

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A73/2023

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED.
	<u>24/05/2024</u> DATE

In the matter between:

ZITHA THOKOZANI

APPELLANT

And

THE STATE

RESPONDENT

MABESELE J ET KUNY J

J U D G M E N T

MABESELE J:

[1] The appellant was convicted of robbery with aggravating circumstances and sentenced to imprisonment for a period of 15 years. The conviction followed on the evidence of three witnesses. They allege to have seen the appellant and co- perpetrators committing robbery in their house in the early hours of 2 December 2018.

[2] The appellant disputes identity. He contends that his defence of alibi was wrongly rejected. He contends further that the sentence imposed on him is shockingly inappropriate.

[3] It is not in dispute that in the early hours of 2 December 2018 the family of Sekgetho was attacked by robbers and dispossessed of the cell phones and laptops. The robbers were armed with knives. Three members of the family testified about the identity of the appellant. In contrast, appellant raised a defence of alibi and called witnesses.

[4] Ms Keikantsemang Sekgetho was asleep in the sitting room with her husband and children when she saw a man walking towards a television. It was around 01:00. When she started screaming the man pointed her with a knife and instructed her to 'shut up'. The man asked her about her cell phones and laptops. She told him that her bag was in the bedroom and that she had nothing with her. The man proceeded to the bedroom. The man had a sharp nose and wide shoulders. His face was smeared with black polish. He had a black beanie hat on his head. A light from the television and passage had brighten up the room. The light from the passage came from the source outside the house.

[5] Few minutes after the man had gone to the bedroom her sister came running into the sitting room and told her that she was robbed of her cell phone and laptop.

[6] Later in the morning, as she was standing outside the house with her sister, Masedi, and still recovering from shock of what had transpired earlier, someone went passed their house. The person looked like the man who was in their house during robbery. She suggested to Masedi that she would call the man and try to speak to him. She and her sister approached the man and greeted him. The man responded. She identified his voice as similar to the voice of the man who threatened her with the knife in the sitting room. She identified the man as the appellant. She testified that, together with her sister and aunt, Marriam, they discussed the features they each observed on the appellant and were in agreement with each other about the features of the appellant.

[7] Ms Resego Masedi Sekgetho was asleep in her room when she heard someone screaming. She also heard some footsteps from the passage. Suddenly, three men entered her bedroom. They had smeared their faces with something black. The men flashed a phone torch in her face and she closed her eyes. One of the men placed a knife on her neck and demanded laptop, phone, passport and ID's. The man with the knife was wearing a black beanie hat. She identified him as the appellant. The light in the room was switched off. However, there was poor light in the passage which penetrated her room. She saw the appellant later that morning as he walked passed the house.

[8] Ms Mirriam Sekgetho was asleep in her bedroom when she heard people into the room. She woke up and noticed three men. A television was on. A light from the toilet and passage brightened the room. One of the men had a sharp nose and dreadlocks. The incident happened fast. She did not see their faces. She testified during cross-examination that when she spotted the appellant walking passed their house, she called others and were all convinced that the appellant was one of the intruders.

[9] The appellant testified. He denied that he was involved in the commission of the offence in question. He said that he was at the party of a friend at the time that the incident is alleged to have taken place. They were drinking alcohol up until he reached a point of saturation and he went to sleep. He confirmed the version of the witnesses that in the morning as he walked passed their home on his way to the shop, the witnesses called him. Both Mr. Emmanuel Nkondo and Ms Deli Zondo corroborated the version of the accused that he was in their company at the party. The witnesses could not commit themselves to the version of the accused that he left the party with them. However, they confirmed the accused's version that he woke up at his place of residence the following morning.

[10] The conviction of the appellant was based on evidence of identification. Because of the fallibility of human observation, evidence of identification is approached by the courts with caution¹. The court should be satisfied not only

¹1972(3) SA 766(A) at 768-A

that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification ².

[11] Ms Keikantsemang Sekgetho identified the intruder by a sharp nose and wide shoulders only. The face of the intruder was smeared with black polish. The witness had just woken up from her sleep when she saw the intruder pointing a knife at her. The incident did not last long and the intruder left the room. The fact that the witness identified the intruder by his nose and wide shoulders, only, demonstrates that the witness did not have sufficient opportunity for observation. The witness testified that she again saw the man/ intruder later in the morning as he walked passed her house. She identified him by his voice after they had greeted each other. There was no further discussion between them. During robbery the intruder, according to the witness, uttered short sentences to the witness, namely, 'shut up', 'where is the cell phone and laptop'. The intruder did not raise the voice. The question that follows is whether the witness properly identified the appellant by his voice. My view is that she did not. These are the reasons:

The intruder spoke to the witness for the first time on the day of the robbery. He uttered short sentences and did not raise his voice. The television was switched on and might have blurred her hearing. His voice was not peculiar

² 1963(2) SA 29(T). See, also, R V Mokoena 1958 (2) SA (T) 212 at 214 -D

from that of others³. For all these reasons it cannot be said that the witness correctly identified the appellant as a culprit.

[12] Ms Resego Masedi Sekgetho was asleep in her room when the intruders entered the room . Upon entering the room, the intruders flashed a torch in her eyes. Obviously, the intention was to prevent her from identifying them. Above that, they had smeared their faces. Visibility was poor in the room. The witness closed her eyes when a torch was flashed in her eyes. She did not explain at what stage she open her eyes. Neither did she explain how it came about that she had managed to clearly observe things around her after her eyes were disturbed and a knife placed on her neck. The witness could not have clearly identified the intruders under the circumstances outlined above.

[13] Ms Mirriam Sekgetho was asleep when the intruders entered the room. She said that the incident happened fast. The intruders had smeared their faces with black polish. She clearly did not have sufficient opportunity to observe the intruders.

[14] The magistrate has raised concerns, correctly, that the witnesses have discussed amongst themselves the description of the appellant and agreed about the description. Keikantsemang testified that the appellant had a hood (beanie) on his head hence she was unable to describe his hair style. In contrast, under cross examination, Masedi said that the intruder a "cheesekop". However, in re-examination she said that the appellant had dreadlocks. Her

³ R V Chitate 1966(2) SA 690(A) at 692-C

version that the appellant took off his hat is unconvincing. I say so because it is unlikely that an intruder, during the course of a robbery, would take off his hat without valid reasons, while knowing that he will be easily identified by the victim.

[15] The magistrate has found corroboration in the evidence of the witnesses. Regrettably, the magistrate failed to properly evaluate the evidence of each witness, taking into account that each witness had slept in their own room when they were attacked.

[16] The accused is entitled to an acquittal if his version is reasonably possibly true, even though there may be suspicions that the accused committed the offence. This principle is reaffirmed in S V T ⁴as follows:

‘.....When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question’

[17] The accused was drunk. Therefore, his questionable version that he was accompanied home by Emmanuel is understandable and does not, in any way, cause damage to his case. The witnesses corroborated his version that he attended a party with them. On the other hand, the evidence of the state witnesses with regard to the identity of the accused is questionable.

⁴ 2005(2) SACR 318(E)

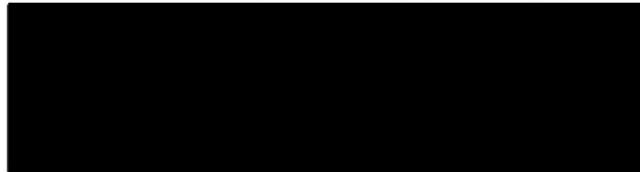
[18] In view of the above, the following order is made:

18.1 The appeal is upheld.

18.2 The conviction and sentence are set aside.



I agree,



KUNY

(Judge of the High Court Gauteng Local Division)

Appearances

On behalf of the Appellant	: Adv.Hlazo
Instructed by	: Legal Aid S.A
On behalf of the Respondent	: Adv. Zuma
Instructed by	: Director of Public Prosecutions
Date of Hearing	: 20 May 2024
Date of Judgment	: 24 May 2024