

SOUTH AFRICA / JUDGMENT

Abdul and Another v S (A847/12) [2015] ZAGPPHC 483 (17 June 2015)

[2015] ZAGPPHC 483

COURT

North Gauteng High Court, Pretoria

BEFORE

E Swartz, T A Maumela

CASE / FILE NUMBER

A847/12

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IN THE HIGH

COURT OF SOUTH AFRICA

(NORTH GAUTENG

HIGH COURT)

CASE

NO: A847/12

In

the matter between:

MOHAMED
ABDUL
+1
APPELLANT
VERSUS
THE
STATE
RESPONDENT

JUDGMENT**SWARTZ AJ**

1. With the leave of this court, the appellants appealed against the convictions and sentence handed down against them by the magistrate

in the regional court, Piet Retief, Mpumalanga.

They were convicted on charges of robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977, read with the provisions of section 51 (2) of Act 105 of 1977, and housebreaking with the intent to steal and theft. They pleaded not guilty to all the charges. After conviction they were each sentenced to effectively serve 15-year prison sentences.

2. Five accused initially appeared before the court a quo. At the close of the case for the prosecution three of the accused were discharged in terms of the provisions of S 174 of the Criminal

Procedure Act. The two appellants also applied for their discharge. This was refused. The magistrate ruled that the State had proven a prima

facie case against them. They were identified by the complainant as being amongst the people who had been in his shop when he was robbed.

3. The State called four witnesses, being the complainant, his assistant, one Nsibande and two police officers who effected the

arrests. The first appellant testified in his own defence and did not call any witnesses. The second appellant chose to remain silent and did not call any witnesses to testify in his defence.

4. The complainant, Mr Sikandar Mansur (Mansur), a then [.....]-year- old gentleman testified that on 29 October 2010 he was robbed in his shop, situated in Market Street, Piet Retief, Mpumalanga. He was held at gunpoint and his attackers took from him his keys, cellular phone, clothing and approximately R300 cash. His assistant, one Siphawe Cynthia Nsibande was equally held up when they were robbed by a group of about five men.
5. On the same day, shortly after the robbery at the shop, Mansur's house was broken into from where R7000 and his passport were taken. The evidence of Mansur was that he was the owner of a certain shop. At approximately 9h15 on 29 October 2010 people whom he thought were customers entered his shop and made enquiries about the prices of blankets. They left and returned a short while later. On their return he was held up at gunpoint. The first appellant searched his pockets and took his keys, cellular phone and cash. He was tied up and cello tape was placed over his mouth. Money was also taken from the till.

6. His attackers left the shop with the items taken from him that included a bundle of keys containing keys to the shop and his house. His assistant, Cynthia Nsimande untied him and removed the cello tape from his mouth. He went to report the incident to the police.
7. He was in the company of the police in search of his attackers when a report was received that certain suspects were arrested. He returned to the police station where he identified his property which the police had retrieved. Everything was returned to him except for the cash and his passport. He kept his passport in a cupboard in his house. The passport was taken from his house. It was never shown to him again.
8. After the police handed his keys back to him he returned to his house where he found his place in disarray. He surmised that the persons who entered his house used the keys to gain entry because the doors and windows were not broken. His passport and about R7000 was taken from the house. His house was securely locked and everything was in order when he left home earlier that

morning.

9. The two appellants were in the shop when he was robbed earlier that morning. He later saw the appellants at the police station after their arrest. Ms Sipiwe Cynthia Nsibandé could not identify any of the accused. Patrick Mthombeni is a Constable in the South African Police Services. After receiving the report of a robbery, he, accompanied by Constable Bapela, drove around in search of any suspicious looking vehicles. They spotted the vehicle in which the appellants were passengers. They ordered the driver to stop and the occupants thereof to alight. When getting out of the vehicle he noticed the first appellant throw Mansur's passport underneath the vehicle. They searched the vehicle and found keys and foreign money in the vehicle. Mansur later identified all these items as his property.
10. The first appellant denied all knowledge of the allegations levelled against him. He was never in Mansur's shop. He contended that Mansur lied when he identified the first appellant as the one who searched his pockets and who removed his belongings. He saw Mansur for the first time at the police station after his arrest.
11. According to the first appellant they were travelling from Ladysmith and were on their way to Piet Retief. They hitch-hiked and managed to get a lift from a total stranger. He was in the company of the second appellant and accused number five. The second appellant and he are related and they were together throughout this time, until their arrest. Upon their arrival in Piet Retief they were dropped off at a petrol garage and made their way to a taxi rank where they were to meet another person, also unknown to them. The purpose of their visit to Piet Retief was to hand over to this stranger, goods which included washing powder, school books and school bags. Having done this, they were heading back to Ladysmith. However, they decided to first visit the local mosque, for prayers.

12. They hitch-hiked again and purely by co-incidence, the very car that dropped them off in the first place, happened to drive by again. The driver of this car stopped and offered them a lift again. However, co-incidentally, the driver of this car, whose name they did not know, was also on his way to the mosque for prayers.

While travelling, the car stopped again and they gave a lift to two other strangers who also happened to be going to the mosque for prayers. After driving off, the police stopped the car. They were ordered to get out of the car and the police searched the car. Mansur's items were found in the car and they were arrested.

13. At the police station they were assaulted and forced to sign statements, which statements they signed in order to save their

lives. He denied throwing Mansur's passport underneath the car. He never saw the passport at all and no-one confronted him about the passport. During cross-examination the first appellant testified that when he hitch-hiked he was in the company of the second appellant. From the time of his arrival until their eventual arrest he was at all times in the company of the second appellant. They never parted ways.

14. In weighing up the evidence presented to the court, the magistrate considered that the only evidence against the appellants was the evidence of Mansur who testified that he saw both of them in his shop; that the first appellant was the one who searched his pockets; that the second appellant did not do anything - he was just present in the shop; the policeman's evidence that he saw the first appellant throwing Mansur's passport underneath the car, which happened to be the passport Mansur kept in a cupboard in his house; and the first appellant's version that the events of the day was all a mere co-incidence. He was just "at the wrong place at the wrong time". He and the second appellant, who are related, came all the way to Piet Retief to bring items that could easily have been purchased in Piet Retief.

15. Counsel who appeared before this court on behalf of the appellants submitted that the magistrate erred in concluding that the State proved its case beyond reasonable doubt, rejecting the first appellant's version and in convicting the appellants. He submitted

that the evidence of Mansur was tainted with contradictions and confusion and therefore not sufficiently reliable for the court to rely on to convict. He refers to the confusion presented when the witness referred to the number order in which the accused stood

before the magistrate and the apparent contradiction this presented.

16. Furthermore, Counsel for the appellants argued that Mansur was a single witness on identification and the magistrate did not approach his evidence with the necessary caution. He also submitted that the magistrate should have drawn a negative inference from the fact that Constable Mthombeni did not show the complainant his passport when they attended the scene. On behalf of the respondent it was submitted that where the evidence of a single eyewitness was corroborated in a way which tends to indicate that the whole story was not concocted. The caution may be overcome and acceptance facilitated.

17. Having regard to this, on the single eyewitness evidence of Mansur, the caution is overcome and corroboration is found by the fact that the incident took place during broad daylight; Mansur's evidence that the first appellant is the person who took his

belongings from his pocket, amongst others his keys that were later recovered in the car when the appellants were arrested; Mansur having identified the second appellant as one of the gentlemen who was present in his shop during the robbery; the evidence of the first appellant that he and the second appellant were together throughout the relevant times; the stolen items were recovered from the

vehicle in which they were travelling. Consequently, it was argued that the risk of mistaken identity is reduced and corroboration for the evidence of Mansur is found.

18. This court is in total agreement with these submissions made on behalf of the respondent. Ms Sipiwe Nsibande did not identify any of the accused. Mr Mansur is a single eyewitness on identification. The court is mindful of the fact that his evidence is not beyond criticism. On a question by the magistrate of how many attackers were present, his answer was that there were four gentlemen who entered his shop and asked for the price of the blankets.
19. On a question by the prosecutor he said there were four gentlemen with the one who asked for the price of the blankets, meaning five people. Later he testified that there were "three plus one" gentlemen in the shop. During the trial there were five accused present in the court. The witness was asked who of the accused were not present during the incident. His initial response was that it was accused numbers 1, 2 and 4. It however transpired that he counted the accused the wrong way around.

20. On behalf of the second appellant it was submitted before us that, if Mansur indeed started counting the wrong side it would in reality mean that it was accused 5, 4 and 2 that were not present. The prosecutor was still confused and suggested that it was accused 2, 4 and 5 that were not present. The witness contradicted himself, so it is submitted, by stating that accused number 4 was present in the shop.

21. The question for consideration by this court is whether the contradiction is material in nature when consideration is had to the totality of the evidence presented, and not considering contradictions in isolation.

See: *S v Mkhole* 1990 (1) SACR 95 (A)

"Contradictions per se do not lead to the rejection of witness' evidence; they may simply be indicative of an error. Not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence".

22.The contradictions of Mansur did not affect his credibility as a witness. It may be indicative of an error. What is also obvious from the record is the initial misunderstanding between Mansur and the interpreter and the magistrate's observation that the witness tried to answer questions even before it was translated to him by the interpreter, and that is why there was at some stage misunderstandings.

23.Despite the evidence of Mansur that the second appellant was in the shop, coupled with the evidence of the first appellant that he

and the second appellant were together at all relevant times up until their arrest, the second appellant elected to remain silent. Thus, the state's prima facie case against him was left unchallenged and to speak for itself.

See: S.v Chabalala 2003 (1) SACR 134 (SCA):

"The appellant had been faced with direct and apparently credible evidence which had made him the prime mover in the offence. He had also been called upon to answer evidence of a similar nature relating to the parade. Both attacks had been those of a single witness and capable of being neutralised by an honest rebuttal.

There could be no acceptable explanation for him not rising to the challengeto have remained silent in the face of the evidence had been damning. He thereby had left the prima facie case to speak for itself. The court was bound to conclude that the totality of the evidence taken in conjunction with his silence

excluded any reasonable doubt about his guilt'.

24.The second appellant was legally represented. There was no need for the magistrate to warn him of the risks involved in leaving the prima facie evidence presented by the prosecution against him unchallenged. See: S v Scholtz 1996 (2) SACR 40 (NC), where, in an appeal against their conviction in a regional court it was contended on behalf of

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the appellants that the magistrate had erred constitutionally in that he had drawn an adverse inference from the appellants' failure to testify. It was contended that the appellants' right to silence as contained in s 25 (3) of the Constitution, Act 200 of 1993 had been infringed. The Court held that an accused's right to silence at the end of the State's case did not prevent the court from drawing an adverse inference against the accused in certain circumstances. In the instant case the appellants had been represented during their trial and it was accordingly not necessary for the court to have warned them that the court could draw an adverse inference from their silence.

25.Accordingly, the appellants' appeal against their conviction is dismissed. This court agrees that the version of the first appellant is not reasonably possibly true and is rejected as false. The second appellant was in the company of the first appellant at all relevant times. All the stolen items were recovered from inside the vehicle

in which the appellants were travelling when arrested. There was no problem with the identification of the appellants. The incident

happened during broad daylight. Mansur had opportunity to see the faces of the appellants when he was robbed. He had enough time to make the necessary identification. The respondent had proven its case against the first and second appellants beyond reasonable doubt.

26.The appellants were convicted of robbery with aggravating circumstances read with S 51 (2) of Act 105 of 1997 which makes provision for a minimum sentence of 15 years imprisonment unless there are substantial and compelling circumstances present. It was

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contended on behalf of the appellants that the magistrate was biased against them and did not investigate whether there was such circumstances present.

27.We are satisfied that the sentence imposed by the magistrate was correct. It is not shockingly inappropriate but just and reasonable.

The appellants spent 17 months in custody awaiting the finalisation of the matter. This factor was not taken into consideration by the court a quo. We agree with the submissions of counsel for the appellants that the time spent in custody should have been incorporated in the sentence accordingly.

ORDER .

1. The appeal against conviction is dismissed.
2. The appeal against the sentence succeeds and in its place it is ordered that the 15-years imprisonment in respect of both the appellants is to run from the date of their arrest, 29 October 2010.

E SWARTZ

ACTING JUDGE OF THE HIGH COURT

I agree

T A MAUMELA

JUDGE OF THE HIGH COURT

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