



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

[Reportable]

CASE NO: A45/14

In the matter between:

SIMPHIWE MDIDIMBA

Appellant

And

THE STATE

Respondent

JUDGMENT DELIVERED ON 25 JUNE 2014

HENNEY, J et ROGERS, J

[1] The Appellant was convicted on 12 December 2013 on one count of robbery with aggravating circumstances committed at Nyanga on 2 June 2010. It was alleged that he robbed the complainant, Beauty Baninzi of R1000,00 cash, 3 bottles of Brandy and an Omega enforce fire system. On 17 December 2013 he was sentenced to 10 years imprisonment. With the leave of the court *a quo*, he appeals against his conviction.

[2] The Appellant was arraigned with three other accused to whom we shall refer to where necessary as accused no.1, accused no.2 and accused no.3. The Appellant was the fourth accused and he was the only one who was convicted by the court *a quo*.

[3] The Evidence

Evidence of the complainant

Beauty Baninzi is the complainant and she stays at Mphetha Square, Zwelitsha, Nyanga. The Appellant is known to her as Trimpie. On 2 June 2010 she was at her home between 21h00 – 22h00. The Appellant and accused no.2 entered her house through the kitchen door. The complainant operates a shebeen from her place of residence. The Appellant and accused no.2 entered the premises first. It seems that the door was open. The security gate in front of the door was not locked and the accused pushed it open before she could lock it properly. A third person also entered and went into her bedroom. They ransacked her place by going through all the cupboards and threw everything out on the floor.

[4] Accused no.2 took some alcohol from a fridge, and the Appellant took R1000,00 cash that was kept in a plastic bag, as well as the complainant's cell phone. The Appellant was the one who asked where the money was. The Appellant thereafter asked for more money and took out an okapi (ou kapie) knife. She did not see him stabbing her with the knife but she was bleeding. She was unable to recall how she

sustained her injury. The witness further testified that she saw accused no.3 coming from her room with an amplifier. She was shoved around in the house and she was dizzy. She recognized accused no.2 because he was, as she also put it, a "bit tall". She also remembers him by the particular hairstyle he had. He had dreadlocks. When he came in she did not see who it was, but when he left, she saw him from behind and she could see from his hair that it was him. Accused no.2 was the one who took 3 bottles of brandy. After they took her belongings, they left and not long after that the police came to her house. The police came back with 2 cases of beer. She later went to the police station to lay a charge.

[5] She testified that Accused no.2 and Accused no.3 each had a firearm. She saw it when they came and asked her for money. Accused no.2 pointed the firearm towards her face and it was in that time when she was touched with the ou kapie. The witness further stated that the Appellant pushed her against a wall. The injury sustained was just a small prick. Her children came to help her afterwards. The incident happened very quickly. Although accused no.2 had a hooded top on his head, accused no.3 and the Appellant did not have anything over their heads. The Appellant's head was shaven.

[6] Accused no.2 did not say anything. The complainant testified that on 19 October 2010 they went to Manenberg Police Station to attend an identity parade but it was cancelled. In cross-examination she testified that she did not see accused no.1. She

only saw 3 persons in her house. It was accused no.1 and accused no.2 and the Appellant.

[7] She further stated that she took a good look at the Appellant because he is known to her. She did not have much time to observe the face of accused no.2. The Appellant was however very close to her. She further testified that although she was in shock, she did not make a mistake about the identity of accused no.2 although she did not know him.

[8] The complainant testified that the Appellant grew up in front of her and she had known him since he was a small child. She further testified in cross-examination that the Appellant pointed at her with a gun and also had a knife. She only saw the knife at the time when he pushed her. The Appellant did not have the gun and the knife with him when they entered her house. She further testified that she is unable to say how she sustained the wound. She further said that she could not say what clothes the Appellant was wearing. She further stated that she has trouble with her eyesight. Sometimes she goes blind and is unable to see or read.

[9] She further denied that she made a mistake due to the failing eyesight when she pointed out the Appellant and the other accused and that on the night in question, she did not have any problems with her eyesight.

[10] Sizakele Ngqele is a policeman and his evidence was to explain why an identity parade was not held. According to the evidence of one of the witnesses, the erstwhile attorney of the accused informed him that the Appellant and the other accused saw the witnesses before the identity parade was held. The identity parade was therefore cancelled. The evidence does not however take this matter any further.

[11] Skumbuzo Sani is the grandson of the first witness Beauty Baninzi and testified that on 2 June 2010 he was at his grandmother's place between 21h00 – 22h00 that evening. He testified that accused no.1, accused no.3 and the Appellant were known to him for years. He knows them from the area. This witness, the other accused and the Appellant all stayed in the same area, Zwelitsha. Accused no.2 was not known to him. On the day of the incident, he saw the Appellant enter the house of his grandmother. The Appellant was in the company of accused no.1. They opened the burglar gate. The witness testified that he left the house and went to look for help. He went to their neighbour to contact the police. At that same time, he saw the Appellant and accused no.1 coming from his grandmother's house. Accused no.1 had a case of beer in his possession, but he could not see what the Appellant had in his possession. Thereafter he went back to his grandmother's house who informed him what had happened. He cannot remember what accused no.1 or the Appellant was wearing. He never had any problems with either accused no.1 or the Appellant.

[12] In cross-examination, Sani explained that at the time, when accused no.1 and the Appellant entered the house, he was sitting and drinking beer with a friend of his,

Nazo. He drank about 5 beers. According to him the lights inside the house were shining bright. He further testified that he did not see any other person enter the house at the time when he was there. He further testified that he did not ask the Appellant what he was doing at the gate when he saw him standing there. He also knew the Appellant by the name of "Trimpi" and he knows where he lives. He was further unable to say how accused no.2 became involved in this case and did not point accused no.1 out to the police.

[13] Under cross-examination he said that he was confused and in a state of shock when he told the police two unknown males entered his house. When he was further asked why he had not mentioned in his statement that it was accused no.1 and the Appellant, and that he knows where they lived, he also said that he was confused. He further testified that he did in fact mention their names to the police, but that it was not written down and that, it was the police who made a mistake when they did not write down the names of the accused no.1 and the Appellant. He denied that he did not give the names to the police because he did not know who they were.

[14] It was pointed out to this witness in cross-examination that he said in his statement that he also saw accused no.3 at the time when he was at his neighbour's house, pointing or gesturing to the other accused to go towards his grandmother's house. In response to this, the witness answered that he saw all 3 of them, but he only saw accused no.3 a bit later when he was outside. Later on, he said he forgot to tell the prosecutor about accused no.3. He further testified that the only person that he did not

mention was accused no.2, because he did not know him and testified that when he came out of his neighbour's house, he saw quite a number of people. He did not see them clearly because it was dark. There was however sufficient light for him to clearly see Accused no.1 and the Appellant. It was only accused no.1 and the Appellant that he could clearly see. He later testified that he could see the people outside the house, because of the spread of the street lights. He further testified that it was at that stage that the Appellant looked to his side and then downwards.

[15] He further could not say why his grandmother said that accused no.3 was inside the house, whereas he said that Accused no.3 did not enter the house. He denied that the Appellant and the other accused were not in his grandmother's house. He further denied that he said that the Appellant and the other accused were in his grandmother's house because his grandmother had told him about it. He further said in cross-examination that he did not see whether any of the persons entering the house, had a weapon.

[16] Ntandazo Ndengane was the next witness who testified on behalf of the prosecution. Only accused no.1, accused no.3, and the Appellant were known to him. He grew up with them. They are however not his friends. He further said that accused no.1, accused no.3 and the Appellant are known to each other and they are friends. On 2 June 2010 he was also present at the shebeen of the complainant. Ndengane testified he was having a beer, when two gentlemen first appeared. At that stage, the previous witness left. After the witness left, three other gentlemen appeared. The first

two gentlemen instructed them to lie down. The other one went to the side of the house where the complainant, to whom he referred as “Mamjeli”, was behind a burglar gate. He however could not see what they were busy doing inside. He then saw people passing cases of beer from the inside of the building, where the complainant was towards the outside. He saw these people taking four cases of beer. Thereafter they left. This witness said at that stage he was scared and only stood up after about 15 minutes. He recognized these people by their clothing and after they left the premises, they went in the direction of Cross Roads.

[17] The police thereafter arrived and he accompanied the police into the area of Cross Roads where they found one person who had a “warm” beer in his possession and two other persons who were walking with two cases of beer. The police however did not manage to apprehend these people. The witness further testified that he is unable to identify any of the persons that were involved in the incident. He did not see any of their faces.

[18] In his evidence, the Appellant denied any involvement of the offences in the commission for which he was charged. On 2 June 2010 on the night when the incident is alleged to have occurred, he was at home with his aunt. The complainant, Ms Beauty Baninzi, is known to him. He further denied that he was involved in the robbery of the complainant. Throughout the day in question, he was at home and did not leave his house.

[19] He was arrested in July 2010 during which time the police came to his house and asked if he was “Trimpie”. He appeared in court alone when the case was postponed. At the next appearance, he met his co-accused. On that same day, he was told that they were going to hold an identity parade. For this purpose he was taken from Athlone Magistrate’s Court to Manenberg police station. He was accompanied by his fellow accused. When they arrived at the police station, they found people sitting there. Accused no.3 then said, “Here are the people who are going to point us (them) out.” He (accused no.3) said that the lady who said they robbed her was also there, whereupon a police officer who opened the door of the vehicle in which they were travelling remarked that it was not right for the people who were going to point them out in the identity parade to see them before the time. They were taken to a cell to wait for their attorney. When the attorney arrived, accused no.3 told her what happened. They told the attorney that the lady who at that stage was wearing a scarf, who is also known as “Mam Mcherry”, and who was present, was the one who said that they robbed her. (The name “Mam Mcherry” in the record is probably a different phonetic transcription of the same name given by the last State witness, namely “Mamjeli”.) According to the Appellant, Mam Mcherry is the owner of the shebeen that they say was robbed. She was the lady who testified in court. The accused’s attorney thereafter went to these people and she came back and confirmed to them that they were going to point them out at the identity parade. At that stage, they were still waiting for the investigating officer. The identity parade did not proceed. The Appellant further testified that he knows the witness Skumbuzo Sani. They stayed in the same area. He only heard in court for the first time that there was a robbery at the shebeen.

[20] Grounds of Appeal

The main thrust of the attack on the conviction of the Appellant is that the identification of the Appellant based solely on the evidence of the complainant, Beauty Baninzi, is not reliable enough to sustain a conviction, in particular, due to the fact that this witness admitted that she had problems with her eyesight. A further ground of appeal that she contradicted herself whether it was accused no.2 or the Appellant who demanded money from her, as well as in respect of who the person was who pointed at her with a firearm. Lastly, it was argued that she was also contradicted by the witness Ndengane, who testified that all the perpetrators had hoodies over their heads, whereas the complainant testified that they had nothing over their heads. The complainant is further contradicted by Ndengane who testified that he could not see their faces.

Evaluation

[21] We do not agree with the submissions made by the Appellant. In our view, the Regional Magistrate gave a comprehensive and carefully considered judgment. In evaluating the identification evidence of the complainant, he applied the relevant cautionary rules to test the reliability thereof. He found that she made a very good impression on the court. He was aware of the fact that during the evaluation of identification evidence the witness needs not only be honest but also reliable. In regard to honesty, it was not argued at the trial or on appeal that the complainant's testimony

was dishonest. The only question was whether she was reliable or whether there was a reasonable possibility that she was mistaken.

[22] In assessing the reliability of her evidence, the magistrate placed great emphasis on the fact that the Appellant was known to the complainant and that she had known him for many years. This fact was not disputed. According to the objective further evidence, this was the very reason why the identity parade was not held, because of the fact that the Appellant recognized her as the person who he knew as Mam Mcherry, the shebeen owner whose shebeen had been robbed.

[23] The Regional Magistrate, in further assessing the reliability of the complainant's identification evidence, mentioned that according to her evidence, the Appellant stood directly in front of her. He spoke to her directly when he asked for her cell phone and money.

[24] We do not agree that the reliability of the complainant's identification evidence can be called into question because of her concession that she had failing eyesight. This could have been a factor to consider if the lighting in the room where the incident occurred had not been very good or if the Appellant had not been in close proximity of her. Those, however, were not the circumstances of the case.

[25] We also do not agree with the further criticism that she contradicted herself as to whether the Appellant or accused 2 demanded money from her, where she initially said

accused 2 demanded money and later said that the accused 2 did not say a word and the Appellant asked for money and was doing all the talking. The complainant was never confronted with this inconsistency or contradiction, if it can be regarded as such, or asked to clarify it either by the prosecutor, counsel for the Appellant and the court. We do not think it can be regarded as a contradiction by the court *a quo* if regard is to be had to the overall impression which she created in her evidence which is, that the Appellant was the person that was doing all the talking and not accused 2.

[26] As regards the other contradiction concerning the question whether accused 2 or the Appellant had a firearm, her evidence is clear that initially she did not see the Appellant with a firearm, but only afterwards. She did not say that accused 2 only had a firearm to the exclusion of the Appellant. In any event, even if this evidence can be regarded as contradictory, it does not adversely affect the reliability of her identification evidence.

[27] We also do not regard the evidence of Ndengane, who could not and did not see the faces of any of the assailants, as having an adverse impact on the reliability of her evidence. Ndengane was clearly not as involved with the attackers as she was. He had only seen them briefly before they went into the part of the house where the complainant was.

[28] A point which the Regional Magistrate did not refer to in his assessment of the evidence of the complainant was that her version was, albeit only to a limited extent,

corroborated by the evidence of her grandson Skombizo Sani who also placed the Appellant at the scene of the robbery. The Appellant was also known to Sani. However, the Regional Magistrate, due to the contradictory nature of his evidence, did not place much reliance thereon.

[29] The Regional Magistrate was in our view also correct in finding that the evidence of the Appellant was not reasonably possibly true. The reasons upon which the Regional Magistrate based his finding were that the Appellant's version was not only inconsistent and contradictory but also improbable. The Appellant clearly was a dishonest witness in many respects, especially where he denied that he told his legal representative the version that was put to the various state witnesses by his counsel about his involvement in the robbery. When he was pushed for an answer about a version that was put to the State witnesses, he either said he forgot what his legal representative told the witness or that he did not give her instructions at all.

For these reasons, we are unable to find that the Regional Magistrate's assessment of the evidence upon which he convicted the Appellant can be faulted.

[30] Before concluding, we wish to comment on a procedural aspect. When the trial in the court *a quo* resumed on 25 October 2012, the prosecutor placed on record that he had been told by police officers and by the court orderly that the appellant had made utterances to the effect that as soon as they got out of prison they were going to kill him. The prosecutor said he would nevertheless continue on that particular day to assist (ie

not inconvenience) No 3's witness, Michael Pitts. When the matter resumed on 15 November 2012, the prosecutor said that the matter was on the roll to ascertain the State's position regarding the threats made by the appellant against the prosecutor. The prosecutor said that he had taken a decision to "recuse" himself because he had to think of his safety and because he would not be doing justice by having to go through "the cross-examination against the very same person whom I know... has made these particular threats threatening my life". The defence advocate said she had nothing to say about the allegations but did not object to a further postponement.

[31] On 21 November 2012 the prosecutor said he had raised with his senior the threats made by the appellant. His senior had advised him to reduce the allegations to writing, which the prosecutor had done. The matter had been referred to the DPP's office for a risk assessment. The prosecutor asked for a further postponement. On 13 December 2012 the matter was again postponed because the DPP had not completed the risk assessment. On 30 January 2013 the prosecutor informed the magistrate that, having consulted telephonically with the DPP's office, he had "decided to proceed with the case to its conclusion and in so doing to avoid further delays". The trial then proceeded without further reference to the alleged threats.

[32] In our view, it was irregular, and an error of judgment on the part of the prosecutor, to disclose to the magistrate the alleged threats. In effect, hearsay information, prejudicial to the appellant and his character, was communicated by the prosecutor to the magistrate. The Regional Magistrate might even have thought, in the

light of this disclosure, that he would need to recuse himself. The proper course, if the prosecutor thought he might need to withdraw from the case, was to discuss the matter privately with defence counsel, in which event the legal representatives would probably joined in requesting the magistrate to postpone the case for sound reasons which they were not at liberty to disclose to the court. If defence counsel refused to consent to this course, the prosecutor could simply have informed the magistrate that he was seeking a postponement on sound ethical grounds which it would not be proper to disclose to the court.

[33] We do not think that in the event the irregularity vitiates the trial. The evidence against the appellant was strong. The prosecutor's cross-examination of the appellant does not appear to have been inappropriately aggressive. The alleged threats were not raised in the evidence. The magistrate made no reference to them. Nevertheless, we trust that prosecutors, faced with similar dilemmas in the future, will be guided by our remarks. We also think that magistrates should in such a situation promptly intervene to prevent further disclosure and should, if disclosure has already slipped out, make clear to the accused in open court that the unproven assertions will have no effect on the court's assessment of the evidence.

[34] In the result therefore we make the following order:

"That the appeal against conviction is dismissed".

HENNEY , J

Judge of the High Court

ROGERS, J

Judge of the High Court