

SOUTH AFRICA / JUDGMENT

Katekani v S (A27/2018) [2018] ZAGPJHC 437 (18 June 2018)

[2018] ZAGPJHC 437

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moshidi, Siwendu

CASE / FILE NUMBER

A27/2018

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG
CASE NO: A27/2018
DPP REF NO: 10/2/5/1-(2018/31)
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED.

In the matter

between: KATEKANI,
 MACHETE
 MALULEKE Appellant
 and
 THE
 STATE Respondent

JUDGMENT**MOSHIDI, J:****INTRODUCTION**

- [1] Mr Katekani Machete Maluleke (hereinafter “the appellant”), stood trial on one count of robbery with aggravating circumstances in the Johannesburg Regional Court. The charge sheet alleged that on or about 26 February 2016, and at Chiawelo, Soweto, the appellant assaulted and robbed the two complainants of cellphones and the cash amount of R1 500,00 (one thousand five hundred rand), and during which he threatened them with a firearm and/or a knife.
- [2] The trial commenced on 8 February
2017. The appellant, who was legally represented throughout the proceedings, pleaded not guilty to the charge. He elected not to make a plea-explanation in terms of the provisions of section 115(1) of the Criminal Procedure Act 51 of 1977, as amended (“the Criminal Code”). However, at the conclusion of the trial, the appellant was found guilty as charged. On 20 April 2017 the appellant was sentenced to 10 (ten) years’ imprisonment. The present appeal is with leave granted by the Regional Court, against conviction only.
- [3] The grounds of appeal are as set out in the notice of application for leave to appeal dated 30 May 2017, and as elaborated upon in the subsequent heads of argument. Briefly stated, and in essence, it is contended on behalf of the appellant that: the court a quo erred in finding that the state succeeded in proving beyond reasonable doubt the guilt of the appellant; that the identity of the appellant as one of the robbers had been proved persuasively; that the contradictions in and between the evidence of the two complainants were not material; that the complainants had no motive to implicate falsely the appellant in the commission of the crime; and finally, that the version of the appellant was not reasonably possibly true.
- [4] The following facts were common cause at the trial: it emerged that the appellant’s defence amounted to an alibi, although in the end, the issue of the appellant as one of the robbers appeared to have become sufficiently common cause. The latter fact is conceded in paragraph 10.4 of the appellant’s heads of argument. It was equally common cause that, the appellant and the complainant’s resided in the same neighbourhood; and that they all knew each other; and that they drank at the same tavern occasionally. In addition the appellant’s heads of argument proceed to state that, what is in dispute is whether the complainants were robbed at all on the day in question (26 February 2016), and if there was any robbery, whether the appellant was one of the culprits.
- [5] In an endeavour to prove its case at the trial, the state called as witnesses, the two complainants. They were, Mr Themba Mhlongo (“Mhlongo”) and Mr Percy Mbasima Kubayi (“Kubayi”). Briefly stated, Mhlongo testified that he knew the appellant for about two years

as they stayed in the same residential area. On the day of the incident, at about 21h00, he was in the company of Kubayi. They had been to an automatic teller machine (“ATM”) to withdraw money. The ATM was situated at a petrol station at the Protea South Shopping Mall, and a Nedbank one. Visibility was clear, and in a lit area, with light provided by an Apollo streetlight. Near a place called Happy Budget in the locality, they were accosted by the appellant who was in the company of three other males. The complainants were pointed with firearms and knives. In particular, the appellant was in possession of a firearm which he pointed at Mhlongo’s head. The complainants were searched. Mhlongo was robbed of two cellphones, namely a Nokia and a ZTE cellphoned. Mhlongo’s wallet containing bank cards and a cash amount of R1 500,00 (one thousand five hundred rand) were also taken from his pockets. From Kubayi, a Samsung Galaxy cellphone was taken at gun-point. On completion of the robbery, the appellant and his cohorts ran away.

- [6] In cross-examination, Mhlongo testified that the appellant stayed about two streets away from Mhlongo’s residence in Chiawelo, Soweto. He provided part of the appellant’s residential address. Prior to the incident, Mhlongo would meet the appellant at a local tavern. He had also been to the appellant’s residence to visit the appellant’s brother. After the robbery, and within some thirty
- (30) minutes, Mhlongo again came across the appellant at a nearby tavern whereat the appellant showed him tattoos on his body, and threatened to kill Mhlongo, calling himself the devil. Mhlongo was still in the company of Kubayi. Thereafter, the complainants ran to the Moroka Police Station. Mhlongo denied strongly the version put to him that subsequent to the robbery, he went to the appellant’s home and attempted to extort money (R1 500,00) from the family. From the police station, Mhlongo and Kubayi accompanied the police to the crime scene since the police wanted to see the place. There, they encountered the appellant who was standing near the soccer-field, in a dark area. Although Mhlongo pointed out the appellant, he was not arrested immediately as the police first wanted to obtain statements from the complainants. It is noteworthy that towards the conclusion of his incisive cross-examination, Mhlongo testified that the appellant had previously also robbed him of a cellphone, and for which the appellant was forgiven.
- [7] Kubayi also testified as a final witness for the state. He corroborated in large measure the testimony of Mhlongo. Kubayi had known the appellant from about 2012 already, and residing in the same location. As in the case of Mhlongo, Kubayi denied the version of the appellant that the robbery did not take place at all on the day in question.
- [8] Kubayi was also cross-examined closely. It is so that there emerged certain inconsistencies and contradictions between his evidence and that of Mhlongo. For example, he testified that there was a small boy in their company immediately prior to the robbery. However, the small boy ran away on the sight of the assailants; that they were accosted by three

- (3) assailants, and not four (4), as stated by Mhlongo; that immediately after the robbery, the complainants tried to follow the robbers in order to retrieve their possessions, but were scared off by cocked firearms; and whether Mhlongo met with the appellant inside the tavern after the robbery; and that they did not sleep at the Moroka Police Station on the night of the robbery. For the rest,

as mentioned before, Kubayi's evidence to a large degree corroborated the evidence of Mhlongo. A careful scrutiny of his

evidence shows that he provided more detail than Mhlongo at certain stages.

- [9] Following an unsuccessful application for the discharge of the appellant in terms of the provisions of section 174 of the Criminal Code, the appellant testified as the only witness for the defence.
- [10] The appellant's evidence was brief in-chief examination. He confirmed that he knew the complainants. He denied the robbery or being involved thereat. On the day in question, he was home, and later went out to separate taverns until 02h00 in the morning. He went home to sleep. He was surprised to observe the complainants arriving at his home with the police on 27 February 2016.
- [11] The cross-examination of the appellant, revealed, inter alia, that: he had known the complainants "for a very long time, because we reside within the same vicinity". As a result, he considered the complainants as friends since they spend time together sometimes (see page 69 – record – lines 16-19); that the appellant indeed met the complainants during the night of the incident on 26 February 2016 at a tavern. This must have been after the robbery as testified by complainants. However, on the version of the appellant, on that occasion, there was no bad blood between the complainants and himself. The relationship was normal and friendly.
- [12] At the conclusion of the trial, the court a quo, in a well-reasoned and motivated judgment concluded that the State had succeeded in proving the guilt of the appellant beyond reasonable doubt (not beyond all reasonable doubt), and that the appellant's version was not reasonably true in the circumstances of this case. By implication, the court a quo was equally satisfied that, the identity of the appellant in the commission of the crime had been proved overwhelmingly, and that, the contradictions in the evidence of the two state witnesses were not of a material nature so as to affect or detract from the credibility, reliability, and veracity of their testimony, and core version. Indeed, and in my view, it is extremely difficult, if not impossible, to fault the evaluation of the entire evidence and conclusion reached by the court a quo. There plainly was no irregularity or misdirection committed by the court a quo. This, for a number of reasons as recalled immediately below.
- [13] In my view, the requirements for satisfactory identification of a perpetrator as enunciated in well-known case law, such as *S v Mthetwa* 1972 (3) SA 765 (A) at 768A, and *S v Charzen* [2006] 2 All SA 371 (SCA), have been fully satisfied. In the instant matter, although none of the

robbed items were found in the appellant's possession or even recovered, the appellant admitted that both complainants knew him, and he knew them. Both the complainants testified that they had recognised the appellant from the assailants who have attacked them. The appellant resided in the same area as they did. He knew them as acquaintances. In fact, he described them as friends. Both the complainants testified that they encountered the appellant about thirty (30) minutes again subsequent to the robbery at the tavern, and that Mhlongo questioned the appellant as to the reason why he had robbed them, and whereat the appellant displayed his tattoos, and uttered the words that he was untouchable and a 'devil'. In this evidence, the appellant confirmed that he had tattoos on his body. His version that on that occasion, all was cordial between the complainants and him was highly improbable. The same applies to part of his version that there was no robbery on the day of the incident. Furthermore, in my view, the contractions relied on by the appellant were not fatal or material as enunciated in case law such as *S v Mkohle* 1990 (1) SACR 95 (A), and as correctly pointed out by the state counsel. The core evidence is that a robbery occurred, in which the appellant was one of the assailants, and well-known to his victims. The appellant's speculation for the reason why the complainants would venture to implicate him falsely, took the matter no further.

CONCLUSION

[14] I conclude therefore that, based on the conspectus of the evidence, and reasons advanced above, the appeal against the conviction ought to fail. This will be in the interest of justice, and that no compelling reason was advanced by the appellant.

ORDER

[15] In the result the following order is made:

1. The appeal against the conviction is dismissed.

D S S MOSHIDI

JUDGE OF THE HIGH COURT

I concur:

T SIWENDU

Counsel for the appellant M Leroto

Instructed by Johannesburg

Justice Centre

Counsel for the respondent Maro Papachristoforou

Instructed by DPP

Johannesburg

Date of hearing 18

June 2018

Date of judgment 18

June 2018

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Prepared on 10 October 2026 · Esheria