s were fired. He later changed and said he did see Shezi take out a firearm and put it on the bed before he was handcuffed and ran away.

[15] The version of the Appellants as to where the firearms were found by the police is contradicted by a number of improbabilities. Firstly if it is

correct that the firearms were found under the bed then all the five occupants of the room would have been arrested and charged alternatively the police would have only laid charges against Shezi as the owner of the room.

[16] Secondly despite Warrant Officer Lebisi having testified that only 1st and 2nd Appellants were arrested in the room the Appellants still insists that two other people including their witness Sipho Mnyando were arrested. There is no proof that indeed other people besides 1st and 2nd Appellants were arrested.

[17] Warrant Officer Lesibi reiterated his version of events in the room during cross examination which version was not discredited by any inconsistency or ambiguity on his part. The Magistrate was correct in accepting that version and rejected that of 1st and 2nd Appellant.

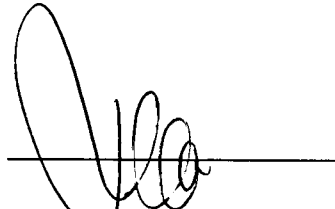
[18] The version of the 1st and 2nd Appellant raised serious concerns and could not be relied upon individually and collectively it is full of contradictions and inconsistencies.

[19] I have no doubt that the finding of the court a quo was arrived at after all the evidence had been looked at holistically. The version by the Appellants is false and was correctly rejected. I accordingly make the following order.

ORDER

The Appeal by all three Appellants is dismissed.

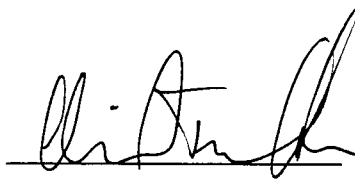
Dated at Pretoria on the ..17th...day of August 2015.



MAKUME A.M.

(JUDGE OF THE HIGH COURT)

I agree



TUCHTEN N.B.

(JUDGE OF THE HIGH COURT)

Date of hearing: 30TH August 2015

Date of Judgments:

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Ref: SA 1/2014 (9/3 MJM)