

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A316/2012

In the matter between:-

TEBOHO JOSIAS MOTLOUNG

Applicant

and

THE STATE

Respondent

CORAM:

MOCUMIE J et FISHER, AJ

HEARD ON:

6 MAY 2013

DELIVERED ON:

05 SEPTEMBER 2013

JUDGMENT

MOCUMIE, J

- [1] On 28 November 2010 the appellant and his co-accused were charged with robbery in the Magistrate court Bethlehem. On 7 February 2012, the appellant was convicted as charged and sentenced to three years imprisonment. His co-accused was found not guilty and discharged. On 14 November 2012 he was granted leave to appeal against his conviction only by this Court after

petitioning the Judge President of this Division. During the trial the appellant was legally represented.

- [2] Mrs Shai Zheng, the complainant, was assaulted and robbed of R2000,00 cash and two packets of cigarettes on 28 July 2011 around 18h00 inside her grocery store in Petsana, Reitz, by two men. She sustained injuries around her neck but did not seek medical attention. She later, on the same day, identified the appellant as one of the assailants at the police station. The appellant's co-accused was arrested later after being pointed out by the appellant as the person who had been in his company when this offence was committed.
- [3] Mrs Zheng stated that she knew the appellant some few weeks prior to 28 July 2011 and explained to what degree. She stated that the appellant came to her grocery store several times during the day. He would ask for prices of items and then leave without buying anything. That is why during the assault she was able to identify him. Apart from her prior knowledge of the appellant as she explained, the grocery store had bright electric lights inside. These lights were on. The appellant and his co-accused were in close proximity with her, about two meters from her, behind the counter, when the appellant took the money from the till where it was kept. The incident took place for about fifteen minutes.
- [4] The appellant was further implicated through the evidence of Captain Mokhethi who testified that on the day in question a

group of people including the appellant had just been arrested on various charges not related to this case. As they were brought into the charge office, the complainant, who had just walked into the police station, pointed the appellant out as her assailant during the robbery at her store. The appellant was there and then confronted with the complainant's allegations. During the interview, the appellant made certain admissions to Captain Mokhehi which were however not reduced to writing but included in the Captain's own statement. Although he denied telling Captain Mokhehi that he was the perpetrator, Captain Mokhehi maintained he did. He had no reason to falsely implicate the appellant. He was not the investigating officer and did not have any interest in the matter which would adversely influence him. As a result of those admissions the appellant was charged and locked up and his co-accused was arrested later.

- [5] Captain Mokhehi was corroborated by Warrant officer Fivas in so far as the arrest of the appellant at the police station was concerned. Although he could not confirm the content of Captain Mokhehi's evidence and what transpired between Captain Mokhehi, the appellant and the complainant, he however confirmed that on that day the appellant was pointed out by the complainant.
- [6] The appellant testified in his defence and did not call any witnesses. He denied any involvement in the robbery. He insisted that he did not know the complainant and was never at her grocery store on the day in question or prior to 28 July

2011. The reason he remembered this was because he had just been released on parole. As on 28 July 2011 he had fifty five (55) days outside the prison on parole. Thus the complainant could not have known him prior to the day in question.

[7] His defence was that of an alibi that on that day from 16h00 he was at his home. He recalled that he was home from 16h00 because he was waiting for officers of Correctional Services who visited him from that time as part of his conditional release on parole. He closed his case without calling anyone at his home or in the neighbourhood if he was not staying with anyone at his home.

[8] In a response to the prosecutor's question during cross examination he admitted that he made an admission to Captain Mokhethi that he committed the robbery. He alleged that he made the admission because Captain Mokhethi and Warrant officer Fivas had assaulted him and forced him to make the admission. He denied that he said anything to the police about his co-accused. He alleged that he made the statement in the presence of Warrant officer Fivas. However, he could not explain why this was not put to the two police officers when they testified. Neither could he explain

(a) how Captain Mokhethi would have known about the admission if the appellant did not make such admission to him,

(b) why would Warrant officer Fivas write down something he did not say.

(c) how would both know that his co-accused was his friend and that they had been together when this robbery was committed if he did not tell them.

[9] It was common cause that the complainant was robbed on 28 July 2011 by two men at her grocery store at 18h00. The only point in issue during the trial and in the appeal before us was the identity of the complainant's assailants.

[10] In convicting the appellant the trial court held that it was satisfied based on the evidence of all state witnesses that the appellant was one of the complainant's assailants. It rejected the appellant's alibi in the light of the complainant's evidence of identification which was strengthened by the fact that:

- (a) the complainant knew the appellant some few weeks prior to the day she was robbed;
- (b) hardly two hours had lapsed when the complainant pointed out the appellant out of her own amidst a group of other unknown suspects that had been arrested with the appellant on other cases, whilst the incident was still fresh in her mind;
- (c) that the incident happened inside the grocery store where there were no other customers except the two;
- (d) the grocery store was sufficiently lit with electric lights;
- (e) the complainant could clearly explain what each participant did during the commission of the robbery.

[11] In its reasoning, the trial court was alive to the pitfalls of evidence of a single witness as well as evidence of identification. There was no material discrepancies the appellant could point to, to indicate that the trial court did not apply its mind judicially to the evidence presented. What seemed to be the only aspect that the appellant referred to as 'material contradiction' was the fact that the complainant stated in her evidence-in-chief that she was called by the police to come to the police station to identify the suspect whereas the police testified that she identified the appellant on her own. This on its own cannot be regarded as a material contradiction. The difference in the witnesses' evidence in this regard was taken into account appropriately by the trial court. The trial court stated categorically that it rejected that version because Warrant officer Fivas was originally not aware why the complainant was at the police station, and secondly the appellant made admissions to Captain Mokhethi which corroborated the complainant's version. What also counted against the appellant and strengthened the complaint's version more was the fact that he had denied being at the complaint's store because fifty five (55) days before 28 July 2011 he was still in custody on some other case, but when calculated backwards, the appellant was out of prison on 04 June 2011 already.

[12] The trial court applied its mind as a trial court should. It considered the probabilities and improbabilities on both sides and preferred the state's version as the more probable.

There is no reason for this Court to interfere with the conviction of the trial court.

[13] The appellant was granted leave to appeal against his conviction only, it is as a result not necessary to traverse the sentence imposed.

[13] In the result the following order is granted.

ORDER

1. The conviction is confirmed.
2. The appeal is dismissed.

B.C. MOCUMIE, J

I concur.

P.U. FISCHER, AJ

On behalf of appellant: Adv L.M. Tshabalala
Instructed by:
Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of respondent: Mr W.Z. Sampisi
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

BCM/sp