

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A214/08

In the matter between:-

TSHIDISO MOELETSANE

Appellant

and

THE STATE

Respondent

CORAM: H.M. MUSI, JP *et* EBRAHIM, J *et* MOOLLA, AJ

HEARD ON: 1 FEBRUARY 2010

DELIVERED ON: 11 FEBRUARY 2010

JUDGMENT

H.M. MUSI, JP

[1] This is an appeal against a judgment of the regional court at Welkom wherein the appellant was convicted on a charge of housebreaking with intent to commit robbery and robbery with aggravating circumstances and sentenced to 15 (fifteen) years imprisonment. The appeal is against both conviction and sentence and is with leave of the court *a quo*. The

appeal was initially heard by two Judges of this court but they could not agree on the outcome.

- [2] The factual background to the appeal is briefly as set out hereunder. On the night of 19 October 2005 at about 2 am Mrs Leah Nchoba (wrongly spelt Nchaba in the charge sheet) and her three daughters, namely, Mpho Violet, Dikengkeng Anna and Jane, alongside her little grandchild, Kekeletso, were asleep in their shack dwelling in Thabong, Welkom, when three men armed with a variety of weapons broke down the door of their house and entered it. Once inside, the men demanded that the lights be switched on whereafter two of them removed several appliances including a TV set, a cellphone as well as a handbag containing a bank card, a Foschini card and cash in the amount of R200,00. One of the three men threw one of the girls onto a bed and raped her. The house is a single structure divided by curtains into a bedroom and kitchen. The family shared the bedroom which had two beds. During the attack Mpho hid underneath a bed and apparently saw nothing and was consequently not called to testify. The mother, Anna and Kekeletso sat on the one bed and

observed events from there whilst Jane was thrown onto the other bed and raped. She could not observe the rapist as she had been instructed not to look him into the face but rather to look to the side. She observed some of the goings on as she looked sideways away from the rapist.

[3] All the complainants who testified pointed to the appellant as one of the attackers. Each one of them gave an account of how she was able to observe him and each vouched that it was him that removed the TV set. The appellant, on the other hand, denied being involved in the crimes charged and pleaded an alibi. He said that on the date and at the time that the offences were committed, he was at a tavern called Chico in Thabong, which is apparently far from the scene, given that he said that he had to board a taxi therefrom to his home which is in the vicinity of the home of the complainants. The court *a quo* found that the appellant had been positively identified as one of the robbers and rejected his alibi.

[4] Two issues fall for decision in this appeal. Firstly, whether the magistrate was correct in rejecting the appellant's alibi

and secondly, whether she was correct on the issue of identity. A finding in favour of the appellant on any of the two issues will necessarily lead to the appeal succeeding.

- [5] The court *a quo* found the witnesses for the State to have been credible and that there were factors that guaranteed the reliability of their observations. However, it gave no reasons for rejecting the appellant's case and, significantly, it made no credibility findings in respect of the appellant. It seems to have rejected the appellant's version purely on the basis that once he had been positively identified as one of the robbers, his alibi version could not stand. This approach was clearly wrong. The strength of the identifying evidence is one side of the coin. The alibi had to be considered in the light of the totality of the evidence, including that of the appellant. See **R v HLONGWANE** 1959 (3) SA 337 (AD) at 340H – 341B. In **S v LIEBENBERG** 2005 (2) SACR 355 (SCA) Jafta JA (as he then was) said the following at 358 i:

“The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been,

when considered in its totality, of the nature that proved the alibi evidence to be false.”

[6] The major difficulty in this case is that the learned magistrate did not conduct a meaningful assessment, if any, of the appellant’s evidence and made no definite findings in regard thereto. Yet the appellant (though not impressive, in my view) was not discredited at all. Cross-examination by the prosecutor did not test the credibility of the alibi but rather focussed on peripheral issues like why would the state witnesses falsely implicate the appellant. The appellant even said in his evidence that he had disclosed his alibi to the investigating officer and had invited the latter to verify it. Of course this version was not put to Inspector Twala, but then again no attempt was made to recall him to respond to it.

[7] I therefore come to the conclusion that the learned magistrate erred in rejecting the appellant’s alibi. It stands to reason that once the alibi is found to have been reasonably possibly true, it could not be said at the same time that the State had proved the guilt of the accused beyond a reasonable doubt. See **S v VAN ASWEGEN** 2001 (2) SACR

97 (SCA) at 101 a – e where the SCA quoted with approval a passage to that effect in **S v VAN DER MEYDEN** 1999 (1) SACR 447 (W) at 449 f – 450 b; **S v LIEBENBERG**, *supra*, at 358 i to 259 e. On this score alone the conviction stands to be set aside.

- [8] I now turn to consider the issue of identity. In this regard there is a serious defect in the case against the appellant which seems to have eluded the attention of the magistrate, to which I shall revert shortly. In my view, no fundamental fault can be found in the evidence of the witnesses Leah and Anna Nchoba regarding their ability to make proper observation. The electric lights were on and the TV was removed from the room in which they were seated. It is clearly a small room and the person who removed the TV must have been very close by. The evidence that they were able to see his face after he had picked up the TV and turned towards them, is credible. Whereas the evidence is that the robbers had covered their faces with their jackets, quite clearly this person must have used both hands when lifting the TV, thus for the first time exposing his face. Both witnesses gave a description of his face and complexion and

said that he wore a hat and khaki jacket. Anna said that she had seen the person the previous day and that he had been wearing the same clothes. It is common cause that the appellant was known to the witnesses by sight and that he stayed in the same vicinity. They even knew his place of residence. I should say though at this stage that I would not place much reliance on the evidence of Jane regarding her description of the person who removed the TV set. She was being raped and how could she possibly have been in a position to make any meaningful observation when somebody was busy physically violating her body and soul? She could only have made a glancing observation of the person.

- [9] The really worrying aspect of the case is the intervention of other people in the morning after the crimes had been reported to the police and statements taken. Significantly, no statement was taken from Anna whereas she was an important witness. Be that as it may, throughout their statements to the police the witnesses told the police that the robbers were unknown to them. How come then that a few hours later they came up with the name of Tshidiso (the

appellant) as one of the robbers? The answer is to be found in the fact that the matter was subsequently discussed with the brother of the girls and neighbours. This emerges from the evidence of the complainants themselves. Leah says that whereas she had known the appellant by sight, she did not know his name and that the name was furnished by her children. Anna says that she gave a description of one of the robbers to her brother and the brother said it was Tshidiso. Likewise Jane confirms that the name was given during those discussions. Now Mr. Nkhahle, for the appellant, argued that this has seriously tainted or, to use his language, “contaminated” the evidence as to identity. I agree.

- [10] In a situation like this where the identifying witnesses conferred with other people about a possible suspect prior to pointing him out, many worrying possibilities present themselves. The one possibility is that someone may have suggested the appellant as the most likely suspect based on the fact that he is known in the vicinity to have criminal tendencies. In fact, Anna said that she had heard negative things about him and Inspector Twala inadvertently mentioned that he had arrested him on previous occasions.

The other possibility is that alluded to by the witnesses, namely, that the name simply fitted the description they gave. The fact of the matter, however, is that a scenario where witnesses elicit the views of other people on the identity of the suspect, is fraught with dangers and is enough to cast doubt on the reliability of the identifying evidence. Inherent in it is the risk of a wrong conviction. It is not known, for instance, whether but for the intervention of other people the complainants would have been able to positively identify the appellant.

- [11] Now doubts could have been cleared had the investigating officer, Inspector Twala, not rushed to arrest the appellant in the presence of the complainants, but had rather quietly arrested him and then arranged for the holding of an identification parade. In fact, it is questionable why he had to take the complainants along for, on his own version, he had known the appellant and where he stayed. The matter is compounded by the fact that in the police statement earlier that morning, the witnesses did not mention, at least, that one of the robbers was familiar. On the contrary, they said that the robbers were unknown to them. Under those

circumstances the appellant was entitled to the benefit of the doubt.

[12] In the result, the appeal succeeds and the following order is made:

Both the conviction and sentence imposed on the appellant are set aside.

H.M. MUSI, JP

I concur.

S. EBRAHIM, J

I concur.

E.A. MOOLLA, AJ

On behalf of appellant:

Adv. R.J. Nkhahle
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv. V.Z. Nel
Instructed by:
Director Public Prosecutions
BLOEMFONTEIN

/sp