

SOUTH AFRICA / JUDGMENT

Mabena v S (70/2018P) [2020] ZAKZPHC 26 (26 June 2020)

[2020] ZAKZPHC 26

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Gorven, Chili

CASE / FILE NUMBER

70/2018P

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IN THE
HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG
Not Reportable
Appeal No: 70/2018P
In the

matter between:

MUZI
EDWIN
MABENA
APPELLANT
and
THE
STATE
RESPONDENT
ORDER
The

appeal against the convictions of the appellant is dismissed.

JUDGMENT

GORVEN J

[1] This is an appeal against the convictions of the appellant. By agreement between the parties, the matter was dealt with in terms of s 19(a) of the Superior Courts Act.[1] The appellant was tried in the Newcastle Regional Court on nine counts and convicted on seven of them. The counts were taken together

for the purposes of sentence and a term of imprisonment of 12 years was imposed. There is no appeal against his sentence. He was charged along with another who was convicted similarly but who was not given leave to appeal (accused 1).

[2] The crisp issue in the appeal is whether it can be said that the State proved beyond reasonable doubt that the appellant was involved in the crimes which took place on 30 November 2010 and which gave rise to the charges. These comprised one count of robbery with aggravating circumstances, four counts of kidnapping and four counts of assault with intent to do grievous bodily harm. He was convicted on the count of robbery, three counts of kidnapping and three counts of common assault which is a competent verdict on the charge of assault with intent to do grievous bodily harm.

[3] The charges arose from what is commonly referred to as the hijacking of a Dyna truck carrying tobacco products and airtime vouchers. Two employees of the company owning the truck and products were driving in the vehicle and two other employees were following in a Nissan 1400 pickup. Both vehicles were stopped along the road leading from Dundee to Vryheid by persons masquerading as traffic officers. The occupants of both vehicles were placed in a Hyundai van driven by an assailant, assaulted whilst being conveyed in it and taken to a remote area where they were tied to a tree and left. The goods contained in the Dyna were taken and the Dyna abandoned. The reason why the two accused were convicted of only three counts of kidnapping and assault is that one of the employees,

who was also placed in the Hyundai van and taken to the remote place, was held to have been complicit in the robbery.

[4] The evidence relied on by the State against the appellant took two forms. First, two of the occupants of the Nissan 1400 claimed to have identified him. Secondly, cell phone evidence. A cell phone found in the possession of the appellant was shown to have been in the vicinity of the crimes on the day in question and cell phones in his possession had communicated with accused 1 around that time.

[5] The identification relied upon was by the two occupants of the Nissan 1400 pickup. Mr Naidoo drove the vehicle and his passenger was Mr Ramdani. They both claimed that the appellant was one of two assailants dressed in Road Traffic Inspectorate uniforms posing as traffic officers at the scene. These two persons stopped the Nissan 1400 at a time that Mr Ramdani was asleep. Mr Naidoo alerted him by saying that the police had stopped their

vehicle, at which point he looked up. Both said that they saw the appellant approaching from the direction of the Dyna with the two occupants of that vehicle and the other bogus traffic officer. He was brandishing a firearm.

- [6] At this point, their versions of the events diverged. Mr Naidoo said that the appellant approached his window. Mr Ramdani said that he did not see the appellant approach the driver's window. He testified that another vehicle had by then drawn up behind theirs and that two persons dressed in black approached from the rear. Mr Naidoo said that that vehicle had only arrived after the

appellant had approached him. Mr Ramdani was clear about one thing only concerning the incident after initially observing the two bogus traffic officers walking towards them from the front and that was that the person who approached his window demanded that he look down which he immediately did. As a result, he did not see any of the assailants thereafter. He corroborated Mr Naidoo that the person who approached the driver's window demanded to see Mr Naidoo's drivers licence and then demanded wallets and firearms. He also corroborated Mr Naidoo that this person was told that a firearm was stored in the cubbyhole and that, shortly thereafter, a person accessed the cubbyhole from the passenger window of the vehicle. At this stage, Mr Ramdani was looking down as instructed.

- [7] Mr Naidoo was clear that the appellant was the one who approached him from the front after walking from the Dyna and who asked for his driver's licence, wallet, and firearm. He told Mr Naidoo to look down. After being told that a firearm was located in the cubbyhole, he went around to the passenger side of the vehicle and retrieved it. Mr Naidoo had ample opportunity to look at

the appellant as he approached from the Dyna in front and when he came to his window and asked for his licence, at which point he was very close to him. Both occupants identified the appellant at an identity parade.

- [8] The second form of evidence related to cell phones. Certain cell phones were recovered from the home of the appellant in March 2011 on his arrest. The admissibility of the search which resulted in their discovery was contested in a trial within a trial. The trial court ruled the evidence arising from the search admissible. As indicated above, this linked the bearer of some of the phones to the scene and to accused 1.

- [9] It is important to bear in mind the approach of an appeal court to findings of fact by a trial court. Those findings stand unless it can be said that the trial court misdirected itself in arriving at them.[2] With this in mind, the evidence should be examined briefly.

- [10] It is convenient to begin with the evidence tendered by the appellant himself. The trial court rejected both his evidence given in the trial within a trial and in the main trial. This rejection was amply justified. There were numerous instances where the evidence of the appellant differed from that put to State witnesses by his legal representative. There were also many occasions

where his legal representative failed to challenge the version of State witnesses in circumstances where he should have done so. This when the appellant was taking copious notes of the State evidence and had sufficient opportunities to consult with his legal

representative. In addition, the appellant frequently changed ground when it became clear that a version either put on his behalf or testified to by him earlier was untenable. There were other difficulties, too many to enumerate. Some examples will suffice.

[11] His claim that the police who arrived at his premises did not identify themselves as police and that he was unaware that they were police officers until his arrival at the police station was correctly criticised and rejected by the trial court. These were experienced police officials who would undoubtedly have realised that, if they did not comply with the correct procedures, reliance on any resultant evidence would be imperilled.

[12] It was the evidence of the appellant concerning the cell phones found at his premises which most clearly illustrated his mendacity. He claimed that cell phones were recovered from his kitchen drawer in a bag. Initially, he did not say how many the bag contained. He later claimed that three cell phones were found at a different place in the house and that 10 cell phones altogether were found there. This computes to seven cell phones having been found in the bag. At a later stage, however, he indicated that 11 cell phones

were found and that they were all in the bag. This in response to the State evidence that only five cell phones had been recovered during the search. When he was confronted with his evidence that he had claimed never to have opened the bag, he attempted to avoid this fact and could not give any plausible reason for this discrepancy.

[13] His assertion that he had not opened the bag was clearly designed to avoid being linked to the cell phones in any way. His explanation for them being in his house was that they belonged to his friend Nathi. This person supposedly ran a cell phone repair business from the appellant's premises. When asked why he had Nathi's cell phones in his home, the appellant indicated that he had made a loan to Nathi and that the cell phones were given to him as collateral for the repayment of the loan. This was said to be why he had not opened the bag. However, when it was pointed out that some of the phones had been used in communication with at least three of his close family, he indicated that Nathi had repaid the loan and the phones were no longer being utilised as collateral but that he had used them because some of them had airtime on them. He was then confronted with the fact that the numbers of close family members were stored in the SIM card found in one of the phones and could not explain this. They were also found stored on two other phones. This accords with the testimony of Captain Krause that the appellant told him that the number of that SIM card was his and that the other two phones were his old phones. It gives the lie to his version of the phones belonging to Nathi. It is clear that these were his phones or at least phones which he had used during this period.

[14] The reason for his evasiveness became clear from the evidence, not attacked by the defence, as to the activity and movement of some of the phones. The SIM card whose number the appellant told Captain Krause was his had numerous communications with accused 1 around the time of the crimes. That number had been saved on the phone of accused 1 under the name Mabena. The phone was located just outside Dundee at 06h37 on the morning of the offences, which took place in that area at around 07h00. Accused 1's phone was located at Sinowane, the area the appellant lived in, at 21h00 on the day in question. All of this shows links to accused 1

and requires an answer as to why this was so and why the phone of the appellant was tracked to the scene of the crimes and back again that day. The version of the appellant was a bare denial that the phones were used by him other than on rare occasions to communicate with his family.

[15] The evidence of the appellant was also demonstrably improbable in many respects. It was correctly rejected as false beyond reasonable doubt by the learned magistrate and no account can be taken of it.

[16] The outcome of the appeal thus resolves itself into whether the evidence led on behalf of the State concerning both identification and the search conducted at the appellant's property was properly accepted by the trial court. And, if so, whether the trial court correctly concluded that the acceptable evidence proved beyond a reasonable doubt that the appellant was guilty of the crimes of which he was convicted.

[17] As regards the search, the witnesses who deposed to what took place corroborated each other in all material respects. In addition, contemporaneous notes were made of items recovered. The notes went to the extent of indicating in which room of the appellant's house the items were discovered. The witnesses indicated that the appellant consented to the search of his home after he had been arrested and his constitutional rights had been read to him. The learned magistrate quite correctly held that the requirements of s 22 of the Criminal Procedure Act 51 of 1977 were satisfied in obtaining this consent prior to searching the premises. As such, the learned magistrate correctly admitted evidence

arising from that search, which includes the cell phone evidence mentioned above. Five cell phones, two firearms and R10 000 in cash was seized during the search.

[18] The inference was correctly drawn by the trial court that, since the appellant could give no plausible explanation for his possession of the phones, and for their movement and communications, it was he who carried and utilised them during the period in question. And the two firearms recovered from his residence during the search gave him the means to have been carrying a firearm on the day in question as was testified to by both occupants of the Nissan 1400.

[19] The identification of the appellant by those two witnesses must be considered next. The learned magistrate set little store by the identity parade on the basis that it fell short of various guidelines governing how such parades should be conducted. In fact, he was quite

scathing as to how the form was completed. However, the evidence at the identity parade cannot be ignored entirely. Even dock identifications, corroborated by other compelling evidence, can be accorded some weight. An identity parade, despite having fewer than the recommended number of persons in it and the other shortcomings, provides stronger identification than one in the dock. As mentioned, both of the occupants of the Nissan 1400 independently identified the appellant at the parade.

- [20] Criticism was levelled at the evidence of Mr Naidoo because the two statements signed by him differed as to whether the appellant was short or tall. Mr Naidoo in evidence disputed having described him as short. This has the ring of truth. He had ample opportunity to observe the appellant before being ordered to look down. He saw him accompanying the occupants of the Dyna while walking towards the Nissan 1400. The appellant walked right up to him and demanded his licence and walked around the vehicle as would a traffic officer, after which he returned to the driver's window and asked Mr Naidoo whether he had a firearm and thereafter walked to the other side of the Nissan to recover it from the cubby hole.
- [21] The learned magistrate was alive to the cautionary rule concerning identification.[3] He also noted the discrepancies between the evidence of Messrs Naidoo and Ramdani as to the sequence of events and the movements and involvement of the various assailants. However, in the light of the fact that Mr Ramdani, on being woken by Mr Naidoo, was immediately confronted by this traumatic and unfamiliar situation and that events happened quickly, it is hardly surprising that he was somewhat confused as to the whereabouts and roles of the dramatis personae at any one time. There is no sense that either of these witnesses was in any way dishonest. At most, it can be said that the opportunity of the passenger to observe and comprehend was compromised. No such criticism can be levelled at the evidence of Mr Naidoo.
- [22] It is trite that courts evaluating evidence must look at the totality of evidence.[4] A piecemeal approach should not be adopted. Taken alone, it may well be that the identification evidence would not have been sufficient.

However, when the cell phone evidence is brought into the reckoning, the identification of the appellant as having been at the scene is sufficiently fortified. It is accordingly my view that the learned magistrate quite correctly held that it had been proved beyond reasonable doubt that the appellant was present at the scene of the crimes. The identification evidence was clearly corroborated by the cell phone evidence.

- [23] In stopping the two vehicles, removing the occupants of the Dyna from that vehicle, brandishing a firearm and demanding a firearm from the driver of the Nissan 1400, it is quite clear that the appellant was not only associating himself with the crimes which took place on that occasion but was an active participant. Although it was not shown that the appellant was one of the people who travelled in the Hyundai van in which the three persons were assaulted, it is quite clear that he associated himself with the actions of these

assailants. He accordingly made common cause with the other perpetrators of the crimes where it cannot be said that he was a direct actor. A common purpose between the appellant and the other participants was thus established in respect of each of the crimes with which he was convicted.

[24] I am accordingly of the view that it cannot be said that the learned magistrate misdirected himself on the facts of this matter. As I have said, he correctly rejected as not being reasonably possibly true the testimony of the appellant. If anything, he was over cautious when approaching the evidence of the State and evaluating whether that evidence was acceptable and demonstrated beyond reasonable doubt that the appellant had participated in the crimes in question. In the light of all of the above considerations,

his findings of fact cannot be impugned.

[25] In the result:

The appeal against the convictions of the appellant is dismissed.

GORVEN J

I agree

CHILI J

DATE OF HEARING: Set down on 19 June 2020 but dealt with in terms of s 19(a) of the Superior Courts Act 10 of 2013 without an oral hearing.

DATE OF JUDGMENT: 26 June 2020

FOR THE APPELLANTS: Most recent heads of argument submitted by LU Vorster of Luando Vorster Attorneys

FOR THE RESPONDENT: DA Paver of The Director of Public Prosecutions, KwaZulu-Natal.

[1] Superior Courts Act 10 of 2013. This reads: 'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law-

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[2] R v Dhlumayo & Another 1948 (2) SA 677 (A) at 705-706.

[3] S v Mthethwa 1972

- (3) SA 766 (A) at 768.
- [4] S v Reddy and Others 1996
- (2) SACR 1 (A) at 8c-d.
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Prepared on 11 October 2026 · Esheria