

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Appeal No.: A189/2012

In the appeal between:

**DAVID TEBOHO TLADI**

Appellant

and

**THE STATE**

Respondent

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**CORAM:**

RAMPAL, J *et* DAFFUE, J

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**JUDGEMENT:**

RAMPAL, J

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**HEARD ON:**

25 FEBRUARY 2013

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**DELIVERED ON:**

28 FEBRUARY 2013

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[1] This is an appeal. The appellant appeals against the conviction and the sentence. He was charged as accused no 1 in the court *a quo*. His co-accused, in other words accused no 2, is not before us. About him not much will be said in this judgment. The appellant was aggrieved by his conviction and sentence - hence the appeal.

[2] The appellant was arrested at Botshabelo on 22 August 2008. He was subsequently charged and tried in the Botshabelo Regional Court. His trial began on 18 March 2009 before Ms M. Khuduga. Mr V. Nel appeared for the State and Mr Kambi for the two accused.

- [3] The charge was robbery with aggravating circumstances. The prosecution alleged that the accused robbed the victims of their property at Section N, Botshabelo on 22 August 2008. The stolen goods were specified and inventorised in annexure “b” to the charge sheet. Amongst them were a ladies handbag containing R4 000,00, shop keys, cellphones and gun safe key. The victims were Ms N.E. Noge and her husband Mr S. Noge.
- [4] The version of the prosecution was narrated by two witnesses, namely Ms Noge, the first victim and Mr Noge, the second victim. The version of the defence was independently narrated by accused no 1, now the appellant, and his co-accused. None of them called any witnesses to give evidence on their behalf. Over and above those witness Mr L.D. Kibi testified as a court witness.
- [5] On 1 June 2009 the appellant was convicted as charged. On the same day he was sentenced to 10 (ten) years imprisonment. Still on the same day he unsuccessfully applied for leave to appeal against the sentence only. He now comes on appeal with the leave to appeal against the conviction and sentence granted by Molemela, J *et* Mathebula, AJ on petition.
- [6] The grounds of appeal, as regards convictions, were that the court *a quo* erred in finding that the appellant had participated in the commission of the crime; that he was not an innocent bystander and that he was correctly and reliably

identified by the victims and the court witness as one of the robbers.

- [7] The thrust of the appellant's defence was that he was not involved in the armed robbery and that he was mistakenly and unreliably identified as one of the robbers. As a result of such wrong and mistaken identification he was wrongfully pelted with stones which eventful attack forced him to run away; that he was pursued by members of the community, but ultimately apprehended by the police who found no incriminating article in his possession.
- [8] In her judgment the regional court magistrate determined that the issue she had to decide was the identity of the perpetrators. Her characterisation of the core of the contest between the prosecution and the defence was correct in my view. At the end of the hearing the court *a quo* decided the issue in favour of the prosecution. Now the question in this appeal is whether that decision could be properly sustained by credible and reliable evidence.
- [9] The testimonies of the victims may be collectively condensed into one version. The couple locked their shop situated at 1055 Section N at 20h00. Ms Noge carried a handbag. There was R4 000,00 and other articles in the bag. The couple walked home. They resided at 1200 Section N. At the gate of their home, three unknown men confronted them. They came from behind. The couple had already turned towards their gate at the time they were

confronted. The first man, X, was standing approximately one metre away from Ms Noge with an empty bottle of Hansa in his hand. The second man, Y, was standing closer to her than X with nothing in his hands. The third man, Z, was standing behind Ms Noge and pointing a gun at Mr Noge.

[10] Y attacked Ms Noge's and snatched her handbag from her left shoulder. Thereupon Z ordered Mr Noge to run into the house. Before he got inside Z fired a shot on the ground very close to Mr Noge's feet. Z then commanded the others: "Let us run". At once all three ran away from the scene. They ran together in the same direction. The scene was illuminated by a high mast community lamp 200 metres away. Ms Noge trotted behind the robbers. Her shop assistant, Mr Kibi, responded to her scream for help. He turned back and pursued the robbers who had just ran passed him. He was also screaming for help. The screaming paid dividends. Several members of the community came out to help. The robbers were hotly pursued by members of the community, who managed to track down and catch two of them at two separate places. They handed them over to the police. However, Z managed to evade members of the community. He escaped with the cash and the two cellphones with the estimated combined value of R1 100,00.

[11] The court witness materially corroborated the version of prosecution to the extent that it applied to him. The

significant features of his corroborative evidence were that he heard the first victim screaming; that he saw three men running towards him and away from the screaming woman; that he ascertained from her that the runners who had shortly run passed him had robbed her of her belongings; that he saw them as they were jumping over the fences from one private property to the other; that he, aided and abetted by helpful residents, pursued them and that he witnessed how the appellant was caught.

[12] The version of accused no 1, in other words, the appellant was that he and accused no 2 were at Mashombo's Tavern at Section N. They consumed some alcoholic drinks there while he was waiting for his girlfriend. His girlfriend never turned up. They left the tavern at of about 21h00. By then he was very intoxicated. On their way to Section L where they lived, certain members of the community started throwing stones at them. As a result of the unprovoked attack they ran away. While he was running away from those attackers, a police vehicle appeared. He was arrested there and then. The police gave him no explanation for arresting him. That, in brief, was the appellant's version.

[13] The appellant's contention was that the court *a quo* erred in accepting, as credible and reliable evidence, the testimonies of the victims and the shop assistant, but rejecting his exculpatory testimony on the basis that it was not reasonably true. He asserted that his version that he was innocently walking back home when he was mistakenly identified,

falsely accused and wrongly pursued by members of the community and ultimately arrested by the police without good cause, was reasonably true. His principal submission was that the court *a quo* misdirected itself in finding otherwise.

[14] Mr Noge was a poor witness. He contradicted himself. He also contradicted his wife. His identification of the appellant was clearly questionable and thus unreliable. I deemed it unnecessary to do a thorough critique of the witness. He failed to impress me. Whenever his evidence deflected from that of Ms Noge, her's had to be preferred. He made his observation of the appellant in very stressful prevailing circumstances.<sup>1</sup> The potential risk for error was very high in his case. The exercise of caution became imperative in view of the unreliable features of his evidence.

[15] Ms Noge was a fairly impressive witness. Notwithstanding certain minor discrepancies, her evidence, as a single witness, was satisfactory in many material respects. She gave credible and reliable evidence against the appellant. Her direct evidence was significantly bolstered by circumstantial evidence.<sup>2</sup> The probabilities and improbabilities inherent in the two conflicting versions, coupled with the false aspects of the appellant's version.

[16] The robber X was in the forefront of the attack. It would appear that he strategically positioned himself between the

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<sup>1</sup> S v Ngcina 2007 (1) SACR 19 (SCA) par [6] per Navsa JA.

<sup>2</sup> S v Reddy and Others 1996 (2) SACR 1 (A) at 9b – e per Zulman AJA.

victims and their gate. He came walking, not alone, but with two others. Once he reached that point, he stopped walking. He must have turned around to face the victims. This is so because Ms Noge saw his face. She saw that he was wearing a black lumber jacket with a woollen collar. With a dangerous empty bottle in his hand he stood within a striking distance from the witness. Obviously the target of the robber armed with a bottle, was Ms Noge, whereas that of the robber armed with a firearm (Z) was Mr Noge. The role of the unarmed robber (Y) was to snatch the handbag from the frightened lady. The first scene was approximately 200 metres from the neighbourhood lamp known in the townships as Apollo light. The witness saw the uncovered face of X. She stated he was hatless.

- [17] The armed robbers certainly posed an obvious threat to the victims. The mere sight of the bottleman (X) and the gunman (Z) discouraged the frightened victims from daring to offer any kind of resistance. So frightened Ms Noge let go of her handbag. The handbag snatcher (Y) easily robbed the lady of her handbag with the full knowledge that he had the strong backing, not only of the gunman but the bottleman as well. I have no doubt that he did what he did to Ms Noge knowing that the two would not hesitate to put their weapons to an immediate and effective use in order to have their joint criminal venture accomplished at all costs.<sup>3</sup>

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<sup>3</sup> S v Lungile and Another 1999 (2) SACR 597 (SCA) para [10] – [14].

- [18] The foregoing analysis demonstrates that X was not a mere innocent spectator, but an important role-player in the armed robbery. Moreover, when the handbag snatcher and the gunman took to flight from the crime scene, the bottleman did not stay put on the scene. He too obeyed the command. He ran away together with them. They all ran in the same direction. Birds of the same feather flock together – so goes the proverb. In this instance, the bottleman flocked together with the gunman and the handbag snatcher.
- [19] The court *a quo* found that X's conduct indicated that he acted in concert with Y and Z. With that finding I am in respectful agreement. What Y and Z did they did in the furtherance of their common, criminal enterprise for and on behalf of X. The converse was also true. What X did he did for the mutual benefit of the criminal gang as a whole. By walking with them to the scene and subsequently fleeing from the scene together with them he tacitly performed acts through which he actively associated himself with the crime they had overtly committed.<sup>4</sup> According to the doctrine of common purpose, X was just as guilty. In my view he was more than an innocent bystander or spectator. He was a covert perpetrator.
- [20] In case there was any doubt about the reliability and accuracy of the observations of Ms Noge in her identification of the appellant as X, the bottleman, then a careful analysis of the surrounding circumstances becomes necessary. The

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<sup>4</sup> S v Safatsa and Others 1988 (1) SA 868 (AD) at 896G and 898A – B.

appellant was in the victim's street. He did not live in that neighbourhood. He lived in a different neighbourhood far from the neighbourhood of the victims. The victims were robbed of their goods at their gate. The robbers seemed to have known the victims, which was why the gunman ordered Mr Noge to run into his house. The robbers then ran away. An incriminating article, the gun safe key, was found on the second scene where the appellant was arrested. Another incriminating article, the first victim's ladies handbag, was found on the third scene in the vicinity of where the appellant's companion and co-accused was arrested. In my view those pieces of circumstantial evidence were telling against the appellant. They strongly militated against his contention that he was mistaken.<sup>5</sup>

- [21] The probabilities and improbabilities tended to overwhelmingly favour the prosecution's version. It appeared somewhat improbable that the appellant would have gone out at night, during August for that matter, wearing a skimpy t-shirt only; that he and accused no 2 were peacefully and innocently walking down the street; that they were mistakenly identified with the real robbers; that they were pelted with stones for no apparent reason; that he was also surprisingly arrested by the police for no apparent reason and that the police did not inform him as to why they were arresting him. All those claims by the appellant were highly improbable.<sup>6</sup>

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<sup>5</sup> R v De Villiers 1944 (AD) 493 on 508 – 509.

<sup>6</sup> S v Van Tellingén 1992 (2) SACR 104 (CPD).

[22] The probabilities were that he and his two companions ran away after they had robbed the victims of their money; that the first victim screamed for help; that her shop assistant amplified her screaming; that the assistant was close and in hot pursuit of the fugitives; that members of the community saw the fugitives were running away from the shop assistant and the victims; that the appellant realising that he had nowhere to escape, made an abortive attempt to hide under a motor vehicle and that members of the community caught him there and handed him to the police. It seemed to me that his co-accused was caught by a different group of members of the community. It was unlikely, in my view, that the two groups would have made the same mistake of letting the three real robbers evade them and catching two completely innocent persons.<sup>7</sup>

[23] Given those circumstances, I am of the view that the court *a quo* was correct in coming to the conclusion that there was no reasonable possibility that the appellant's exculpatory version could be true. Similarly, the corollary that the evidence consisting of the credible and reliable identification of the appellant and fortified by the indirect evidence of incriminating articles established the guilt of the appellant beyond reasonable doubt, was also correct.

[24] In my view the court *a quo* committed no appealable misdirection as regards either the facts or the law. In the absence of a proven material misdirection no appellate

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<sup>7</sup> S v Teixeira 1980 (3) SA 755 (AD) at 761A, 763A and 764B.

interference is permissible. Accordingly, I am inclined to confirm the verdict. In reaching this conclusion I was fortified by the lame and unpersuasive manner in which the appellant's heads of arguments were drafted, as well as the defence counsel's frank and responsible concession that he could not argue, with conviction, that the verdict was flawed.

[25] As regards sentence, the prescribed minimum sentence for a first offender convicted of robbery with aggravating circumstances, is 15 (fifteen) years imprisonment. The court *a quo* found that substantial and compelling circumstances existed. By virtue of that finding the court *a quo* sentenced the appellant to a lesser sentence of 10 (ten) years imprisonment.

[26] Mr Tshabalala hardly made any submission in an attempt to justify interference. He thereby tacitly conceded that there was no real substance in the appellant's grounds of appeal against sentence. The attitude of counsel was understandable. Mr Zweni supported the sentence.

[27] In the light of the foregoing, I deem it unnecessary to dwell on the matter, save to say that the appellant was convicted of a very serious crime of armed robbery where a firearm was used. In my view, a sentence less than 10 (ten) years imprisonment would not fit the crime and would not have been fair to society. I would, therefore, confirm the sentence.

[28] Accordingly I make the following order:

28.1 The appeal fails *in toto*.

28.2 The conviction and sentence are confirmed.

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**M. H. RAMPAL, J**

I concur.

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**J.P. DAFFUE, J**

On behalf of appellant:

Mr M.K. Tshabalala  
Instructed by:  
Legal Aid SA  
BLOEMFONTEIN

On behalf of respondent:

Adv L. Zweni  
Instructed by:  
Director of Public Prosecutions  
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