

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

Appeal No. : A182/2011

In the appeal between:-

**RICKY GANDA**

Appellant

and

**THE STATE**

Respondent

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**CORAM:**

VAN ZYL, J *et* DAFFUE, J

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**HEARD ON:**

6 FEBRUARY 2012

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**JUDGMENT BY:**

DAFFUE, J

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**DELIVERED ON:**

5 APRIL 2012

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**INTRODUCTION**

[1] On 4 February 2011 the appellant was convicted by the Regional Court at Welkom on two counts of robbery with aggravating circumstances. On the same day he was sentenced to 8 years imprisonment in respect of both counts, such sentences to run concurrently.

[2] On 5 April 2011 leave to appeal against conviction was

granted by the court *a quo*.

### **THE ISSUES**

[3] It is apparent from the application for leave to appeal that appellant relies on several grounds of appeal, but the two main issues to be considered are (a) whether the acceptance of appellant's identification by the two state witnesses is correct and (b) whether appellant's alibi in respect of the two incidents was correctly rejected as not reasonably possibly true. Pertaining to identification it is appellant's case that the ID parade was defective and the court *a quo* incorrectly accepted the evidence in that regard notwithstanding serious irregularities. One alleged irregularity is the evidence by the state witness, Lydia Hlanganiso that the investigating officer was present during the parade and also in the same room with the identifying witnesses. Secondly, the witnesses were able to see the line-up of suspects before the ID parade started. Insofar as appellant's alibi is concerned, it is appellant's case that the court *a quo* incorrectly doubted the authenticity of the document indicating that he was detained in Mozambique. It is averred that an onus was placed on appellant to prove his innocence insofar as the court *a quo*

found that appellant should have called the author of the document. It is also alleged that the court *a quo*, without sufficient reason, regarded the procedure at the border between Mozambique and South Africa as described by appellant questionable. Pertaining to the second incident it is alleged that the court *a quo* incorrectly found that there was nothing to suggest that the host of a traditional feast/ceremony had to remain on the premises at all time during the ceremony.

### **LEGAL PRINCIPLES**

[4] In assessing the evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof. See **S v SHILAKWE** 2012 (1) SACR 16 (SCA) at 20, para [11]. The Supreme Court of Appeal approved of the following *dictum* :

“But in doing so, (breaking down the evidence in its component

parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees.”

See **S v HADEBE AND OTHERS** 1998 (1) SACR 422 (SCA) at 426F – H and **S v MBULI** 2003 (1) SACR 97 (SCA) at 110, para [57].

- [5] The same principles apply when an alibi defence is relied upon by an accused. The acceptance of the evidence on behalf of the state cannot by itself be a sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence

implicating the accused is true which can only be done if there is at the same time no reasonable possibility that the evidence exculpating him is not true. See **S v VAN ASWEGEN** 2001 (2) SACR 97 (SCA) at paras [7] & [8], 100f-101e and **S v LIEBENBERG** 2005 (2) SACR 355 (SCA) at 358H – 359E, paras [14] and [15]. The effect hereof is that once the trial court accepts the evidence in support of an accused's alibi as reasonably possibly true, it follows that the court should find that there is a reasonable possibility that the evidence led on behalf of the state is mistaken or false.

[6] Bearing in mind the above the correct approach is to consider the alibi in the light of the totality of the evidence in the case and the court's impression of the witnesses. See **R v HLONGWANE** 1959 (3) SA 337 (A) at 341A. In doing so, the trial court should remind itself that no onus rests on an accused and that the state must prove that the accused committed the crime and it must therefore disprove the alibi.

[7] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was) dealt with this aspect as follows:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

See **S v CHABALALA** 2003 (1) SACR 134 (SCA) paragraph [15]. In this regard it is apposite to consider the evaluation of inherent probabilities by the trial court as accepted by the Supreme Court of Appeal in **MAGADLA v S**, 80/2011 [2011] ZASCA 195 delivered on 16 November 2011, (unreported), at paragraph [22] and further.

- [8] The right to remain silent and its effect on the disclosure of an alibi defence was thoroughly discussed and considered in the **S v THEBUS** 2003(6) SA 505 (CC) at 533 and further. The CC, per Moseneke J, found that a distinction may properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent. It is clear that the late

disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi, although standing alone, it does not justify an inference of guilt. Secondly, such late disclosure is a factor to be taken into consideration in determining the weight to be placed on the evidence of the alibi. The Court stated further: “The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole.” At para 68, 537G.

- [9] In **S v MBULI** *loc cit* at para [42] at 107A Nugent JA stated that our courts have over the years drawn attention to circumstances that might placed the probity of identification parades in doubt. So, for example, the accused person should not be so distinctive from the others on the parade that a witness might tend to identify him on extraneous grounds; the parade should not be conducted in circumstances that allow prior discussions amongst the witnesses and the police officers who are investigating the

crime should avoid being involved in the conduct of the parade. In paragraph 48 of the judgment Nugent JA commented that the mere presence of the police officers, including the investigating officer, at the identification parade was an insufficient ground upon which to doubt the probity of the identification evidence.

- [10] The identification of a perpetrator, based on the evidence of a single witness must also be considered. Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and having done so, should decide whether it is satisfied that the truth has been told, despite the shortcomings or defects in the evidence. See **S v SAULS** 1981 (3) SA 172 (AD) at 180E – G. Our courts have repeatedly stated that evidence of identification must be approached with caution. There is no doubt that honest witnesses may make mistakes because of the fallibility of human observation and therefore all various

factors set out in **S v MTHETWA** 1972 (3) SA 766 (AD) at 768A – C and any other factors that need to be considered should be weighed one against the other, in the light of the totality of the evidence and the probabilities.

- [11] The fact that a witness failed to provide a description of the accused does not always assist him or her. In the event where the witness was in a situation where he or she had ample opportunity to make a proper and reliable observation of the perpetrator, such factor will be taken into consideration to consider the value to be attached to such evidence, especially so where the witness did not have any reason to falsely implicate the perpetrator. See **MAGATLA** *loc cit* at paragraph [32]. In this matter three judges found that the perpetrator had been identified correctly notwithstanding the fact that there was no evidence by the complainant as to the perpetrator's clothing and any physical attributes or marks on his face or body with which she identified him, factors that the minority heavily relied upon in an endeavour to uphold the appeal. In the minority judgment strong reliance was placed on the judgment of Williamson JA in **S v MEHLAPE** 1963 (2) SA 29 (AD) at 32A – F.

[12] In **S v NDUNA** 2011 (1) SACR 115 (SCA) at 120H – 121E, the Supreme Court of Appeal dealt with similar fact evidence as follows:

“[17] It is settled law that, whilst similar fact evidence is admissible to prove the identity of an accused person as the perpetrator of an offence, it cannot be used to prove the commission of the crime itself. This legal principle operates, in addition, to exclude such similar fact evidence from being confirmatory material on another count.

[18] However, the application of the rule is not to be confused with the situation where the rule is invoked to establish the cogency of the evidence of a systematic cause of wrongful conduct, in order to render it more probable that the offender committed each of the offences charged in respect of such conduct (S v GOKOOL 1965 (3) SA 461N at 475A – D)..... This court (per Schreiner JA) stated the rule succinctly in R v MATHEWS AND OTHERS 1960 (1) SA 752(A) at 758B – C:

‘Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common

sense relevancy and then adds material to it or, more commonly, excludes material from it, the resultant being what is legally relevant and therefore admissible.... Katz's case is authority for asking oneself whether the questioned evidence is only, in common sense, relevant to the propensity of the appellants to commit crimes of violence, with the impermissible deduction that they for that reason were more likely to have committed the crime charged, or whether there is any other reason which, fairly considered, supports the relevancy of the evidence”

### **THE EVIDENCE**

[13] Two branches of Pep Stores were robbed exactly two months apart. In the first instance the Pep Stores branch of Wesselsbron was robbed of cellular phones and cash in the amount of R33 000,00 on 4 December 2005. In the second instance Pep Stores in Virginia was robbed of R22 000,00 cash on 4 February 2006. Appellant, who was charged with these two counts, pleaded not guilty and elected not to give any plea explanation.

[14] In both robberies the assailants did not wear any form of disguise and used firearms in the execution of the crimes.

Two employees of Pep Stores, Me Rose Khabe and Me Nongamtini Joyce Dithebe testified in respect of the first robbery in Wesselsbron. Me Dithebe was not able to identify any of the assailants. Me Khabe the manageress, a 48-year old lady who was in the employ of her employer for 24 years at the stage when the robbery was committed, not only pointed out appellant in the dock, but also at an ID parade held on 23 September 2006. The assailant identified as the appellant pointed a firearm at her. The robbery was executed at 11 o'clock in the morning and the lights in the shop were on. She was ordered to accompany the assailant to the office. He took cellular phones and ordered her to open the safe and remove the money which she did. Thereafter she and another employee were taken to the toilet where they were locked-up with other employees. She was neither asked by the prosecutor, nor by the defence counsel to provide the trial court with any distinctive features of the assailant. Her testimony pertaining to her opportunity to identify appellant reads as follows:

“Even if I was shocked at the time he pointed me with the firearm the very first instance, he looked me in the eye and I

also looked him in the eye. Secondly, when I handed him the cash in the office I looked him in the eye and even when he demanded airtime from me I was looking him in the eye and I was talking to him.”

When confronted with appellant’s alibi, she mentioned the following:

“I will not change my mind because on the 4<sup>th</sup> of December he was in Pep Stores in Wesselsbron. He cannot say that it was not him.”

Although she was told that she was going to point out one of the people who were involved in the robbery since he had been arrested, she testified as follows:

“If this person who was present at the robbery was not there I would not have pointed out anyone.”

She denied in her evidence that the investigating officer was present with the witnesses in the same room during the ID parade. In this regard, she contradicts the version of the state witness Me Lydia Hlanganiso.

[15] Me Maggie Matshela and Me Lydia Hlanganiso were employers at Pep Stores, Virginia on the 4<sup>th</sup> February 2006. Me Matshela was not able to identify any of the assailants, but Me Hlanganiso identified the appellant. According to her the appellant and another person visited the store two days prior to the 4<sup>th</sup> of February 2006. The appellant was looking at school trousers, but she noticed that he was in fact observing the employees within the shop whilst holding grey school trousers in his hands. They did not buy anything and left. On the day of the robbery she was standing close to the counter where another employee, Mr Rodger Mohape was busy packing sweets when appellant pointed a firearm at Mr Mohape. They were also taken to a toilet after the appellant went to the office first to obtain money from the safe. When appellant's alibi was put to her, she denied that and specifically said that appellant "was there with gum boots on as well as a blue machine cover". When asked about any marks with which she could identify appellant, she stated that "I don't know of any marks, but it was him." She confirmed that she identified appellant at the ID parade by his facial appearance.

[16] Captain Lushana was called to testify. He was in charge of the ID parade. Appellant was represented during the ID parade by a legal practitioner, one Mr Macheka. Me Khabe identified the appellant within 50 seconds and Me Hlanganiso took 57 seconds to do that. Captain Lushana denied that the investigating officer, inspector Dlamini was present at the ID parade. The customary SAP 329 form was completed during the parade and handed in as an exhibit. Inspector Masilo was also called upon to testify. He guarded the witnesses before attending the ID parade and confirmed that he was the only police officer inside the room where the witnesses were kept prior to them being taken to the parade. The matter was not discussed with the witnesses and they were not told who to point out. After a witness went to the parade, such witness did not return to the waiting room and the witnesses were not allowed to communicate with each other. Mr Matsohole was also called to testify. He is employed by the Department of Correctional Services. He escorted the witnesses from the ID parade. He did not have anything to do with the investigation and did not discuss anything with the witnesses.

[17] It is recorded that appellant was arrested on 14 November 2006 and after several postponements the trial eventually started on 29 January 2009 on which date Me Hlanganiso testified. Me Khabe only testified on 3 November 2009. It was put to her in cross-examination that the appellant was detained at the Mozambique border, after being arrested on 2 December 2005 for not having a valid passport, that he was released only on the 5<sup>th</sup> of December 2005 and that he could not commit the crime on the 4<sup>th</sup> of December 2005. It was at that stage mentioned that appellant has proof of such detention. The witness was not confronted with proof. On that day and after the State closed its case, the defence requested a postponement. Appellant's legal representative referred to a document in his possession, the authenticity which was challenged by the prosecutor and hence they needed to obtain the author of the document to testify and also to obtain an interpreter to interpret the contents which were written in Portuguese. The prosecutor mentioned the following:

“Your Worship, my only problem is that this document comes

now after this case has been on the roll for so long. If the document was already in the possession of the defence why don't (sic) they produce it long ago. This matter has been dragging from last year already, so it is just a waste of time, delaying tactics Your Worship, and this document that the defence have in their position, is not for the state to help them to get the witness to the court, it is the defence... This matter comes from 2007, it's already now 2009, and now we are going to 2010 and the document is still in the possession of the defence. Why did they keep it so long?"

Mr Mokhele, acting for the appellant, replied as follows:

"Your Worship, just to add on with the availability of the document, the instruction that we got from the client was that the document was available, but because of the present situation we were struggling to get hold of the person who was suppose to bring the document, hence it came in late, because we could have arranged that a long time back, Your Worship."

[18] On 16 September 2010, the trial was resumed and the appellant testified in his defence and called a witness in support of his alibi, Mr J Tjabane. When asked where he was

on the 4<sup>th</sup> of December 2005, he said that he was in Maputo in Mozambique and that he specifically went to Maputo as his young daughter was ill. He testified that on his arrival at Maputo he was arrested. He went to Maputo without being in possession of a passport. He obtained a document, which was handed in as exhibit, to the effect that he was detained from 2 December 2005 and released on 5 December 2005 only. This document he obtained from “the offices on site of Mozambique at the border”. It should be noted that appellant later testified that he was not allowed to cross the border and that he did not continue with his journey to Maputo. He thus contradicts himself insofar as he testified initially that he was arrested at Maputo, which is far away from the Mozambique/South African border, it being the capital of Mozambique.

- [19] Pertaining to the robbery on the 4<sup>th</sup> February 2006, he relied on an alibi insofar as he hosted an ancestral feast/ceremony at his parental home, which ceremony was also attended by his sister’s son, Mr Tjabane, who testified on his behalf. He was at the premises the whole day and could not leave as a result of his culture. Therefore he denied that he was at Pep Stores in Virginia on the 4<sup>th</sup> February 2006. The people who

attended the family feast “have been an average of so-called lot, there was a lot of people” according to his version. He mentioned that he was at his place of employment, Symunya Wholesale in Welkom on the 2<sup>nd</sup> February 2006, being the day on which he was allegedly seen by the witness, Me Hlanganiso, two days prior to the robbery.

In cross-examination appellant stated that he went to Mozambique before and that he used public transport. That time he was not arrested and he also passed through the border without a passport. In December 2005, he was arrested at a roadblock between Maputo and a certain town or place named Matola. On his version in cross-examination he was somewhere between the border and Maputo, being a third version. According to him, he pleaded with the personnel at the border to let him through and they acceded to his request.

[20] It is to be noted that the document he relied upon and which was handed in as exhibit “D” in support of his alibi that he was in Mozambique at the time, is dated 5 December 2005. This document was for the first time referred to during the

trial at the end of 2009, and long after the trial started. On appellant's version it was kept in a file that he normally carried with him. Appellant could not give any proof that he was working with Symunya Wholesalers on the 2<sup>nd</sup> February 2006.

[21] The appellant's witness, Mr Tsabane was vague in his evidence and several questions had to be put to him more than once. He could not even remember when he was requested by appellant to testify on his behalf pertaining to the alibi. When he was asked about other ceremonies, he confirmed that other ceremonies were held, but was not able to give the dates thereof. This specific ceremony, on the 4<sup>th</sup> February 2006, was important to him and that is why he remembered the date, but he could not explain why this specific date was so important or why he could remember this date, but not the others.

### **THE COURT A QUO'S FINDINGS**

[22] The court *a quo* correctly found that it was not in dispute that the two Pep Stores at Wesselsbron and Virginia were robbed two months apart, that cash were stolen in both instances

and that the robbers were armed with firearms in each case. Also on both occasions, the robbers locked the employees in the toilets before they escaped. The only issue was who orchestrated it. The court *a quo* was aware of the fact that the two state witnesses were single witnesses and that the evidence had to be treated with caution. It was also clear that the court *a quo* considered the aspects dealt with in the case law pertaining to identification. The court *a quo* also fully dealt with the factors why Me Hlanganiso was able to identify appellant whilst the co-employee could not and the same reasoning applied to the identification of Me Khabe, whilst her co-employee was also not able to identify appellant. It is apparent from the record and the judgment of the court *a quo* that Me Hlanganiso and Me Khabe had more time and more opportunities to observe the assailant than the co-employees. The court *a quo* further found that there was no reason why the state witnesses would falsely accuse appellant. The court *a quo* also found that the ID parade was properly conducted and that the state witnesses were not influenced to point out anybody. In my view, and notwithstanding the attempts in cross-examination to show that the ID parade was irregular, the court *a quo*'s finding

cannot be faulted. It must also be taken into consideration that the appellant's legal representative was present during the ID parade and it is apparent that he did not question any conduct and/or alleged irregularity. Appellant was given an opportunity to change his position on the parade, but he elected not to do so, indicating that he was satisfied. It must also be pointed out that Mr Nel, on behalf of appellant, made it clear that he could not attack the ID parade within any conviction.

The court *a quo* dealt in detail with appellant's alibi evidence. It was critical of appellant's conduct and evidence insofar as the relevant document from the Mozambique authorities, indicating that he was detained for three days and which was in his possession all the time, only came to the fore and was mentioned at the end of 2009, long after the trial started. Mr Nel submitted that although there might be suspicion and question marks in this regard, that was not enough for the court *a quo* to reject the alibi, as it should have accepted it. He referred to **S v LIEBERBERG** *loc cit* and **S v THEBUS** *loc cit* in order to persuade us to find in appellant's favour. The court *a quo* also referred to the inherent improbabilities

and contradictions in appellant's version pertaining to crossing the South African and Mozambique borders without a valid passport. It must also be recorded that it was put to Me Khabe that appellant was arrested for not having a valid passport. During his evidence it transpired that appellant never had a passport at all. The criticism of appellant's evidence is well founded and even considered on its own, could be rejected as false and improbable. However if it is considered with the totality of the evidence the court *a quo's* rejection of appellant's alibi in this regard is supported.

- [23] Appellant's alibi pertaining to the traditional feast that he arranged and attended on 4<sup>th</sup> February 2006 must also be considered. As indicated his nephew testified on his behalf. The court *a quo* found that he had reason to be biased, that he had sufficient opportunity to concoct his evidence in favour of the appellant and that his version pertaining to what occurred during the day that the traditional feast was allegedly held, appeared to be improbable. On his version he observed the appellant the whole day and appellant never left the premises from the morning until the evening. He testified in this vein notwithstanding the fact that "a lot of

people” attended the festival. In my view and having regard to the improbabilities in the version of the defence, especially in the light of the totality of the evidence, the court *a quo* did not misdirect itself and rejected the alibi in this regard on proper grounds.

[24] Consequently the court *a quo* did not err in its finding that the State had proven its case beyond reasonable doubt and therefore appellant’s conviction in respect of both counts of robbery is in order.

### **ORDER**

[25] Therefore, I would make the following order:

Appellant’s appeal is dismissed.

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**J.P. DAFFUE, J**

I concur and it is so ordered.

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**C. VAN ZYL, J**

On behalf of appellant: Adv. J S Makhene  
Instructed by:  
Bloemfontein Justice Centre  
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On behalf of respondent: Adv. W J Harrington  
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