

SOUTH AFRICA / JUDGMENT

Bangane v S (CA38/2023) [2024] ZANWHC 200 (30 July 2024)

[2024] ZANWHC 200

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Motsatsi

CASE / FILE NUMBER

CA38/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG

CASE NO.: CA38/2023
REGIONAL MAGISTRATES
CASE NO.: RC30/2019
Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional
Magistrates: YES/NO
In the matter between:-
THABO
ZAMILE MOTLHABANI BANGANE
APPELLANT
AND
THE
STATE
RESPONDENT

CORAM: HENDRICKS JP et MOTSATSI AJ
DATE OF
HEARING
: 21 JUNE
2024
DATE OF

JUDGMENT

: 30 JULY 2024

JUDGMENT

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is 30 JULY 2024 at 10h00.

ORDER

Resultantly, I make the following order:

- (i) The appellant's point in limine is dismissed.
- (ii) The appeal against conviction is dismissed, and the conviction is confirmed.
- (iii) The appeal against sentence is dismissed, and the sentence is confirmed.

MOTSATSI AJ

Introduction

[1] The appellant approached this Court to appeal a decision of Regional Court Magistrate, Mr. Lephadi, sitting in Itsoseng on 6 February

2020. He was found guilty of robbery with aggravating circumstances. The appeal is against both conviction and sentence. This appeal is disposed of in terms of section 19 (1) (a) of the Superior Courts Act 10 of 2023.

[2] The appellant was charged with robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 ("CPA") to which he pleaded not guilty. He was convicted and sentenced to an effective term of 12 years imprisonment. The appellant was legally represented in the court a quo at all times.

[3] The background facts giving rise to the charge are as follows: It is alleged that on 9 January 2019, and at or near Makouspan, the appellant unlawfully and intentionally assaulted Martha Nolovo ("Nolovo"), the complainant and with force took an amount of R 24 359 from her, her property or property in her lawful possession. Nolovo was in the company of Gloria Mabalane

("Mabalane"). These two women were on their way home from a meeting of SEF, an association where a group of people contribute money at regular intervals. On that day, they had collected contributions from their members and had the money with them for safekeeping. The money was wrapped in a plastic bag. The complainant had this bag hanging over her shoulder. At a junction of the road, and near a shop, they saw the appellant in the company of another man, but the two men went past them.

- [4] A short while thereafter, the men approached them from the back, snatched the money from them, having produced knives. The other man who snatched the bag, wearing a red shirt, moved further from them while the appellant, identified as wearing a blue shirt, ran to the opposite direction. Novolo started screaming for help, alerting the people at the shop to come to their aid and to chase the man who had snatched the money bag. One of the people who came to the aid of the two women was Obakeng Itumeleng (“Itumeleng”). The community members were outrun by the perpetrator who snatched the plastic bag containing the money.
- [5] In the meanwhile, Mabalane ran to Nolovo’s house, which was nearby and found Nolovo’s husband, James Novolo (“James”),

who heard the screams. She got into James’s bakkie and they drove out to look for the perpetrator who had snatched the money.

They could not find him. However, upon return, they saw a group of community members who had gathered and realised that the man earlier identified by his blue shirt, had been apprehended by a community member. He started assaulting him with stick and pelting him with stones. James drove into the crowd. The appellant then got into the back of the bakkie, and closed himself inside the canopy of the vehicle.

- [6] The appellant’s version is that he was not at the scene of the robbery. He denied the allegations that he robbed the complainant. In his plea explanation, he states that he was in a taxi and after alighting, people stopped him and asked to search him. When he refused, they started beating him with sticks and pelting him with stones. He said he then produced a knife in order to defend himself. He pleaded mistaken identity.

Point in Limine

- [7] The appellant, in his heads of argument, raises a point in limine which must first be considered. The appellant contends that the State failed to provide a complete record of the proceedings in the court a quo, including the testimony of the State’s key witness. This Court is called upon to determine and rule on whether a failure by the State to provide the complete record infringes the appellant’s constitutional right to a fair trial in terms of Section 35(3) of the Constitution of the Republic of South Africa 108 of 1996.
- [8] The respondent conceded that the record is indeed incomplete and that the Regional Magistrate who presided during the trial and sentencing, is deceased. However, he submitted that the transcribed record of the judgment by the late Regional Magistrate is comprehensive enough as it summarise the evidence of the state witnesses and the defence evidence, and that this Court, in making a ruling in the appeal, could rely upon the trial Magistrate’s judgment.

[9] Similar to the task of the Constitutional Court in the matter of *Phakane v S* (CCT61/16) [2017], this Court is called upon to determine whether the appellant's right to a fair appeal would be compromised to the extent that his appeal could not to be fairly determined, resultant from the incomplete record. In *Phakane v S* (A186/2013) [2014] ZAGPPHC 1073, it was accepted that the records are missing, and it was admitted that the applicant's rights to fair trial were infringed. However, the court found that such infringement did not prejudice the appellant.

[10] The Constitutional Court relying on an earlier decision of the Supreme Court of Appeal (SCA) in *S v Chabedi* [2005] ZASCA 5, reiterated that:

"[T]he requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal

of everything that was said at the trial. The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular

record and on the nature of the issues to be decided on appeal."

[11] The Constitutional Court adopted a similar approach in *Schoombie v S* [2016] ZACC 50. In that case, the record was found to be missing upon lodgement of the appeal by the two appellants. The record was then reconstructed from the notes of the presiding judge, Judge Hendricks J (as he then was). The Full Court noted that the original record was unavailable and considered the Judge's notes and his judgment and disposed of the appeal. The appellants then successfully approached the Constitutional Court directly and attacked the reconstructed record as being inadequate. The Constitutional Court concluded in *Schoombie* that:

"The Full Court, taking into account all the evidence, concluded that there was a "clear and unambiguous intention on the part of the two, to kill the deceased". It says it was unable to ascertain from the reconstructed record "whether a cautionary approach was adopted in respect of certain witnesses" but concludes that "[n]o inference is justified however that the trial court did not approach the evidence" of Mr Mokwakwa and the other witness "with the necessary caution".

That conclusion was sound. It is not assailable now. The Full Court acknowledged that the original case record was unavailable and that the reconstructed record did not clearly indicate whether a cautionary approach was adopted in respect of certain witnesses. But it concluded that the trial Judge's judgment on leave to appeal indicated that he had made a positive credibility finding in the case of those witnesses. This is plainly right. The leave to appeal judgment also addressed the State's failure to call certain witnesses. The Full Court was able to assess independently the legal consequences of that failure.

All of this points powerfully to one conclusion: the record was amply adequate for just consideration of the issues the applicants raised on appeal.

- [12] In the present case, the appellant contends that the State failed to provide the complete record that includes the record of the testimony of one of the State's witnesses, namely Obakeng Itumeleng ("Itumeleng"). While the evidence of Itumeleng is indeed missing from the record, the evidence in chief, the cross examination and re-examination of the complainant and that of the second State witness, Mabalane, is clearly captured on the record. Most importantly, the record also comprises the address by the prosecutor and the legal representative of the appellant, as well as the full judgement of the court a quo.
- [13] I am unpersuaded that the missing evidence, as it is submitted on behalf of the appellant, will hamper this Court in evaluating the evidence that the trial court relied on to determine the judgment on conviction. It is my view that the record is adequate enough for a fair and meaningful adjudication of this matter, and therefore a proper consideration of the appeal is possible. The point raised in limine of the incomplete record must consequently fail.

Ad Conviction

- [14] It is trite that the onus rests on the State to prove the guilt of an accused person beyond a reasonable doubt. Further, that if the version of the accused is reasonably possibly true, (s)he must be acquitted. It is also an established principle on appeals that in considering the judgment of the court a quo, the appeal court is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless the record reveal that those findings are patently wrong.
- [15] On appeal, this Court must determine whether the court a quo applied the law correctly to the facts and whether the appellant was correctly convicted. In *S v Monyane and Others* 2008 (1) SACR 543 (SCA) Ponnann JA said the following with regard to the court's power on appeal:

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited. ... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 e – f)."

Grounds of Appeal

- [16] The appellant's one ground of appeal, as contained in the 'Notice of Appeal', is that the court a quo erred in its analysis of the facts and evidence, leading to his conviction. In his submissions, the appellant criticises the court a quo primarily regarding the credibility of the state witnesses; discrepancies in their evidence; the application of the cautionary rule by that court; the failure of the State to obtain phone records; the identity of the appellant and the rejection of the version of the appellant. The full grounds of appeal are cited for completeness:

"In convicting the Appellant the learned Magistrate erred in making the following findings in his evaluation of evidence: -

1.1 That the state proved the guilt of the Appellant beyond reasonable doubt on the charge of Robbery with Aggravating Circumstances even though on several occasions during the testimonies of state witnesses the court raised some concerns or reservations.

1.2 That the credibility of the state witnesses (except for Masabatha) to be beyond reproach and that they are reliable witnesses and failed to pay attention to the necessary cautionary rules of evidence in criminal proceedings.

1.3 That though conceding that there were "some discrepancies" in the state witnesses' evidence, went on to conclude that such discrepancies were so immaterial they don't dent the state case, whilst there was ample evidence during cross — examination to refute State's case.

1.4 That the confusion between Mrs. Novolo and Mabalane can be ascribed to the trauma they experienced instead of considering such as material discrepancies demonstrated both by their viva voce evidence and the statements recorded on the day of the incident.

1.5 That Mrs. Mabalane and Mrs. Novolo cannot be faulted for not seeing the assault on the Appellant yet they both claim to have spoken directly and in person with the appellant when he was in the back of the bakkie.

1.6 That all the State witnesses corroborated each other in material respects (excluding the evidence of Masabatha, Appellant's girlfriend) yet there are glaring inconsistencies in the individual state witnesses' testimonies and on material aspects.

1.7 In concluding that the appellant was in the sight of the three witnesses, namely Ms. Novolo, Ms. Mabalane and Mr. Itumeleng yet it is Ms. Novolo's testimony that she was not present when the community apprehended the appellant and further that she did not even know about it until she arrived at the scene.

1.8 That the Appellant's evidence is rejected as a cocktail of lies though the version he presented is very probable and not far-fetched. Further that his girlfriend can be charged with perjury.

1.9 By disregarding the appellant's version that he was never told why he had been arrested until after he had disclosed his previous conviction.

1.10 The appellant's version that two men confronted him whilst he was trying to hike back to Mafikeng demanding to search him and on refusing, they started beating him with sticks leading him to seek refuge at the tavern.

1.11 By disregarding Masabatha's testimony as being untruthful because it corroborated the appellant's version even though the court even stated that Masabatha's evidence was never discredited by the State.

1.12 By disregarding the fact that there was no certainty about how much money was in the robbed bag or in the alternative how much had been collected and how.

1.13 By downplaying the fact that the police did not retrieve the cellular phone records of the Appellant and Masabatha, to establish whether they had regular communication during the day of the robbery and what the nature of their communication, if any, was.

1.14 By further downplaying the significance of this evidence of the cell phone records even though Constable Ketela under cross-examination

conceded that retrieval of the cell phone records was crucial.

1.15 By disregarding the fact that the state witnesses had very selective memories when asked about the assault on the Appellant by the mob and some did not even see injuries yet claiming to have never lost sight of the appellant from the time of robbery.

1.16 By not taking into account the discrepancies in the complainants' evidence and statements especially as regarding to the persons who they interacted with after the SEF meeting in Makouspan.

1.17 Further disregarded the variation in the testimony of Ms. Novolo and Mrs. Mabalane with regard to how they got some money from one Mavis Mabobo Handa.

1.18 Disregarding that Mrs. Mabalane testified that she only saw the perpetrators for two seconds each and the snatching only took a few seconds whereafter they screamed and Mrs. Mabalane immediately ran to Mr. Novolo's residence.

1.19 That the state witness Obakeng Itumeleng did not see the bag being snatched, but only saw a perpetrator in possession of it after the ladies screamed for help.

1.20 That Mr. Itumeleng did not point the Appellant to anyone, and as such it remains unclear how the mob decided he must be beaten up or apprehended.

1.21 By overlooking that the Appellant was apprehended by the "community" hundreds of metres away from the place where the offence allegedly took place.

1.22 By overlooking that the state did not produce any witness who apprehended the Appellant before the "community" started to assault him and police eventually turned up except mentioning that one Mr. Itumeleng never lost sight of the appellant.

1.23 By overlooking the possibility that the complainants may have been influenced by finding the mob beating up the Appellant, causing them to believe he was one of the robbers.

1.24 By overlooking the fact that the two ladies Ms. Novolo and Mrs. Mabalane did not testify about pointing out the Appellant to anybody which could have led to his arrest and even testified that they both for one reason and another found the appellant being beaten the community mob.

1.25 Further by disregarding the difference in Mrs. Mabalanel s testimony that she did not see the appellant being assaulted by the community whilst Mr. Novolo's statement was to the fact that when he arrived at the scene the community was busy assaulting the appellant throwing stones at him. This is further against the fact that Mrs. Mabalane allegedly alighted Mr. Novolo's car before he stopped.

1.26 By also disregarding the discrepancy in Mrs. Mabalane and Ms. Novolo's testimonies with regard to where they found the appellant. Ms. Novolo stated that she found the appellant cornered by the community at a tarven whilst Mrs. Mabalane testified that he was along the road going out of Mandela Park.

1.27 In overlooking the difficulty in reconciling Mrs. Mabalane's testimony to the effect that "they" went to one Masabatha's place to collect SEF books before going to Mooifontein Police Station with the police. Ms. Novolo stated that Masabatha stayed in Moukspan and was surprised to find her in Mandela Park.

1.28 By not requiring Mrs. Mabalane to produce before court the alleged records of the money collected on the day of the alleged robbery

given that such documentary evidence was crucial to the veracity of the state's case.

1.29 By overlooking what seems to have been an afterthought in Mrs. Mabalane's viva voce evidence under re-examination when she was asked

as to why she chose to run to Mr. Novolo's place instead of asking people nearby to help apprehend the robbers as well as an inconsistency in the testimony.

1.30 By disregarding the fact that Mrs. Mabalane in her testimony said the police called her aside to ask her what was happening and yet Warrant Officer Modise in his testimony said it was the complainants who approached him and told him what was happening. This has a bearing on how the police got to know and how they ought to have conducted their investigation including establishing the bodily features of the appellant as the accused.

1.31 By overlooking the fact that the first peace officer at the scene namely warrant officer Modise did not record any events at the scene including the names of complainants or the community members who had apprehended the appellant. This was also the case with Constable Ketela yet he had his pocket book with him.

1.32 By disregarding the fact that the police witnesses did not even corroborate each other about what was found in the Appellant's possession, what the appellant was wearing as well as who informed constable Ketela what had happened.

1.33 By failing to apply its mind in accepting the versions of Ms. Novolo and Mrs.Mabalane that the appellant was able to hold off and block the community from chasing the other suspect, versions which the investigating officer Ketela did not agree with.

1.34 By disregarding the manner in which the investigating officer had handled the items such as the cellular phone which would have

provided valuable information and possible leads if indeed the appellant had been involved in the alleged robbery. Constable Ketela

under cross — examination conceded to having been negligent.

1.35 In concluding that communication before, during and after the robbery was inconsequential and irrelevant in a case where another suspect is at large.

1.36 Further on the analysis of identification evidence by focusing only on the fact that the incident occurred during daylight and ignoring such aspects as time and situation as well as voice, build and dressing of which aspects the state witnesses including the police officers differed on.”

[17] The respondent, on the other hand, contended that the appellant’s identity was corroborated by both Nolovo and Mabalane. They were ad idem that the man found in the canopy of the bakkie, having been apprehended by the members of the community, was the same man who took the police in search of his friend who had snatched the money bag, and whom Itumeleng identified as the same man that wielded a

knife at the complainant and Mabalane and whom he saw fleeing, while giving his friend also time to flee.

[18] The respondent further conceded to the discrepancies and contradictions in the evidence of State witnesses, but submitted that

such were so immaterial that it did not dent the credibility of their evidence. Regarding the rejection of the appellant’s version, the respondent submits that the appellant was caught after being chased by the State witness and the community, and was positively identified by the witnesses and the victim.

[19] The respondent, in opposing the appeal, argued that there were no material misdirection’s committed by the trial court in so far as factual and credibility findings were concerned. On the merits, the respondent counterargued that except for a general submission on the appellant’s version that he did not rob the victim with a knife and that his version may be reasonably possibly true, there was no demonstrable and material misdirection committed by the court. The respondent concluded that the Regional Magistrate properly considered the totality of the evidence and submitted that the appeal should be dismissed.

[20] In its judgment, the court a quo made the following relevant consideration of fact. On 9 January 2019, at around 16h00, the complainant and Mabalane were on their way home from a SEF (SURF) meeting where they collected an amount of R 24 339,00, when they were accosted by the appellant and a co-perpetrator, who robbed them of the money and threatened them with knives. The court a quo found that Itumeleng, who heard the screams of the complainant, saw the appellant from the time when he was wielding a knife during the robbery and had sight of him at all times. He chased him and identified him as the same man apprehended by community members.

[21] In *R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 705-706 it was held that:

“The trial court has advantages which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has the trial court had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. The mere fact that the trial court has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as it was. Even in drawing inferences the trial court may be in a better position than the appellate court, in that it may be more able to estimate what is probable or improbable in relation to the particular people whom it has observed at the trial...The appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial court. Where the appellate court is constrained to decide the case purely on the record, the question of onus becomes all-important. In order to succeed, the appellant has to satisfy an appellate court that there has been 'some miscarriage of justice or violation of some principle of law or procedure'.”

With regard to the identification of the appellant, the court a quo demonstrably considered that the incident happened during broad daylight. The court also referred to its application of the cautionary approach.

[22] The court a quo considered the discrepancies and contradictions in the evidence of the State witnesses and concluded that they were so immaterial that they did not dent the evidence of the witnesses, and found their credibility beyond reproach. Further, the court a quo found that the fact that the two State witnesses, Nolovo and Mabalane did not see the assault on the appellant, did not render them to be unreliable or lying witnesses. The court a quo attributed their confusion to the trauma experienced during the robbery. The court a quo outrightly rejected the version of the appellant as improbable. I am satisfied that there are no material misdirection on the part of the Regional Magistrate. In the premises, the appeal against conviction falls to be dismissed.

Ad Sentence

[23] In so far as sentence is concerned, no material misdirection occurred when imposing sentence and consequently the appeal against sentence should accordingly be dismissed.

Order:

[24] Resultantly, I make the following order:

N V MOTSATSI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES FOR THE APPELLANT ADV N KAPUMHA ATTORNEYS FOR APPELLANT LEGAL AID SOUTH AFRICA NO. 742 DR. JAMES MOROKA MAFIKENG JUSTICE CENTRE MMABATHO FOR THE RESPONDENT I H MAKHUVHA ATTORNEYS FOR RESPONDENT DIR. OF PUBLIC PROSECUTIONS MEGA CITY COMPLEX EAST GALLERY 3139 SEKAME ROAD MMABATHO DATE JUDGMENT RESERVED: 21 JUNE 2024 DATE JUDGMENT HANDED DOWN: 30 JULY 2024

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