

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A173/10

In the appeal between:-

MOKETE JOHANNES MAHLATSI

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAL, J *et* MTHEMBU, AJ

HEARD ON:

7 NOVEMBER 2011

DELIVERED ON:

24 NOVEMBER 2011

JUDGMENT

MTHEMBU, AJ

- [1] The appellant was convicted on robbery with aggravated circumstances as provided for in section 1 of Act 51 of 1977. The appellant was convicted on 6 April 2009 and sentenced to 15 years imprisonment on the same day
- [2] He was aggrieved by the conviction and sentence. With the leave of the court a quo he now appeals against conviction only

- [3] The facts of this case are briefly the following. Rose Malefane and Alina Lesege were both employed at the Bloemspa Guesthouse. On 9 June 2008 in the early hours the doorbell rang at the guesthouse. They were awaiting a guest who had earlier on made a reservation. They went to the reception. Through the door, they could see a person. Alina spoke with this person who said that he was looking for a room for six people. Rose left the area to go and make arrangements for the guest. Alina opened the door for this man. Then approximately five to six other persons stormed inside. Alina was pointed with a firearm
- [4] The robbers were looking for the safe. Earlier in the day a dove had entered the guesthouse and it then began flying around. Thinking that it was some of the guests, the robbers then fled.
- [5] After the robbers had fled, it was discovered that Rose's cellphone missing. The police were called. They came. The waitresses learnt from the police that a plasma TV, coffee machine and the cash register were missing.

[6] The two witnesses could not identify any of the robbers, as they were clad in balaclavas.

[7] The appellant was linked to the robbery in the following manner:

7.1 The appellant previously worked for a security company at the guesthouse and that is where he met Alina

7.2 While he was working at the guesthouse, he proposed love to Alina

7.3 They had each other's cellphone numbers.

7.4 Appellant's services were terminated.

7.5 He later met Alina on a bus travelling from Botshabelo to Bloemfontein.

7.6 In the bus, the appellant informed Alina that there were things that he wanted at the guesthouse.

7.7 Alina realised that it was wrong and was afraid to take part, however, the appellant promised her that he would reward her.

7.8 The appellant informed her that he would phone her when they came. On the day of the robbery the appellant phoned her and told her that they were

coming. She was afraid, but agreed with the plan.

7.9 The appellant phoned her when they arrived, but she did not answer her phone.

7.10 During cross-examination it was not denied that the appellant is also known as “Castro”.

[8] The appellant did not testify in his defence nor did he call other witnesses in his defence.

[9] In his heads of argument , appellant’s submissions were that:

9.1 Alina did not identify the appellant as Castro. She also did not identify the voices of the robbers as that of the appellant.

9.2 There was no indication that the cellphone numbers that appeared on Alina’s cellphone were those of the appellant.

9.3 It is uncertain if the Castro referred to is the same Castro as the appellant.

9.4 The court *a quo* in a leading question linked Castro with the appellant and Alina simply confirmed this.

9.5 It was submitted that the court *a quo* incorrectly relied on this evidence to find a nexus between the said

Castro and the appellant.

- 9.6 In the absence of any other evidence, the evidence was insufficient to justify the conclusion that the only reasonable inference that the appellant was part of the group of robbers or that he was involved in the robbery.
- 9.7 It was submitted on behalf of the appellant that, the telephone calls were insufficient to prove beyond a reasonable doubt that they were linked with the robbery.
- 9.8 The trial court erred in finding that the television set and coffee machine were part of the items that were robbed since such finding was based on hearsay evidence and therefore inadmissible
- 9.9 The evidence regarding Malefane's missing cellphone was unsatisfactory and it could not be found beyond a reasonable doubt that the robbers were responsible for the disappearance thereof.
- 9.10 No *prima facie* case was made against the appellant and there was no onus on him to testify.

[10] During argument, Mr. Pretorius on behalf of the appellant, conceded that the appellant was correctly identified as Castro. He also conceded that the issue regarding the stolen goods was not taken up in the court *a quo* and he did not intend to proceed with it. It then flows from the above that the Castro that Alina had been in conversation with is indeed the appellant. Accordingly then the circumstantial evidence is overwhelming against the appellant

[11] In light of the above concessions and on a conspectus of all the evidence I am of the view that the court *a quo* acted regularly and did not misdirect itself in any manner or in any material respect with regard to the conviction which would entitle this court to interfere with its decision. As Greenberg JA stated in **REX v DHLUMAYO AND ANOTHER** 1948 (2) SA 677 (AD) at 705 – 706:

“3. The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole

personality. This should never be overlooked.

4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
5.
6.
7. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.
8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.”

See too **S v HADEBE AND OTHERS** 1997 (2) SACR 641 (SCA) at 645 e – f.

In my view the conviction on robbery with aggravated circumstances is in order and the appeal ought not to succeed. The appellant has not appealed against his sentence.

[12] I make the following order:

12.1 The appeal against conviction is dismissed

12.2 The conviction is confirmed

12.3 The sentence stands

J.B. MTHEMBU, AJ

I concur.

M.H. RAMPAI, J

On behalf of appellant:

Mr. K. Pretorius
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent:

A. Bester
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN

/sp