

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A106/2015

In the appeal between:-

DAVID HLAO

Appellant

and

THE STATE

Respondent

CORAM:

MOLEMELA, JP *et* MOKOENA, AJ

DELIVERED ON:

31 DECEMBER 2015

MOLEMELA, JP

- [1] This is an appeal against conviction and sentence. The appellant appeared before the Regional Court in Welkom (court *a quo*) and was charged with assault with intent to do grievous bodily harm. He was convicted and sentenced to 12 months' imprisonment plus a further 12 months' imprisonment wholly suspended for a period of five years on condition that he is not convicted of the same offence again. The appellant applied for leave to appeal against both conviction and sentence and leave was duly granted. He was released on bail pending his appeal.
- [2] The facts that gave rise to the appellant's prosecution were presented to the court *a quo* through the evidence of one state witness, namely the complainant. He testified that he was asleep at his place of residence when he was awoken by the sound of a knock on the window. The dogs were also barking frantically. He peeped through the window and saw one person standing in his yard at the area of the carport. Upon seeing this person, he asked his wife to call the police. He then went outside, locked the door and

then threw the house key back into the house. When he went around the corner of the house, he saw a person standing there, looking the other way. He then screamed at this person, who immediately turned around and walked towards him. A second person emerged from behind a wall at the courtyard brandishing a knife. This person, whom he later identified as the appellant, charged at him and made a stabbing movement. He raised his hand to protect his face and was stabbed in the hand. A third person emerged from the garage. The three persons then started hitting him on the face and ribs. They then pulled him to the ground and started kicking him all over. They also hit his head against the wall. He started screaming and called out to his wife, asking her to call the neighbours. When his wife started screaming, his three assailants then fled. The neighbours came and offered assistance, after which the police were called. He was transported to the hospital, where he received medical attention. He testified further that about a week or two after the incident he saw two men standing at the gate of his house looking into his yard. As he approached them with his vehicle they walked away. He drove past them and parked in the next street with the intention of seeing where they were heading. He saw them walking in the direction of Boxer supermarket. They eventually went into the Internet Café. He summoned the police. The police arrived at the scene. After initially stating that they could not arrest the suspect without a case number, the police asked him to enter the Internet Café and to identify the suspect. He saw the appellant sitting near a pool table and identified him to the police. The appellant was then arrested.

- [3] The complainant was extensively cross-examined and his identification of the appellant as one of the perpetrators was disputed. The complainant conceded that he was shocked by the incident. He however maintained that he made a positive identification with the aid of LED spotlights. The appellant's defence was that of an alibi. He testified that on the night of the incident he was at his home with his wife and children. He denied having been at the gate of the complainant's premises on the date of his arrest. His wife was called as a witness and confirmed his alibi. It turned out that his wife had been sitting in the courtroom during the appellant's testimony. The court found that the evidence of identification was reliable because the complainant had testified

that the incident had lasted 45 minutes, during which he was in close proximity with his assailants in a well-lit area. The court stated that even though the scene was mobile, there was enough time for the complainant to see who was attacking him because he was able to describe the role each assailant played in the attack.

- [4] The appeal against conviction is on two main grounds, firstly that the appellant's alibi was rejected despite being reasonably possibly true and, secondly, that the complainant's evidence of identification was not reliable and did not pass muster against legal principles applicable to the evidence of identification.
- [5] It is a trite principle of our law that in criminal cases, the State bears the onus of proving the accused's guilt beyond reasonable doubt. This is the case even where the defence of an alibi has been raised, which means it is the state that bears the onus of disproving the alibi. In **R V HLONGWANE 1959(3) SA 337 (A) AT 340-341** it was laid down that where such a defence has been raised, the correct approach is to consider the alibi in the light of the totality of the evidence and the court's impression of witnesses. It was held in **S v Musikar 2013 (1) SACR 517 (SCA)** that once an accused person has raised a defence of an alibi, that alibi has to be accepted unless of course it (the alibi) is proved to be false beyond reasonable doubt.
- [6] Furthermore, it is trite law that the evidence of a single witness must be treated with caution. The evidence of a single witness can sustain a conviction if such evidence is satisfactory in all material respects. See **R V MOKOENA 1956 (3) SA 81 (A) AT 85**.
- [7] The proper approach applicable to the analysis of evidence pertaining to identification was laid down as follows in the seminal judgments of **S V MTHETHWA 1972(3) SA 766 (A) AT 768A-D**: "Because of the fallibility of human observation, evidence of identification is approached by courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must be tested. This depends on various factors

such as lights, visibility and eyesight, the proximity of the witness, his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parade, if any; and of course the evidence by or on behalf of the accused. The list is not exhaustive. The factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and the probabilities." It is thus clear that it would not be enough to rely on the identifying witness' honesty without testing his/her reliability.

- [8] I turn now to assess the evidence that was presented by the state's only witness, namely the complainant. His own version is that he became aware of the second suspect (appellant's) presence only after he had screamed at the first suspect. According to him the appellant approached him wielding a knife at the stage when the first suspect was also approaching him. The complainant gave the following account of the events:-

"Complainant: Ja, die eerste verdagte. Hy het na – hy het met sy rug na my toe gestaan en ek het op hom gegil. Op hom geskreeu, gegil. Die suspect het omgedraai en na my rigting toe beweeg en die tweede een, verdagte, het links om die hoek uitgekom by my courtyard.

Prosecutor: Agter die muur uitgekom?

Complainant: Ja, uitgekom....

Prosecutor: Hoe ver van jou af was die tweede verdagte?

Complainant: So 'n meter. Maar die tweede verdagte, toe hy uitkom toe het hy klaar die mes in sy hand.

Prosecutor: Kan u aan die hof voorhou hoe hy die mes vasgehou het?

Complainant: In sy regter hand.

Prosecutor: En nader hy toe?

Complainant: Hy het my gestorm toe keer ek met my linkerhand en toe het hy my gesteek in die linkerhand want hy wou my in my gesig steek.

Prosecutor: Gaan aan

Complainant: Die tweede verdagte het ek geherken in sy gesig en kleredrag.

Prosecutor: Wat het vir u uitgestaan? Sy gesig?

Complainant: Gesig

Prosecutor: wat staan vir u uit?

Complainant: Die geweld wat hy mee- soos hy gesteeek het met sy groot oë, hare en baard.”

- [9] On the complainant's own description of the incident, it is clear that the appellant was not previously known to the complainant. He saw the appellant for the first time when he emerged from around the courtyard. When he first observed him, the first suspect was already approaching him. At that stage, the appellant was allegedly already brandishing the knife, ready to strike, and was a mere metre from the complainant. Upon reaching the complainant he immediately stabbed him. Naturally, the complainant's attention was focussed on the knife that was being brandished at close proximity to him and where it was directed at. At the same time, he also faced another threat from the first suspect, who was already charging at him. Immediately after the stabbing, a third person emerged. All three persons then assaulted him jointly. He was subsequently thrown to the ground and kicked at. His head was bashed against the wall. The third suspect threatened to shoot him. The scene was mobile. Under such circumstances, it is highly improbable that the complainant would have had an opportunity to have a good look at the face of the second suspect (appellant) when a knife was being wielded, about to strike.
- [10] It must also be borne in mind that under cross-examination the complainant conceded that although his ordeal lasted for about 45 minutes, he was unable to state exactly how long he had observed the appellant. In his evidence in chief, he was vague in his description of the appellant. The court *a quo*'s finding that “the complainant was very sure about the way he identified the accused by his hair and the big eyes that the accused had while he was coming towards him with the knife” is not supported by the record. As correctly observed in the case of **S V CHARZEN 2006 (2) SACR 143 (SCA)**, facial characteristics are a more reliable and enduring source of identification than variable features such as hairstyle or clothing. The complainant did not

give any details of how he could distinguish the appellant's big eyes, hair and beard from any other person's features. It bears mentioning that these features would have been noted during a very stressful time for the complainant, moments before the stabbing. He also conceded that he was in shock at the time of the incident. His shock is not surprising because he ventured out of his house having seen only one intruder, only to discover that there were two more intruders who were also armed with a knife and firearm, respectively. I am satisfied that the complainant's evidence, as a single witness, cannot be described as being satisfactory in all material respects. His evidence of identification of the appellant as the intruder is not reliable and cannot sustain a conviction.

[11] With regards to what transpired on the date of the appellant's arrest, the appellant's conduct was not of someone that was hiding from anyone. The complainant's evidence was that when the appellant and his companion saw him approaching the gate of his house, they quickly moved away. It is thus surprising that when the complainant stood at the door of the Internet Café and was visible to the appellant, the appellant made no attempt to run away. Considering that the complainant's evidence is that the appellant's companion vanished after the departure of the first police officers who visited the Internet Café and refused to arrest the appellant and his companion, it is odd that he too, knowing the offence he had committed and having seen the complainant at the gate of his house earlier on the same day, would not have tried to leave the place in order to evade arrest.

[12] It is trite that a court's finding on the credibility of a particular witness depends on its impression about the veracity of that witness. Aspects that have a bearing on the credibility and reliability of a witness include not only a witness' candour and demeanour but also the witness' bias, internal and external contradictions on important aspects of the case, cogency, the witness' opportunity to observe the event and the quality, integrity and independence of the witness' recollection of the incident. It is significant that the court *a quo* stated in its judgment that the appellant was extensively cross-examined and his evidence was not shaken by cross-examination. The court *a quo* also

stated that the appellant's wife was a good witness and remarked that little weight had to be attached to her evidence due to the fact that she had been in the courtroom during her husband's testimony. Under the circumstances, the court *a quo*'s unexplained preference of the complainant's evidence to that of the appellant is rather surprising. The appellant's alibi was not shown to be false. The totality of evidence does not in any way suggest that the appellant's version is not reasonably possibly true.

[13] Having considered all the afore-mentioned circumstances, I am of the view that the State failed to discharge the onus of proving the appellant's guilt beyond reasonable doubt. The conviction is unjustifiable and consequently cannot stand. Given my views on the conviction, it stands to reason that the sentence imposed must also be set aside. The appropriate order is the following:

1. The appeal against conviction and sentence succeeds.
2. The conviction is set aside and replaced with the following order:
"The accused is found not guilty and is discharged."

M.B. MOLEMELA, JP

I agree.

R. MOKOENA, AJ

On behalf of appellant:

Adv J.S. Makhene
Instructed by:
Bloemfontein Justice Centre

On behalf of respondent:

Adv S. Mthethwa
Instructed by:
Director of Public Prosecutions
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