

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal number: A61/2015

In the appeal between:

MUZI PETROS MADUNA

Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE, J *et* FISCHER, AJ

JUDGMENT: FISCHER, AJ

HEARD ON: 27 JULY 2015

DELIVERED ON: 13 AUGUST 2015

- [1] On 24 November 2013 at approximately 20h00 and at or near Rhirone in the Harrismith district, three men approached the complainant Dumisani Sechage and his [.....] year old girlfriend T. T. where they were walking on the outskirts of the township. Whilst two of the assailants proceeded to attack the complainant with knives, the appellant restrained the complainant's girlfriend by holding on to her shoulders whereafter the appellant himself proceeded to attack and stab the complainant. The three assailants thereafter fled the scene, pursuant to which only the

appellant was charged with assault to do grievous bodily harm, it being the state's case that he had stabbed the complainant with a knife. On 25 November 2014 the appellant was convicted as charged and sentenced to two years imprisonment and on 28 January 2015 granted leave to appeal both the conviction and sentence by the trial court.

- [2] The sole issue in this appeal turns on the adequacy of the evidence concerning the identification of the appellant as one of the knife wheelding attackers who attacked and stabbed the complainant, it being common cause that the other two assailants were subsequently neither identified nor charged.
- [3] The complainant himself could not identify any of his attackers but testified that three men wearing balaclavas approached him and his girlfriend on the outskirts of the township and without saying anything proceeded to attack and stab him. In amplification of his evidence he testified that all three men had approached him but that one of them, who was subsequently identified as the appellant, had grabbed his girlfriend by the hand whilst the other two proceeded to attack and stab him. The appellant thereafter released his girlfriend and proceeded to stab him as well, whereafter they all three fled the scene.
- [4] The complaint's girlfriend T. T. testified that three men had approached her and the complainant on a street in the township, that the appellant held her by the shoulders whilst the other two proceeded to attack and stab the complainant, whereafter the

appellant had released her and moved toward the complainant and stabbed him. All three men then ran away.

- [5] According to the girlfriend the available light by means of which she allegedly was able to identify the appellant was provided by a so-called Apollo light situated in another street which she estimated was between 10 and 12 metres away. She furthermore claimed that when the appellant grabbed her by the shoulders they were at all material times no more than approximately half a metre apart and staring into each other's faces for what she estimated was between two to three minutes whilst the other two unidentified assailants were attacking and stabbing the complainant.

- [6] According to her she knew that the appellant was the assailant who had grabbed her as

"I saw him." and

"Yes, I know him." and

"We were facing each other as he held me on my arms and was wearing a hood."

The state then closed its case. The appellant himself did not testify having pleaded not guilty and denying any involvement whatsoever in the attack.

- [7] In his judgment the magistrate reminded himself of the need for caution in his approach to all the evidence concerning the identification of the appellant. He was of the view that notwithstanding the "very poor illumination" as testified to by the

complainant's girlfriend, she had made a good impression on the court, that there was evidently no problem with her eyesight and, having had regard to the close proximity of the appellant to her, she had had sufficient opportunity to identify him. In the magistrate's opinion the contradictions regarding what clothing all three assailants were wearing, where on his body the complainant had been stabbed and whether or not the assailants were all wearing balaclavas, as opposed to a hood in the case of the appellant, were insignificant and did not as such serve to detract from the credibility of the girlfriend's evidence. According to the magistrate the appellant was, in the circumstances, duty bound to rebut such evidence, which he failed to do, thereby entitling the court to draw an adverse inference.

[8] A critical reading of the record shows however that, whilst the complainant himself was unable to identify any of his assailants, notwithstanding the fact that he had been approached by all three whilst in the company of his girlfriend, the evidence of the girlfriend was not above criticism in that the following evidence manifestly affected her ability to identify the appellant:

1. Firstly, she testified that whilst the other two assailants were attacking and stabbing the complainant, the appellant was holding her by the shoulders whereafter he too moved away from her and stabbed the complainant. She thereafter changed her version by stating that she had not seen the appellant stab the complainant.
2. Secondly, the light used for identification purposes was situated in another street and after initially claiming that the

light was behind both her and the appellant when being held by the shoulders, she subsequently changed her version by claiming the appellant was facing the light. Even more startling was her concluding testimony to the effect that she could not see as there was “no illumination”.

3. Thirdly, she contradicted the complainant in testifying that the appellant was wearing a hood which, according to her was clearly visible at the time that the three assailants approached her and the complainant. In contrast hereto the complainant himself was emphatic that all three assailants were wearing balaclavas and that it was for this reason that he was unable to identify any of them when they approached him standing next to his girlfriend.
4. Fourthly and whilst she was adamant that the complainant had been stabbed in the vicinity of the right shoulder, right upper arm and in the vicinity of the spine on the right hand side of the back, the complainant himself testified that he had been stabbed on the left upper arm, left shoulder and left side of the back.
5. In the fifth place she stated in one and the same breath that whilst it was too dark to see what the appellant had been wearing, she was nevertheless able to see that he was wearing a black top and hood.
6. Finally, and in contradiction of her claim that she was unable to identify the other two assailants before, during and immediately after the attack, the complainant himself testified that

“... she met up with these three people when we met the following day and she said that those people who she met are the ones who stabbed me.”

- [9] The approach to the evidence of a single identifying witness must not only be reliable and credible but falls to be approached with caution. (See **S v Mthetwa** 1972 (3) SA 766 (A) at 768A-C.) In addition thereto it has frequently been stated that something more is required than the mere assertion by a single witness that he or she has correctly identified the culprit. (See **S v Sithole and Others** 1999 (1) SACR 585 (W) at 591E-F.)
- [10] It has repeatedly been emphasised that in addition to honesty and sincerity, the court must be placed in a position to test the say-so of the single witness so as to determine the reliability of this witness's observations in traumatic circumstances. (See **S v Ngcina** 2007 (1) SACR 19 (SCA) at para [17].) There must be certainty beyond reasonable doubt that the identification of the alleged perpetrator was reliable in all the circumstances. (See **S v Sharzen and Another** 2006 (2) SACR 143 (SCA) at paras [11] – [15].) Identification with reference to specific physical features, facial features, clothing, colour, hairstyle and length of hair, evidentiary samples of a forensic nature and the weapons used in the assault would always serve to provide a measure of objective assurance against any of the pitfalls arising out of a subjective identification based on nothing more than claims that “I saw him.”, “Yes I know him.” and “We were facing each other as he held me on the arms...”
- (See **S v Sharzen and Another** *supra* at paras [16] – [19].)

[11] I am prepared to accept for purposes hereof that T. T. was an honest witness. In my opinion however and having regard to not only the particular circumstances of the case, but more importantly her contradictory evidence, lack of illumination and the absence of objective corroboration, she cannot be regarded as a reliable witness in respect of the crucial question of identification of the appellant. I am of the view that the girlfriend's evidence is insufficient and the possibility exists, and as such cannot be excluded, that the appellant was not involved in the assault on the complainant, in which case he is entitled to the benefit of the doubt. (See **S v Ngcina** *supra* at paras [18] and [19]).

[12] In the circumstances it cannot be found that the appellant's guilt had been proved beyond reasonable doubt.

[13] In the result the following order is made:

1. The appeal by the appellant succeeds and his conviction of assault with intent to do grievous bodily harm together with the related sentence, are set aside.

P. FISCHER, AJ

I concur.

B.C. MOCUMIE, J

On behalf of the appellant:

Mr J. D. Reyneke
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. M. Strauss
Instructed by:
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