

SOUTH AFRICA / JUDGMENT

Abrahams and Another v S (CA&R6/2017) [2017] ZAECHGC 100 (7 September 2017)

[2017] ZAECHGC 100**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

N Conjwa, NG Beshe

CASE / FILE NUMBER

CA&R6/2017

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE HIGH COURT, GRAHAMSTOWN)****CASE****NO:**

CA&R6/2017

In

the matter between

LUZUKO

ABRAHAMS

1st Appellant

SIMPHIWO

NDZELANI

2nd

Appellant

and

THE

STATE

Respondent

JUDGMENT

CONJWA: AJ

[1] The appellants appeared before the Regional Court Port Elizabeth where they were charged with :

Count 1 : Kidnapping

Count 2 : Robbery with aggravating circumstances

Count 3 : Obstructing the Administration of Justice

Despite having pleaded not guilty they were convicted on all the charges. They were sentenced to undergo 12 years imprisonment and all three counts were treated as one for purposes of sentence.

[2] With the leave of the court a quo they are appealing against the convictions.

[3] The facts upon which the appellants were convicted were that on the evening of 10 May 2013, the witnesses who are family members were at Mrs R. G.'s place at Veeplaas watching TV.

[4] Mr T. S. had been requested to prepare tea and was in the kitchen when somebody came knocking at the door. When he opened the door he found the second appellant who was in the company of another young man. The second appellant offered him a cell phone for sale. He decided to go outside to have a better look at the phone. He was pointed with a firearm by the second appellant. He then came to realise that there were other assailants who had been lying in wait outside. They ordered him to leave with them. T. asked from the second appellant how he could do this to a person that he knows. This plea fell on deaf ears as he was taken to the swings, presumably the playground, at gun point. The second appellant allegedly advised T. that he knows that there were loan sharks at his home and that they owned a Plasma TV at his house.

[5] On arrival at the playground, T. was tied against a pole using the scarf that he had been wearing around his neck. The second appellant left in the company of other assailants, while the 1st appellant was left behind keeping guard over T..

[6] On arrival at Mrs R. G.'s place, the second appellant, who was in the company of another young man who was never arrested for the offences, found the family gathered in the lounge watching TV and they asked for T.. They said that they wanted him to join them on a drinking spree.

- [7] The two left to return later but the second appellant was now in the company of the first appellant. They were both armed, the first appellant with a knife while the second appellant was armed with a fire arm. They demanded money alleging that the family was in the business of lending money.
- [8] The first appellant cut off the TV and the decoder from the socket. The two appellants allegedly went on a rampage dispossessing everyone present in the room of anything of value including cell phones, money and even items of clothing. They struck such terror with the people who were present that it is alleged that a 12 year old child (S. S.) who had been present inside the room offered them a cell phone even though they had not seen it, while one N. M. offered to take them to an outside room to get money that she had there.
- [9] The appellants took a bag which they used to carry the TV, decoder and other items and vanished into the night with all the stolen goods which included a Plasma TV.
- [10] On the morning of 11 May 2013 Constable Mbilana, who had been on duty received a complaint of robbery at Veeplaas from radio control. On arrival at the scene he met the first appellant who advised him that he had been robbed of his Plasma TV by five armed men. He was advised by the first appellant that he was able to identify one of the five men who robbed him. First appellant advised Mbilana that these people could not have gone too far and this was confirmed by a community member who was present at the scene. Mbilana was pointed to a house where these people were alleged to be.
- [11] He went to search the house which appeared to be disused and he found the Plasma TV contained in a black plastic bag hidden behind a bed which had been placed against the wall. The first appellant identified the plasma TV as his. He was advised by Mbilana that he must bring proof that he was the lawful owner of the TV.
- [12] To this he responded that he did not have the documents as he had been requested by some young men to sell the TV. He was unable to take Constable Mbilana to these young men when requested to, but offered to take him to the place where the young men allegedly got the plasma TV from.
- [13] The first appellant took him to the complainant's place and it is there that he got to know of a robbery that had occurred the previous night where a plasma TV and cell phones had been stolen.
- [14] Although Mbilana had testified that appellant was never taken out of the van and shown to the owner of the house- R. G.- , the latter had given testimony which implied that the first appellant had been shown to her when he was brought to her home.
- [15] The first appellant was later taken to the police station in Zwide where he was searched and found to have a knife in his possession.

N., who had been in the company of the investigating officer when Mbilane and his colleagues brought the first appellant to the police station, identified the first appellant as one of the assailants. There is divergence between N. and Mbilane's testimony as N. had testified that appellant was amongst four other people when she pointed him out at the police station.

[16] An identification parade was conducted where the appellants were pointed out as the perpetrators of the robbery by the people who had been present at the scene on the day of the incident.

[17] It is common cause that the appellants had changed positions, numbers and names during the identification parade. The appellants however contend that they had been allowed to change the names, numbers and positions by a correctional officer who had been present during the parade. The state contended that the actions by the appellants were intended to unlawfully influence the outcome of the identity parade.

[18] The first appellant testified that he had met five young men who were carrying plasma T.V. He knew one of these young men. He later met the police, signalled for them to stop and he informed them of what he had just witnessed. He further advised the police that he knew where one of those young men stayed. He took the police to this young man's place. They found him, he was searched by the police and a knife was found in his possession.

[19] The house was searched but it all came to a naught. He requested the police to call back up so that a search of the nearby

houses could be conducted. The police continued with the search and the plasma TV was found in a closed house. The first appellant was later taken to the house where the robbery had taken place. The people who were found in the house identified the TV as the one that had been stolen from their house on the previous evening. The first appellant was taken into police custody after the TV had been positively identified by the people who were in the house.

[20] The second appellant testified that he had been sleeping at home when the police came in company of T. and certain a lady presumably T.. T. and the lady pointed him out to the police and identified him as one of the assailants. Although the police made a thorough search of the house, they found nothing. Appellant no 2 confirmed that he knew T. even prior to the date of the incident as T. was in the habit of standing on street corners begging for money from the passers-by.

[21] The appellants called Constable Ncitha to confirm that contrary to T.'s assertions, she had indeed been to the second appellant's home to identify him before she was called upon to identify him at the identification parade.

- [22] It has been stressed in argument before us as in heads of argument by Mr Charles who acted for the appellants, that the court a quo had erred in finding that the state case had been proved beyond reasonable doubt. At the centre of his argument, as I understood it, was that the identity of the appellants as the assailants had not been proved beyond reasonable doubt by the State.
- [23] It is trite that the guilt of an accused person must be proved by the state beyond a reasonable doubt, and that there is no obligation upon an accused person, when the State bears the onus, to convince the court of his innocence.[1] The standard of proof remains proof beyond reasonable doubt evidence with such a high degree of probability that the ordinary reasonable man, after a mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged.[2]
- [24] Equally trite is that in the absence of demonstrable and material misdirection a trial court's findings of fact are presumed to be correct and that they will only be disregarded on appeal if the recorded evidence shows them to be clearly wrong[3]
- [25] It is against this back ground that the findings of the court below must be considered.
- [26] Mr Charles in developing his argument made reference to the fact that there wasn't ample light in the lounge where the incident took place. He found support for this in the testimony of B. S. who had testified that the electric light emanating from the kitchen provided light in the lounge where most part of the robbery took place.

This argument in my view loses sight of the fact that the witnesses and the appellants were together for a substantial length of time. During which time one of the intruders was able to see Ms G. trying to conceal the remote control of the TV.

- [27] The second appellant did not visit the house once but twice. On each occasion he had spent time talking to the occupants of the house. The two appellants spent some time ransacking the house, thus giving the witnesses enough time to identify them. I acknowledge that this was not a mobile scene and that the witnesses must have been scared but one should not lose sight of the fact that in as far as the second appellant is concerned he had gone to the house prior to the robbery and he had talked to the witnesses.
- [28] An issue had been made during trial of the fact that some of the witnesses had seen the appellants before they were caused to attend the parade implying that this must have influenced their subsequent identification of the appellants at the parade. Whatever doubt or unease that this might have caused, is laid to rest when one considers the evidence in its totality. The assessment of credibility based on a piecemeal self-contained and insular analysis of the evidence of each of the witnesses who might have testified at the trial, may tend to distort reality. What is required is an integrated approach, based on the evidence in its totality. [4]

[29] The shortcomings in the State's case, if any, are buttressed by a number of factors. It is common cause that T. knew the second appellant before the day of the incident. It can never be that he can mistake him for somebody else especially given the fact that they had been in each other's company for some time that evening.

[30] The first appellant was found in possession of the TV that had been stolen from the complainant on the previous night and was unable to give credible account of his possession thereof. He came with a farfetched story that the trial court was correct in rejecting.

[31] This brings me to what happened on the day following the incident T. had allegedly told the police that he was unable to identify the people who committed the robbery. In my view the explanation that he gave for not providing the name of second appellant to the police, namely, of being scared of the second appellant is reasonable. This in view, inter alia, of the fact that the second appellant did not hesitate to go to Mrs G.'s house to commit the robbery with his face uncovered

knowing that T. knew him. It was also the second appellant who had suggested that T. be killed for the same reason.

[32] The appellants did not fare well in their testimony. They contradicted their own evidence thus making nonsense of their

evidence. They also contradicted the version that been put to the witnesses on their behalf.

[33] In *S v Chabalala*[5] it was held that the proper approach to assessing evidence is "to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence,

taking proper account of inherent strengths and weaknesses probabilities and improbabilities on both side and having done so, to

decide whether the balance weighs so heavily in favour of the State to exclude any reasonable doubt about the accused guilt."

[34] Much as contradictions have been shown to exist within the evidence of the state, these were not material that they can be allowed to vitiate the whole of the state case. It is said that contradictions per se do not lead to the rejection of a witness' evidence. They may simply be indicative of an error.[6]

[35] Marais JA quoting with approval the comments in *Moshephu and Others v R* (1980-1984) LAC 57 at 59 F-H set out the approach to be adopted in evaluating the evidence as follows:

"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was

established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and

individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other evidence. This is not to say that a broad and indulgent approach is appropriate when evaluating evidence. There is no substitute for a detailed and critical, examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole .If that is not done, one may fail to see the woods for the trees”[7].

[36] Regard being had to the evidence as a whole, I am satisfied that the Magistrate did not misdirect himself when considering it. There is therefore no basis to disturb the guilty finding of the trial court.

[37] Consequently the following order is made:

The appeal is dismissed.

N. CONJWA

ACTING JUDGE OF THE HIGH COURT

I agree

N.G. BESHE

JUDGE OF THE HIGH COURT

Counsel for the Appellant's

: Mr Charles

Instructed by

: Justice Centre

Grahamstown

Counsel for the Respondent : Adv D Els

Instructed by

: DPP's Office

Date heard

: 30 August 2017

Date delivered

: 07 September 2017

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- [1] S v V 2001(1) SACR 453 (SCA)
- [2] R v Mlambo 1957(4) SA 722 (A) at 738A; S v Phalo 1992(2) SACR 558 (SCA) PARAS 10 and 11
- [3] S v Hadebe 1997(2) SACR 641 (SCA) 641 at 641 (SCA); S v Ndidoo 2003(1) SACR 347 (SCA) para 2..
- [4] S v Toubie 2004 (1) SACR 530 (W)
- [5] 2003(1) SACR para 15
- [6] S v Mkohle 1990 (1) SACR 95(A)
- [7] S v Hadebe 1997(2) SACR 641 at 645i-j and 646a-b
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