

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

14/05/09.
CASE NO.: A 951/07

In the matter between:

JAMES THOMAS MAZIYA	THIS IS NOT APPLICABLE
(1) REPORTED: ☒	
(2) OF INTEREST TO OTHER JUDGES: YES/NO: ☒	
(3) REVISED: ☒	
THE STATE	RESPONDENT
14/5/09 DATE	<i>[Signature]</i> SIGNATURE

JUDGMENT

MAKGOKA, AJ:

- [1] The appellant stood trial in the district court, Meyerton, on two counts, namely, assault with intent to do grievous bodily harm and theft. The appellant was convicted on both counts and referred for sentencing in the regional court, Vereeniging, where the appellant was sentenced as follows: 6 years imprisonment on count one and 1 year imprisonment on count 2. The regional court ordered the sentence in count 2 to run concurrently with sentence imposed in count 1.

- [2] The appellant was represented throughout the trial by different legal representatives. The regional court, before sentence, referred the matter to the High Court for special review in terms of section 116(3), as the regional magistrate was in doubt as to the correctness of the convictions. On 24 August 2007 Murphy J found the proceedings to be in accordance with justice. The Honourable Judge also noted further that there was no adequate explanation for the failure to lead or call for evidence in respect of the alibi defence as raised by the appellant during the trial.
- [3] With leave of the regional court, the appellant approached this court on appeal against the conviction on both counts.
- [4] The evidence led by the State, which culminated in the conviction of the appellant, was tendered by three witnesses, namely Anna Fransiena Petronella Jakoba Grobler (jnr), Anna Fransiena Petronella Jakoba Grobler (snr), as well as Humprey Bagula.
- [5] From the evidence of the complainant and her mother, Grobler (snr), it is common cause that on 24 January 2007 the complainant was assaulted with intent to cause grievous bodily harm, as a result of which she sustained some injuries. With regard to the second count, it is common cause that the complainant on this count, Mr Bagula, lost an amount of R190, which amount was stolen together with his bag.
- [6] As there was no dispute that the complainants were assaulted and stolen from, respectively, as testified by them, the crisp issue to be decided on appeal relates to the identity of the culprit/s.

- [7] The general guidelines relating to evidence of identity were laid down by the then Appellate Division in *State v Mithethwa* 1972(3) SA 766 [A] at 768, wherein Holmes JA articulated the guidelines thus:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration, suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities."

See also *State v Nango* 1990 SACR 450 [A], where it was held that:

"Wanneer 'n beweerde misdadiger se identifikasie by 'n strafverhoor in geskil is, draai alles om die eerlikheid van die uitkennende getuies en die betroubaarheid van hulle waarnemings."

- [8] Applying the factors set out in *Mthethwa* to the first count, the following are worth noting: although the incident occurred during broad day-light, the scene was quite mobile, at least as regards the start and duration of the attack. Up to that point, the complainant had no reason to particularly observe her attacker, as the attacker appeared friendly and helpful. Once the attack commenced, the complainant did not have sufficient time to observe the assailant. She was scared and fell short of breath; the complainant had no prior knowledge of the assailant; and the fact that no identity parade was held. The same goes for Grobler (snr). The fact that the appellant was later pointed out in a group of people becomes irrelevant. Even if one accepts the evidence of both witnesses that the appellant was the only one who tried to run away when he was approached, does not take the issue any further.
- [9] With regard to the second count, the evidence against the appellant was as follows: John Masuku testified that he was seeing the person who stole Bagula's money, for the first time on the day of the incident. The person was sitting under a tree with another person drinking liquor. Suddenly the said person stood up and grabbed the complainant's bag and ran away with it. He then chased the person, using his bicycle, but the person threatened him with a beer bottle and disappeared into a bush. He went back to the complainant.
- [10] According to the complainant, he later went to the police station, where he was told that "the guy who took his documents is arrested." He also saw the person who stole his bag for the first time on the day of the incident.

[11] The appellant's defence was that of an alibi. The appellant provided the court with sufficient particulars for his alibi to be followed. He gave the name and place of his employment before his arrest, where he testified he was on the two dates of the crimes. He further gave three names of people who were with him on those particular days. It should at all times be kept in mind that the appellant does not bear any onus to prove his alibi. The duty to prove an accused's guilt beyond reasonable doubt, rests on the State throughout the trial.

[12] The regional magistrate, in his referral in terms of section 116(3) of the Act, expressed himself as follows with regard to how the appellant's alibi was treated in the district court.

"Wat die alibi betref het die beskuldigde vanuit die staanspoor sy verweer openbaar. Hy is in hegtenis gehou, en op sy eie was daar niks wat hy kon doen om kontak te behou met die werkgewer nie. Dit blyk dat nóg die regsverteenwoordiger, nóg die vervolgingsgesag, nóg die landdros, enigiets gedoen het om te sorg dat die alibi ondersoek word en die relevante getuienis voor die hof geplaas word. Die beskuldigde kon met min moeite die bouverseel waar hy gewerk het aan die ondersoekbeampte gaan uitwys, sodat vasgestel kon word wie die werkgewer was en die nodige getuienis voor die hof geplaas word."

[13] The regional magistrate could not have articulated the position more aptly. In his judgment, the magistrate did not address the alibi raised by the appellant. In my view that constituted a material misdirection on the part of the magistrate. On the facts of the case,

and in particular given the doubt expressed above relating to identification, it can not be safely held that the alibi of the appellant was not reasonably possibly true.

[14] Given the totality of the factors in the appeal, I am of the view that the conviction of the appellant on both counts is not sustainable.

[15] As a result I propose the following order:

[15.1] The appeal against conviction succeeds;

[15.2] The conviction on both counts is set aside.



TM MAKGOKA
ACTING JUDGE OF THE HIGH COURT, PRETORIA

I agree.



CP RABIE
JUDGE OF THE HIGH COURT, PRETORIA