

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A226/2014

In the appeal between:-

MALEBO, LEHLOHONOLO EMMANUEL

Appellant

And

THE STATE

Respondent

CORAM:

MOCUMIE, J *et* DAFFUE, J

HEARD ON:

16 MARCH 2015

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

19 MARCH 2015

INTRODUCTION

[1] Appellant and two other accused were arraigned in the regional court held in Bloemfontein on a charge of robbery with aggravating circumstances. Their first appearance was on 11 January 2010 and appellant was convicted as charged on 1 Augustus 2013, his 36th appearance – three years and seven months later. The magistrate mentioned in his reasons that this was due to a change in legal representatives and absence of the accused on several occasions. The fact of the matter is that delays are prevalent in our lower courts and something should be done soon to

see to it that delays of this kind are eliminated. Justice delayed is justice denied. The State is also entitled to finalization of criminal trials within a reasonable time.

- [2] Appellant was convicted as mentioned whilst his two co-accused were acquitted. He was sentenced to 12 years' imprisonment.
- [3] On 12 December 2013 leave to appeal against his conviction was granted by the court *a quo*.

II **GROUND OF APPEAL**

- [4] The following grounds are relied on:
 - 4.1 The court *a quo* erred in finding that the only reasonable deduction to be drawn from the proven facts is that the appellant had committed the offence.
 - 4.2 The court *a quo* erred in rejecting the appellant's version as not reasonably possibly true.

III **LEGAL PRINCIPLES**

- [5] The court *a quo* convicted the appellant based on the applicable principles applying to circumstantial evidence. It is required to consider the relevant case law again.
- [6] The *locus classicus* is **R v Blom** 1939 AD 188 at 202 – 203.

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the

inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

- [7] In **R v De Villiers** 1944 AD 493 at 508 – 509 the appeal court referred to the above test and pointed out that not each proved fact must exclude all other inferences, but the facts as a whole must do so and continued as follows:

“It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn.”

See also **S v Ntsele** 1998 (2) SACR 178 (SCA) at 182b – f; **S v Boesak** 2000 (1) SACR 633 (SCA) at para [13] and **S v Reddy and Others** 1996 (2) SACR 1 (AD) at 8e – h and especially the following *dictum*:

“A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room doubt for doubt of the fact which they intend to establish ... Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a millstone.”

The State does not have to prove the guilt of the accused beyond a shadow of doubt.

[8] Inherent probabilities and improbabilities may be considered in evaluating the evidence in totality. See **S v Chabalala** 2003 (1) SACR 134 (SCA) at para [15]. It is permissible to test the accused's version against the inherent probabilities, but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot be reasonably possibly true. See **S v Schackell** 2001 (2) SACR 185 (SCA) at para [30].

[9] The oft-quoted *dictum* of Malan JA in **R v Mlambo** 1957 (4) SA 727 (AD) at 738A – C is worth repeating:

“In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged.”

[10] Where an appeal is lodged against a trial court's findings of fact, the court of appeal must take into account that the court *a quo* was in a more favourable position than itself to form a judgment. When inferences from proven facts are in issue, the court *a quo* may also be in a more favourable position than the court of appeal, because it is better able to judge

what is probable or improbable in the light of its observation of witnesses who have appeared before it. Therefore, where there has been no misdirection of fact a court of appeal assumes that the court *a quo*'s findings are correct and will accept these findings unless it is convinced that the trial court is wrong – See **R v Dhlumayo and Others** 1948 (2) SA 677 AD at 705 – 706.

- [11] Therefore, in order to interfere with the court *a quo*'s judgment, it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory, or whether the record shows them to be such. See also **S v Monyane and Others** 2008 (1) SACR 543 (SCA) at para [15] where the SCA stated that it is only in exceptional cases that it will be entitled to interfere with the trial court's evaluation of oral evidence and concluded as follows:

“This court's powers to interfere on appeal with the findings of fact of a trial court are limited. ... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f).”

- [12] “Although courts of appeal are slow to disturb findings of credibility, they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour, but predominantly upon inferences and other facts, and upon probabilities. In such a case a court of appeal, with the benefit of

the full record, may often be in a better position to draw inferences.”
 See **Minister of Safety and Security and Others v Craig & Others NNO** 2011 (1) SACR 469 (SCA) at para [58].

IV EVALUATION OF COURT A QUO’S JUDGMENT

[13] The court *a quo* was fully aware of the fact that it had to apply the test applicable to circumstantial evidence. It evaluated the evidence in a coherent manner and decided to acquit appellant’s two co-accused based on its dissatisfaction with the evidence produced by the State.

[14] Many facts were common cause. On 14 September 2009 at about 05h30 the complainant’s Quantum motor vehicle (“Quantum”) was robbed in Bloemfontein by three unidentified men. One of them was armed with a firearm. The complainant was forced to the back of the Quantum and pressed down to the floor of the vehicle. He could not see in which direction they were going. One of the robbers mentioned at a stage that they were travelling in the direction of Thaba Nchu.

[15] The Quantum got a flat tyre which could not be changed as the vehicle did not contain a spare wheel. The robbers blindfolded and handcuffed complainant where after he was taken to the veld and dropped into a hole. They took his wedding ring and wallet.

[16] Complainant eventually freed himself and hitch-hiked to the Tweespruit Police Station. Together with members of the

South African Police Service they searched for the Quantum and eventually found it in the vicinity of Tweespruit/Westminister close to the N8 national road. The SAPS members decided to keep the Quantum under observation.

- [17] A red bakkie arrived which later appeared to be that of a local farmer who rendered assistance through his employees. The tyre was changed and the Quantum was driven further along the N8 in the direction of Ladybrand.
- [18] The SAPS followed the Quantum in a clearly marked police vehicle. A BMW vehicle of the tracking agency which had installed a tracking device in the Quantum approached from the front, made a u-turn and thereafter both the SAPS vehicle and the BMW followed the Quantum for a distance of about 5 kilometres. The Quantum stopped suddenly close to Westminister. Three men disembarked and started to run in different directions.
- [19] One of the persons ran towards a nearby hill where he hid himself underneath a rock. A Police helicopter – clearly marked – was summoned to the scene and that person was eventually traced to his hiding place and arrested. This person was on his own admission the appellant.
- [20] Appellant confirmed that he was duly identified by the farm worker, Mr Sabata Abraham Mogete, whose employer arranged for the rendering of assistance with his red bakkie.

Appellant was one of the three persons that approached this State witness for help at about 07h00 that same morning. The farm owner arrived on the farm at about 07h30 and the required assistance was rendered.

[21] I have read and considered the version of the appellant presented to the trial court and shall not repeat it in full. It is so far-fetched and improbable that the court *a quo* was correct in rejecting it as false in the light of the totality of the evidence. Anyone who believes appellant's version will also believe in fairies.

[22] On appellant's version, he and one George attended a tavern in Bloemfontein from the Sunday night to the early hours of Monday morning, the 14th September 2009. Someone called George on his cellphone, asking for assistance with a flat tyre. The two of them went with George's vehicle to Westminister where they found Tebogo who was unknown to appellant at that stage. These two gentlemen, i.e. George and Tebogo, were not arraigned as accused before the trial court if appellant is to be believed as it is his case that he met his two co-accused for the first time at court.

[23] According to appellant they could not change the tyre as the spare wheel of George's Microbus did not fit. George left in his vehicle to seek help from a nearby garage. Eventually the appellant and Tebogo decided to hitch-hike in order to look for help as George, with whom they had cellphone

communication at the time, was apparently not getting the necessary assistance. Another hitch-hiker, totally unknown to appellant, arrived on the scene whilst they were busy hitch-hiking and took them to a nearby farm where they met the State witness and farm employee, Mr Sabata Mogete, whose employer eventually arrived and assisted them by making his red bakkie available and providing them with two tyres. Once the flat tyre had been changed, appellant, Tebogo and the unknown hitch-hiker drove off in the Quantum in the direction of Ladybrand. At that stage appellant's friend, George, was completely out of the picture. In fact, appellant was now on his way with Tebogo to Ficksburg and did not seem to bother to arrange with George to get back to Bloemfontein.

[24] Suddenly Tebogo, the driver of the Quantum, shouted "ghost, ghost" and brought the vehicle to a stand-still. Shots were allegedly fired at them and this caused appellant to run to a nearby hill where he hid himself. He was under the impression that they were attacked by taxi owners.

[25] As indicated by the court *a quo*, appellant contradicted himself several times, did not answer questions and came up with an improbable and clearly fabricated version. He made a bad impression as a witness. His version was rejected as false and I am in full agreement with the court *a quo*'s reasoning.

[26] The fact that an accused is a liar does not mean he is guilty. People lie for various reasons and sometimes based on pure habit. The court must be satisfied that the State has proved its case beyond reasonable doubt. In *casu* many facts are common cause. The only issue is whether or not appellant was one of the robbers. On his version he was in Bloemfontein during the early hours of the particular morning, but then left for Westminister with his friend, George, to render assistance to one Tebogo who was unknown to him. Co-incidentally, he found himself in the Quantum that had been robbed in Bloemfontein a couple of hours earlier. Instead of explaining his innocent presence to the Police, he took off to a nearby hill and hid himself notwithstanding the fact that the SAPS in a marked police vehicle and later on in a marked SAPS helicopter were on the scene. The appellant's version was correctly rejected as false and the only reasonable deduction to be drawn from the proved facts is that he was one of the robbers.

[27] One may even consider the matter based on the so-called "doctrine" of recent possession. See **S v Parrow** 1973 (1) SA 603 (AD) at 604B – E; **S v Skweyiya** 1984 (4) SA 712 (AD) at 715C – D and **S v Mavinini** 2009 (1) SACR 523 SCA para [6]. The accused does not have to be in actual possession of the thing robbed or stolen at the time of his arrest if he was seen in possession thereof soon after the commission of the crime of robbery or theft. It was however not necessary to follow this line of thought. It would lead the

court *a quo* to the same and just conclusion. There is no merit in the appeal.

V ORDER

[28] The following order is issued:

The appellant's appeal against his conviction is dismissed.

J.P. DAFFUE, J

I concur.

B. C. MOCUMIE, J

On behalf of appellant: Me S. Kruger
Instructed by:
Legal Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv M. Strauss
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

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