

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION: BLOEMFONTEIN

Appeal Number: A178/2014

In the matter between:

PAPIKI SEPTEMBER MOSIA
DAVID MOSIA

1st Appellant
2nd Appellant

And

THE STATE

Respondent

CORAM: EBRAHIM, J *et* MOENG, AJ

JUDGMENT: MOENG, AJ

HEARD ON: 1 DECEMBER 2014

DELIVERED ON: 11 DECEMBER 2014

- [1] The appellants were charged in the Sasolburg regional court with housebreaking with intent to rob and robbery (count one) as well as robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 (count two). They were initially charged with another accused (the deceased) that has since passed away during the course of the trial and before verdict was passed. They were convicted on count one despite their pleas of not guilty and were

sentenced to seven years imprisonment each. They were acquitted on the second count. Leave to appeal was refused by the regional magistrate but they were granted leave to appeal on petition to the Judge President against both conviction and sentence.

- [2] The state adduced the evidence of two witnesses. The first witness, Pule Johannes Dlamini, is the complainant in respect of count one. He went to bed on 28 October 2006 at 21h30 and ensured that the door and window to his shack was closed. He was awoken by people in his house at midnight, demanding money. He discovered later on that they forcefully gained entry through the door. It was dark in the house and he managed to identify the first appellant as he ignited matches. He was wearing a hat and a T-shirt that had only one sleeve. He only identified the second appellant when he was about 100 meters away from his house by the T-shirt he was wearing. He managed to identify him as a result of a mass light that illuminated the area. He knew both appellants well as they were staying in his street and they were known to be thugs. They robbed him of his leather jacket, blue Jack Puzzle tackies, R80.00 cash and cosmetics.
- [3] He went to his mother's house the following morning to report the incident. He witnessed the two appellants and the deceased pass by. The deceased was wearing his tackies. He identified his tackies by the maroon paint that had spattered on them. The second appellant

was not wearing the same T shirt. He later pointed them out at an identification parade.

- [4] Mokete Jacob Mokwena is a sergeant in the South African Police Service stationed in Sasolburg. The complainant approached him after the identity parade and reported that the deceased was wearing his tackies during the identity parade. The tackies were blue in colour and had green spatters of paint. He repossessed the tackies from the deceased and handed them over to the complainant. The witness in respect of count two was untraceable and the state case was closed without his evidence.
- [5] The appellants approached the court with an application in terms of section 174 of the Criminal Procedure Act 51 of 1977 for their discharge in respect of both counts. The court a quo concluded that the appellants had a case to answer and dismissed their application.
- [6] The first appellant testified that he was at home, asleep on the day of the alleged incident whereas the second appellant stated that he spent the night at his grandfather's house. They met earlier that morning and were accompanied by the deceased to Mankona's tavern. They met the complainant who accused the deceased of having robbed him of the tackies he was wearing and an argument ensued. The deceased disputed that it was the complainant's tackies

and asserted that his mother bought them for him. They thereafter proceeded to the tavern where they were later arrested by the police. They both know the complainant very well as they stay in the same area. They know where the complainant is residing and their names are well known to him as they used to buy from his stall.

- [7] The epitome of the reasons advanced by the court a quo in convicting the appellants', after she summarised the evidence, are as follows:

"According to the complainant he could see you on the night of the incident, that is how he managed to identify you, even at the time of the parade. That compounded his suspicion or believe that you were the culprits or the fact that accused nr 1 wore his tackies and accused 2 was identified by the T-shirt at the parade that he wore when the robbery occurred. It cannot be a co-incidence that complainant claims that he was robbed by you on the day of the incident and he further saw you the following day walking together in the streets. And he is further able to identify you at the parade. It is no coincidence that the tackies robbed, according to the complainant, were found with one of the accused. It further is no coincidence that the accused nr 2(sic) was identified with the same T-shirt that he wore at an ID parade. There is no reason advanced or that the court can think of, why the accused, if they are not the culprits, were incriminated here, except that they were seen on the scene of the incident. Complainant was positive that you were the culprits. And it is not because he knew that one of the accused was from custody that he was incriminated. The accused are found GUILTY on count 1 as charged. There was no evidence led on count 2 and the accused are ACQUITTED on count two".

[8] I am satisfied as it will appear hereunder that the regional magistrate materially misdirected herself in convicting the appellants'. The reasoning of the court a quo was seriously flawed. The evidence in this case called for a cautionary approach. She however failed to warn herself against the dangers that are inherent in the evidence of a single witness and the evidence of identity. She failed to evaluate the evidence in its totality and relied on the version of the complainant without properly evaluating such evidence and having regard to the numerous inconsistencies therein. The regional magistrate completely ignored the version of the appellants and also failed to consider the merits and demerits therein.

[9] The provisions of section 208 of the Criminal Procedure Act are peremptory when the evidence of a single witness is evaluated. An accused may be convicted of any offence on the single evidence of any competent witness. The courts' approach to section 208 was summarised in a *dictum* of De Villiers JP in **R v Mokoena** 1932 OPD 79 80 (with reference to the corresponding section in the 1917 Criminal Procedure and Evidence Act):

"in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc, etc".

- [10] It has however been repeatedly said that the exercise of caution should not be allowed to displace the exercise of common sense, and once a judicial officer has anxiously scrutinised the evidence of a single witness he should not be 'swayed by fanciful and unrealistic fears'. (See **R v J** 1966 (1) SA 88 (SRA). Where it is a single witness who makes the identification the court must be particularly cautious.
- [11] The appellants raised an alibi, stating that they were not at the scene of the crime when the offence was committed. The alibi therefore called into question the state's evidence concerning their identity. An alibi is not a kind of special defence which has to be proved by the defence (See **R v Biya** 1952 (4) SA 514 (AD). The State must prove that the accused committed the crime and it must therefore disprove the alibi. The correct approach is to consider the alibi in the light of the totality of the evidence in the case and as stated in **R v Biya** supra, '... if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime'.
- [12] The dicta in **S v Mthetwa** 1972 (3) SA 766 (A) at 768 is of significance with regard to the evaluation of the evidence of a witness who identified an alleged offender.

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, 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 parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These 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"

- [13] In **R v Masemang** 1950 (2) SA 488 (A) 493 van den Heever JA relied on his own experience in stating that even an honest witness quite often makes a positive identification of the wrong person. Whatever the reason ("the innate and instinctive desire that there shall be retribution may be conducive to this"), it is a factor which the courts have to take into account. In **R v Shekelele** 1953 1 SA 636 (T) at 638G Dowling J said that 'an acquaintance with the history of criminal trials revealed that gross injustices are not infrequently done through honest but mistaken identifications'. 'People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence'. The judge believed that a bald assertion that the crime was committed by the accused is insufficient.
- [14] Most recently, Cameron JA held in **Charzen and Another v S** 2006 (2) SACR 143 (SCA) that:

“But, as our courts have emphasised again and again, in matters of identification honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness’s recollection of a person’s appearance can be ‘dangerously unreliable’, and must be approached with caution. This case illustrates the risks.”

- [15] The complainant was a bad witness and the magistrate was oblivious to this. The concessions made by counsel for the state in his heads of argument clearly highlight this. He contradicted himself in numerous respects. I will highlight a few of these discrepancies. The complainant admitted to having made three different witness statements to the police. He in one of these statements indicated that five people entered his shack and that he recognised three amongst the group. One of those that he identified was Thabo. When quizzed in cross examination about Thabo, he made an about turn, stating that Thabo was not present in the house but was in the company of the appellants’ when he met them the next day at his mother’s house. This response was however also contrary to his evidence in chief where he stated that it was only the appellants’ and the deceased that passed his mother’s house.
- [16] His evidence in chief was that he identified the first appellant because he lit a match. He however changed ground in cross examination and stated that it was the second appellant who ignited the match. When

interrogated about this discrepancy, he stated that he could not remember who lit the match as he could not see these people clearly. His initial version in chief was that the first appellant was wearing a hat when they robbed him. He however controverted this version in cross examination and stated that it was the deceased that was wearing a hat.

[17] He stated in cross examination that the main reason why he identified the accused persons was because of the tackies worn by the deceased and the single sleeve T-shirt worn by the first appellant. The tackies, worn by the deceased were identified by the maroon spatters of paint they had. This was however contrary to the evidence of Sergeant Mokwena that the tackies had green spatters of paint. The deceased had also given an explanation as to how he came in possession of these shoes. This explanation was thus in contrast to the complainant's evidence.

[18] The complainant could also not have identified the first appellant by the T-shirt since he was admittedly wearing a different one when he met them the next day. The fact that an identifying witness knows the offender is normally taken into account as a factor reducing the risk of a mistaken identity. The complainant testified that he knew the appellants very well as they were staying in the same street as him. He strangely did not know their names and referred to one of the intruders as Thabo in his witness statement. His response when he

confronted them the day thereafter was contrary to someone who knew the appellants very well, as he did not confront them for having robbed him, but he drew the inference that they were the culprits because they were in the company of the deceased who was allegedly wearing his shoes. The magistrate heavily relied on the pointing out of the appellants' at the ID parade. It is common cause that the complainant met the three accused when they passed his mother's house. The police then arrested them moments later. The probative value of this identity parade was therefore eradicated. The magistrate's reliance on the T-shirt worn by the first appellant in convicting him was therefore misplaced.

[19] It is also not clear how the magistrate could place reliance on the tackies worn by the deceased in convicting the two appellants. He was admittedly already deceased when the verdict was passed. The mere fact that they were walking together the next day could also not lead to the conclusion that they should have been together at the complainant's house the previous night. Even if one could take this aspect into consideration, the contradiction between the evidence of the complainant and Sergeant Mokwena, as well as the explanation that was tendered by the deceased relating to how he got the shoes, should have aroused doubt in the mind of the magistrate.

[20] The magistrate further placed reliance on the fact that the complainant could see the appellants on the night of the incident and

that is how he managed to identify them. She failed to evaluate the circumstances under which this observation was made. It was admittedly at mid-night and dark in the room. The only form of illumination was a match or matches that were lit and admittedly went off time and again. As indicated here above there was a discrepancy relating to the person that ignited the matches. The only way that the second appellant was identified was when he was one hundred meters away from the complainant, with his back facing him. It is mind boggling how this could have been accepted as a reliable form of identification.

- [21] There must have been certainty beyond reasonable doubt that the identification is reliable. It is not sufficient for a witness to merely say that he saw the offender, there should have been an objective assurance against the pitfalls of subjective identification. Such objective facts, upon which reliance could be placed, had to exclude the possibility of a mistaken identity.
- [22] The magistrate failed to evaluate the evidence of the appellants. She dismissed their version by merely stating that it was no coincidence that they were implicated. Criminal trials are not adjudicated by coincidences. The state had to show beyond reasonable doubt that the appellants' committed the offence. The appellants' version was consistent and they were outstanding witnesses. Their version of events was maintained in cross examination and there was no reason at all, why it could be rejected.

[23] There are a number of other worrying features that marred this trial. The appellants applied for their discharge in terms of section 174 of the CPA in respect of both counts at the end of the state's case. No evidence at all was led in respect of count two. The magistrate concluded that the appellants had a case to answer and dismissed their application. This, to say the least, was improper.

[24] The magistrate's interference in the prosecutor's duty to lead the complainant's evidence in chief and her descend into the arena was another worrying feature. She on numerous occasions took over the leading of the witness in chief. When the prosecutor ended his examination in chief, the magistrate asked another twenty questions before the attorney could be afforded the opportunity to cross examine. This created the impression that she was assisting the prosecutor in proving his case. She at one stage prompted the complainant, in examination in chief, to state that the appellants' were thugs. This can be illustrated by the following:

"Court: okay, what do you mean, they were threatening, I am sorry sir, what is to threaten or how did they threaten you?---- Your worship, as you can imagine you are in the house when the next thing you see the person is already in the house and it is at night. We normally know that people that normally do that are tsotsis'.

Court: were you threatened by the fact that you knew that they were tsotsis or is there any threat that they applied to you? ---- I know that they are tsotsis your worship..... Did you know them to be tsotsis prior to the incident? ---- Yes your worship. (My emphasis)

[25] After some lengthy examination of the complainant to ascertain whether the appellants used force to remove the property, the magistrate had the following to say to the prosecutor in an attempt to prompt him to ask questions relating to this element of the offence:

“Court: you need to clarify the evidence..... yes because you know robbery, there must have been force applied to the person to induce submission”

[26] A number of examples of her constant interference can be quoted, but the above illustrations are adequate for our current purposes. I find the remarks by Kotze AJA in **S v Meyer** 1972 (3) SA 480 (A) relevant in this regard:

“Wanneer ’n regterlike beampte optree soos hierbo aangedui gaan hy, na my mening, redelike perke te buite. Hy skep dan nie die indruk dat die doel van sy ondervraging is om duidelikheid te vind nie. Veel eerder word die indruk gewek dat die geskil vooraf beoordeel word en dat reg en geregtigheid nie geskied nie (Solomon and Another, NN.O. V. de Waal, 1972 (1) S.A. 575 (A.A.) op bl. 580). In die onderhawige geval het die optrede van die landdros, volgens my mening, in sy geheel gesien, en veral sy gedrag teenoor die appellant terwyl hy getuig het, sulke afmetings aangeneem dat dit nie gesê kan word dat hy “vleklose onpartydigheid” gehandhaaf het nie (Rondalia Versekeringskorporasie van S.A. Bpk. V Lira, 1971 (2) S.A. 586 (A.A.) op bl. 589). Bygevolg moet bevind word dat hy nie sy funksie as regspreker na behore uitgeoefen het nie. Afgesien van die meriete in hierdie saak is ’n bevinding onvermydelik dat die landdros nie deurgaans ’n onbevange oordeel bewaar het nie (Lira se saak op bl. 589) en dat sy optrede so ernstig afgewyk het van behoorlike en ordelike regspraak dat die verhoor en uitspraak ongeldig is”.

[27] I am of the view that, when all the evidence is considered, the appellants' version is reasonably possibly true. The state failed to prove the identity of the appellants beyond reasonable doubt. On an evaluation of all the evidence the complainant's testimony was not satisfactory in all material respects and the appellants' version was reasonably possibly true. In the premises, the conviction cannot stand.

[28] The following order is therefore made

1. The appeal is upheld.
2. The appellants' conviction and sentence are set aside.

L.B.J. MOENG, AJ

I concur.

S. EBRAHIM, J

On behalf of the appellant:

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Instructed by:
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On behalf of the respondent:

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