

SOUTH AFRICA / JUDGMENT

Faku and Another v S (CA&R 205/2013)

[2014] ZAECGHC 56 (3 July 2014)

[2014] ZAECGHC 56**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

G Goosen, G Bloem

CASE / FILE NUMBER

CA&R 205/2013

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 205/2013

Date heard: 25 June 2014

Date delivered: 3 July 2014

In the matter between

LISA FAKU.....First Appellant

LOYISO NGENDI..... Second Appellant

and

THE STATE.....Respondent

JUDGMENT

GOOSEN, J.

[1] This is an appeal against conviction with leave having been granted on petition to this court. The appellants were convicted of robbery with aggravating circumstances in the Regional Court at Uitenhage on 26 April 2013 and sentenced to 12 years' imprisonment. An application for leave to appeal was refused by the Regional Magistrate. Leave to appeal was granted on 6 September 2013 to appeal

against their conviction to the full bench of this division.[1]

- [2] On 25 October 2010 an armed robbery occurred at the BP petrol station at Colchester adjacent to the N2 road between Port Elizabeth and Grahamstown. The robbery occurred when security personnel employed by G4S Cash Solutions were collecting cash from the BP petrol station. Two metal canisters containing cash were taken, as was a .38 revolver with six rounds of ammunition. Three accused were arraigned on trial charged with robbery, theft of a motor vehicle and possession of a firearm and ammunition. One of the accused, namely accused three, was discharged at the close of the prosecution case. The appellants were convicted of robbery with aggravating circumstances but acquitted of the remaining charges.
- [3] The prosecution's case was that the robbery was carried out by an unknown number of men. They made their escape from the petrol station in a white bakkie, which was the subject of the theft charge. Almost immediately after the commission of the offences the bakkie was seen in Colchester stopped in a road parallel to the N2. There were five persons on the back of the vehicle. A Toyota vehicle with CA registration plates pulled up. The persons on the back of the bakkie got into the Toyota. Two metal canisters were put into the boot of the Toyota. It then left, heading in the direction of Port Elizabeth. The bakkie was left at the side of the road abandoned. The police were alerted and as a result a radio call was put out for police to be on the lookout. The radio call was picked up by a police Tactical Response Team (TRT) unit that was on patrol in the vicinity of Motherwell, Port Elizabeth.
- [4] Whilst driving along a back road near Motherwell the TRT team spotted a BMW and a Toyota travelling very close together in the opposite direction. The TRT unit set off after these vehicles. As a result a high-speed chase ensued. When the vehicles entered Motherwell the Toyota turned off and headed in a different direction to the BMW. The TRT team followed it and after a short chase pursued the vehicle into a cul-de-sac. There the vehicle came to a halt and persons got out of the car. Two of them ran away. The TRT vehicle also came to a halt and two of the members in the vehicle, set off after the escaping occupants of the Toyota. It was common cause that the first appellant was arrested at the vehicle and that the second appellant was arrested a short distance from the Toyota vehicle. The circumstances in which they came to be arrested was disputed at trial. It was also common cause that a metal canister containing cash was found in the boot of the Toyota. This was one of the canisters taken during the course of the robbery.
- [5] The state's case was that the first appellant was the driver of the Toyota and that he was arrested at the vehicle. It was also its case that the second appellant was one of the passengers in the Toyota who had attempted to flee. He was arrested in the yard of a nearby property attempting to scramble over a fence.
- [6] The first appellant's defence was that on the day in question he had borrowed the Toyota from his uncle who had hired the vehicle. He went to Colchester to drop off his girlfriend at the hitchhiking spot so she could get a lift to East London. After she had left and whilst he was seated in his car talking on his telephone he was hijacked at gunpoint by two men who emerged from a BMW that pulled up behind him. He was forced onto the back seat and

made to lie down on the floor of the Toyota. The vehicle then drove off. It stopped somewhere and two men got into the Toyota. It then drove off. It again stopped and some persons got out. It continued driving. He then heard talk about police and there was then a high-speed chase. When the vehicle came to a halt three persons jumped out of the vehicle and ran away. He was then seated behind the driver's seat. When he got out of the vehicle and before he could explain to the police what had happened, the police assaulted him. The assault was of such a nature that he lost consciousness. He was later taken for medical treatment at the hospital. He was arrested and charged.

- [7] The second appellant's defence was that he was in no way involved. He was in the vicinity collecting money. He saw a Toyota

speed into a narrow 'passage' followed by a police vehicle. Shots were being fired. He ran away and went into a house.

He was then arrested by the police.

- [8] The prosecution, inter-alia, led the evidence of the four TRT police officers involved in the arrest of the appellants. Each of them testified that when the Toyota came to a halt two persons jumped out of the vehicle and fled. Two officers set off after them. The other two approached the Toyota where first appellant was arrested when he was taken out of the vehicle where he was seated in the driver seat.

- [9] During the course of the testimony they were confronted with the content of a report contained in the docket in which was contained

the description of the events at the scene of the arrest. The report indicated that there were occupants in the Toyota, three of whom had fled. Mr Wessels sought to have the reports received by the court as exhibits. This application was refused.

- [10] The investigating officer, detective warrant officer Botha was not called to testify. Before the defence closed its case an application was made pursuant to section 186 of the Criminal Procedure Act, Act 51 of 1977 (hereinafter the CPA), for the court to subpoena the investigating officer, to testify. This application was also refused.

- [11] The trial court considered the evidence led by both the prosecution and defence and accepted that of the four policemen who testified as to the circumstances of the arrest of the appellants. Based upon this credibility finding the court rejected the versions of the appellants and convicted them on the count of robbery. Since there was no evidence to link them to the theft of the motor vehicle or the possession of the firearm and since it was not established that the weapon recovered was indeed a firearm within the meaning of section 3 of the Firearms Control Act, they were acquitted of these charges.

- [12] On appeal it was submitted that:

- (a) the magistrate had committed an irregularity in failing to receive the two reports as exhibits;

- (b) the magistrate had erred in failing to exercise the court's powers in terms of section 186 of the CPA; and
- (c) the trial court had misdirected itself in relation to certain factual findings and had erred in rejecting the appellants' versions as not being reasonably possibly true.

[13] The conviction of the appellants is founded upon accepted evidence as to the circumstances of the arrest of the appellants. The facts as found by the magistrate were determined on the basis of a finding of credibility of the prosecution witnesses. On this basis the versions presented by the appellants was found to be not reasonably possibly true and therefore rejected.

[14] On appeal, Mr Wessels pointed to a number of features in the magistrate's judgment which, it was submitted, constituted

misdirection as to fact. One of these was that the magistrate found that the Toyota motor vehicle had been hired for the purpose of committing the robbery, whereas there was no evidence to suggest that that was the case. The Toyota motor vehicle had indeed been hired. The first appellant explained that it had been hired by his uncle and that he had borrowed the vehicle on the day in order to travel to Colchester.

[15] The magistrate also found that the first appellant had attempted to make good his escape, rather than demonstrating his relief when the police arrived at the Toyota. It was submitted that there was no evidence that he had fled from the vehicle after it had stopped. Indeed, the evidence of the prosecution was that he was seated in the vehicle when the vehicle was approached. It was also argued that the magistrate also laboured under a misapprehension that the first appellant had, in exercising his right to remain silent, chosen to sacrifice his liberty by choosing not to reveal the fact that he had been hijacked on the day.

[16] This construction of the facts was weighed in the assessment of the probabilities associated with the first appellant's version, both in respect of his allegation that he had been hijacked on the day in question and, as to the events that occurred when he was arrested. It was common cause that the first appellant had suffered an injury when he was removed from the Toyota and arrested. He received medical treatment for the injury.

[17] Mr Wessels argued that the magistrate had failed to take into account the contradictions between the prosecution witnesses as to what occurred when the Toyota motor vehicle was pursued and when the appellants were arrested. In particular, he pointed to the evidence of Constable April who stated that two persons had alighted from the Toyota when it stopped, whereas, in a police statement made shortly after the incident, he had stated that three persons had fled from the vehicle. Mr Wessels also pointed to the content of two reports which were contained in the police docket with which the prosecution witnesses were confronted during cross examination. It was these two reports that the magistrate refused to receive as exhibits. It was also in consequence of the content of these reports that Mr Wessels made application in terms of section 186 of the CPA before the magistrate to call the

investigating officer as a witness.

[18] I shall deal with these two latter contentions before dealing with the misdirections upon which the appellants rely.

[19] The magistrate's failure to receive the two reports as exhibits may be easily disposed of. It is clear from the record that the reports were not properly proved. The authorship was unknown. Certainly none of the witnesses who were confronted with the content of the reports could shed any light on them nor comment on the veracity or otherwise of those reports. In my view, the magistrate's refusal to receive them as evidentiary material was quite correct. Although Mr Wessels did not abandon the point he certainly did not seek to make much of it on appeal.

[20] Insofar as s186 of the CPA is concerned, the section imposes upon a trial court a duty to cause a witness to be subpoenaed if the evidence of such witness appears to the court to be essential to the just decision of the case. In *S v Gabaatholwe and another* 2003

(1) SACR 313 (SCA) the court said of this duty at paragraph 5:

The role of the judicial officer in the criminal trial as an administrator of justice, open-minded, impartial and fair in fact and

in demeanour (*R v Hepworth* 1928 A.D. 265 at 277; *S v Rall* 1982 (1) SA 828 (A) at 831A – 832H; *S v Gerbers* 1997 (2) SACR 601 (SCA) at 606a – 607c) informs the exercise of its judgment in terms of s186. Although the section contemplates the exercise of the court's power at any time during criminal proceedings, the necessity of calling a witness in the interests of just decision will usually be less apparent at the end of the State case than it would be after all the evidence has been heard. At the

earlier stage the trial court does not know whether the accused will testify and, should they do so, precisely what will be placed in dispute. It can make assumptions only based on the plea and the substance of the cross-examination. Generally the result must be that in any reassessment on appeal the decision to refuse a subpoena even greater latitude will be allowed to the trial court's discretion than would be the case if the application had been brought after the defence case.

[21] And further, at paragraph 6:

In s 186 "essential to the just decision of the case" means that the court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow, but rather that such conviction or acquittal, as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.

[22] In this instance the defence brought its application at the close of the defence case. It sought then to have the trial court subpoena the investigating officer. The investigating officer had not been called by the prosecution but had been made available to the defence as a potential witness. The application was however motivated on the basis that the defence wished to cross-examine the investigating officer in relation to the two reports that were in the investigating docket which reflected that three persons had got out of the Toyota motor vehicle and attempted to flee the scene. It was suggested that on the probabilities that information could only have originated from the TRT police officers who had attended the scene where the appellants were arrested. The defence therefore wished to investigate the apparent contradiction between the content of that report and the evidence presented by the four TRT police officers that only two persons fled from the Toyota motor vehicle, in the light of the fact that it was the first appellant's version that three persons had fled from the scene and that he was left in the motor vehicle behind the driver's seat at the point at which the police arrested him.

[23] The magistrate considered the application and came to the conclusion that the investigating officer's evidence as to what had transpired on the arrest scene could not assist since the investigating officer had not been on the scene. His evidence

therefore could only be of a secondary or hearsay nature and could accordingly not assist in the determination of what had occurred. The magistrate accordingly exercised his discretion and refused the application.

[24] As noted in *Gabaatlholwe* (supra) a court of appeal will interfere with the exercise of the trial court's discretion only on very limited grounds. In *S v B and another* 1980

(2) SA 946 (A) it was considered that an appeal court would interfere with the exercise of the discretion only if it was shown that no court could reasonably have failed to call the witness (at 953E).

[25] In this instance it cannot be said that this has been established. The trial court's observation that the evidence of the investigating officer could provide no assistance as to what had transpired on the scene when the appellants were arrested cannot be faulted. There was no indication that the investigating officer was the author of the reports. Such information as was contained in the reports regarding the events at the scene of the arrest of the appellants could only be based upon the author's interpretation of what was conveyed to him or her and could, properly considered, not provide any assistance as to what had occurred on the scene. Apart from this aspect the investigating officer could provide no evidence which, upon any construction, could be considered to be essential to the just determination of the case. To the extent that the effect of a reference to 3 persons fleeing from the Toyota motor vehicle, as contained in the reports, might have been relevant to determining the veracity of the evidence as to the events at the scene, such fact or apparent contradiction, was already on record both by reason of the cross-examination of the witnesses as well as in the reference in the statement made by Constable April shortly after the events. There was thus

already evidentiary material before the court upon which it was able to consider the veracity of the witnesses and to make a determination as to the events as they occurred. Accordingly no irregularity was committed by the trial court by refusing the application in terms of s 186 of the CPA.

- [26] What remains to be considered is the trial court's evaluation of the evidence and its finding as to the credibility of the prosecution witnesses.
- [27] It must be accepted that the magistrate erred in certain respects in relation to certain findings of fact. The magistrate was clearly wrong in finding that the Toyota motor vehicle had been hired for the purpose of use in the robbery. He was also wrong in his reference to the fact that the first appellant had not told Swanepoel that he was the victim of a hijacking when it was not Swanepoel who had interviewed the first appellant but rather Wolmarans. The magistrate's error in this regard is, in my view, of no consequence. It appears that the reference to Swanepoel was no more than a bona fide mistake. The evidence shows unequivocally that the first appellant did not report to Wolmarans that he was the victim of a hijacking. Indeed it was Wolmarans' evidence that the first appellant had elected to make no statement to him when interviewed and had instead made arrangements to secure the services of his own attorney.
- [28] Wolmarans testified that the first appellant had at no stage made any reference to the fact that he had been hijacked either prior to the arrival of the attorney or thereafter. Significantly, Wolmarans was not challenged in cross-examination on this issue. Nor was it put to him that the first appellant would testified that he had indeed told him that he was the subject of a hijacking. Of equal significance is the fact that the first appellant in his evidence-in-chief made no mention of the fact that he had allegedly reported the hijacking to Wolmarans. That issue emerged for the first time in cross-examination of the first appellant. An analysis of the evidence does not indicate any significant or substantial attack on the credibility and reliability of Wolmarans as a witness. In my view it is therefore not surprising that the magistrate accepted, correctly in my view, that the first appellant had not reported that he was the victim of a hijacking. It is this fact that weighed with the magistrate in assessing the inherent probabilities in the first appellant's version. The magistrate considered that it would be highly improbable that an innocent victim of a hijacking would not, when he had the opportunity to disclose to a police officer, disclose that he had been the victim of a hijacking and that he would instead elect to exercise his right to silence even at the expense of his liberty. Although it is correct that the magistrate here laboured under the misapprehension that the first appellant had spent a considerable period of time in custody whereas he did not, the fact remains that he considered it improbable that a person who was the innocent victim of a hijacking would not point that out to the police even when he had the assistance of a legal representative. In my view this assessment of the probabilities cannot be faulted.

- [29] It is perhaps appropriate to mention here that there are certain features of the version of the first appellant that are not supported by other evidence presented by the prosecution. The witness Dobson saw the white bakkie being abandoned. He saw five persons on the back of the bakkie get into the Toyota. Although he didn't see the driver get into the Toyota, after the Toyota left he went to the bakkie and found that it had been abandoned. He assumed that the driver had also got into the Toyota. On his observation at least six persons got into the Toyota. However, according to the first appellant, when he was forced into the back of the Toyota there were two persons in the Toyota. When it first stopped after the hijacking two persons got into the back of the Toyota. This version would mean that at least four people got into the front seat of the Toyota. This is improbable.
- [30] The fundamental question which the magistrate faced in regard to the conflicting versions as to the circumstances in which the first appellant was arrested turned on whether the first appellant was seated in the driver's seat at the time that the police confronted him. The evidence of the two police witnesses, April and Songca on this issue was clear and unequivocal. Both testified that two persons had fled from the Toyota and had run away. They were pursued by the other members of the TRT team. Constable Songca explained that when he emerged from the TRT vehicle he was focused on the person remaining in the Toyota who was the driver. He noted that the driver attempted to move the Toyota forward. Both he and April interpreted this as an attempt to make a getaway. Songca said he was concentrating on the driver. He pointed his firearm at him and held his firearm pointed in his direction whilst he shouted at him to get out of the car. It was then that they approached the vehicle and the first appellant was removed from the vehicle and forced to the ground. His hands were tied using cable ties. Both April and Songca denied that the first appellant was seated behind the driver's seat.
- [31] It was suggested that the evidence of these two policemen was not reliable inter-alia because April had in his police statement referred to three persons fleeing from the vehicle and then had corrected the statement to indicate that two persons had run away. It was suggested that this raised some suspicion as to possible collusion between the police officers. An indicator of this collusion was also to be found in the fact that the statements by each of the TRT police officers had been commissioned by warrant officer Botha who was the investigating officer and that the commissioning all occurred at the same time.
- [32] In my view the argument is founded in little more than speculation. Whilst it is indeed so that April referred at one point in his police statement to 3 persons having fled from the vehicle and later referred to 2 persons, what is striking about the police statement deposed to by April the day after the incident is that he clearly identified the first appellant, whom he had arrested, as being the driver of the Toyota motor vehicle. He testified to this and remained unshaken in cross-examination on this aspect. In this he was supported by Constable Songca. It is against this evidence, namely that the first appellant was the driver of the Toyota motor vehicle, that the magistrate evaluated the first appellant's version, and found, having regard also to the inherent probabilities, that the first appellant's version was

not reasonably possibly true and therefore rejected it as false. In this finding I can find no fault. It follows therefore that the first appellant's appeal cannot succeed.

[33] Turning to the second appellant, the principal criticism leveled at the magistrate is that he did not set out in detail his reasons for preferring the evidence of the two police officers to that of the second appellant as regards the circumstances of his arrest.

[34] The magistrate made a clear credibility finding. It is apparent from the judgment that he considered the discrepancies and contradictions between the four policemen's accounts of events to be minor and of no consequence. He accepted that their versions corroborated one another. It is in this context that he made the positive finding of credibility.

[35] An appeal court will not readily interfere with a trial court's assessment of the credibility of a witness. It will do so only where it is clear, from an assessment of the evidence as a whole, that such a finding is wrong. In this instance there is no basis for such a finding. It must therefore be accepted that the trial court's assessment of the credibility of the witnesses is correct. That being so the trial court was faced with the evidence that the second appellant was indeed an occupant of the Toyota and that he had attempted to flee from the scene. He was apprehended attempting to get over a fence. These facts, once accepted, are entirely destructive of the second appellant's explanation of his presence and the circumstances of his arrest. The magistrate's finding that his version is not reasonably possibly true therefore cannot be faulted.

[36] It follows from the above that the second appellant's appeal also cannot succeed.

[37] In the result I make the following order:

The appeal is dismissed.

G. GOOSEN

JUDGE OF THE HIGH COURT

BLOEM, A.J.

I concur

G BLOEM

ACTING JUDGE OF THE HIGH COURT

Appearances: For the Appellants

Adv. J. W. Wessels

Instructed by S. B. Maqungu Attorneys

For the Respondent

Adv. M Le Roux

Director of Public Prosecutions

[1] An amended order dated 20 February 2014 was handed up at the commencement of the appeal. That order does not specify that leave was granted to the Full Bench. It therefore resolved any question as to the jurisdiction of this court to adjudicate the appeal.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2014/56.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/faku-and-another-v-s-unknown-topic-aecghc-2014>

Prepared on 9 October 2026 · Esheria