

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A119/2009

In the matter between:-

MOHLOLO JAMA

Appellant 1

ABE LEBAKENG

Appellant 2

versus

THE STATE

Respondent

CORAM:

MOCUMIE *et* MOLEMELA, JJ

HEARD ON:

2 AUGUST 2010

DELIVERED ON:

12 AUGUST 2010

JUDGMENT : APPEAL

MOCUMIE, J

[1] The appellants appeared on two charges of robbery in the Magistrate Court, Ficksburg. They were convicted as charged on 4 June 2009 and each sentenced to three (3) years imprisonment on each count. They now appeal against their conviction only with leave of the court *a quo*.

- [2] Mr. Pretorius, on behalf of the appellants, submitted that in essence the trial court erred by accepting that the State had proved its case beyond reasonable doubt and rejecting the appellants' version as not reasonably possibly true.
- [3] The facts of this case are simple. The two complainants, a husband and wife, were robbed by a group of four men of R1 500,00 and a handbag on the night of 8 November 2008 on their way back from Lesotho. When a police van emerged, the assailants ran away. According to both witnesses each one was robbed seven to fifteen paces away from the other by a set of robbers. Thus each one could only identify one of the assailants who attacked them.
- [4] The first complainant, the husband, identified his assailant by his light complexion. When a person was arrested, he then saw his face and told the police that it was his assailant. The second complainant, the wife, identified her assailant by his dark complexion and his tall height. She too saw the face of a person arrested when the police brought him into the police

van. Both complainants gave no other description of their assailants because the area where they were accosted was dark; it was the first time they met the assailants; the incident happened quickly and they were terrified for their lives.

[5] The appellants denied that they committed these robberies from the outset. At the scene where they were arrested they were refused to say anything and were pepper sprayed when they tried to explain their side of the story. According to them they were from a traditional ceremony and under the influence of liquor. They came across two people. Just as they were passing them one of the two made remarks to the effect that they are the “tsotsi’s”, robbers, that had just robbed them. Just then a police van emerged. At that stage they were arguing and challenging the two witnesses about why they called them robbers. The complainants there and there told the police that they were the alleged robbers.

[6] It is common cause between the state and the defence that the complainants were robbed by a group of four men on the night

in question. The only question is whether the complainants indeed pointed out the correct people as the trial court found.

- [7] The evidence of the two complainants is based on complexion, unidentified clothing and what emerged during cross examination, the faces of the assailants, without any particular description. From the evidence it was not clear beyond reasonable doubt that the two appellants were the only people who were in the area on the night in question as also testified by both the complainants and the police officer. It is highly improbable that the appellants having robbed the two complainants would have remained at the scene when their counter parts fled after committing such a serious offence. The items taken from the complainants were not even found in the appellants' possession but some distance away from where they were accused of having robbed the complainants a few seconds ago. As was held in **S v Charzen** 2006 (2) SACR 143 (SCA) at 149g-h:

“ There was no physical evidence: not a fingerprint, not a recovered cellphone, nor wallet, nor purse ...nothing to connect the accused

to the crime and thus provide a measure of objective assurance against the pitfalls of subjective identification.”

[8] The appellants’ version that they were at the wrong place at the wrong time is more probable than that of the two complainants. It is highly improbable in these circumstances that the complainants could have identified their assailants. Their evidence shows that they did not have the time and opportunity to do so. The description they gave of their assailants is general and is not supported by any extraneous evidence. Moreso as both are single witnesses in the identification of their respective assailants.

[9] In my view the trial court did not caution itself against the possibility of the witnesses’ fallibility in identifying the appellants in line with the approach set out in **S v Mthetwa** 1972 (3) SA 766 (A) at 768 A - C and in **S v Charzen** supra at 147i-j where the Supreme Court of Appeal states:

“[11] But, as our courts have emphasised again and again, in matters of identification, honesty and sincerity and subjective

assurance are simply not enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance can be 'dangerously unreliable', and must be approached with caution..."

"[19] ... The greatest assurance of guilt must lie in such [physical] evidence, rather than in identification on its own, which, as this case shows, can be beset by error and misdescription and doubt, in which case, possibly and even presumably, guilty persons must walk free."

[10] On this basis alone the appeal ought to succeed.

[11] In the circumstances the following order is made:

ORDER:

- 1. The appeal against the conviction in respect of both appellants succeeds.**
- 2. The conviction and sentence in respect of both appellants are set aside.**

B.C. MOCUMIE, J

I concur.

M.B. MOLEMELA, J

On behalf of the appellant: Mr. J. Pretorius
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. C.F. Steyn
Instructed by:
Director of Public Prosecutions
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BCM/eb