

SOUTH AFRICA / JUDGMENT

Maluleke v S (A285/2016) [2017] ZAGPJHC 72 (10 March 2017)

[2017] ZAGPJHC 72

COURT

South Gauteng High Court, Johannesburg

BEFORE

FHD Van Oosten, TM Masipa, TP Mudau

CASE / FILE NUMBER

A285/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LOCAL

DIVISION, JOHANNESBURG)

CASE

NO A285/2016

Reportable:

No

Of

interest to other judges: Yes

Revised.

10

March 2017

In

the matter between

MDUDUZI

MALULEKE APPELLANT

and

THE STATE

RESPONDENT

Criminal Law –

Appeal against conviction and sentence - appellant convicted of

Robbery with aggravating circumstances-sentence

of 15 years'

imprisonment imposed - identification of the appellant core issue in

trial court and on appeal - single witness

called by State to testify

on identification of appellant - applying the criteria referred to in

S v Mthetwa held that the reasonable possibility of a mistaken identification not excluded - appeal upheld and conviction and sentence set aside.

JUDGMENT

VAN OOSTEN J:

- [1] The appellant was convicted of robbery with aggravating circumstances in the Randburg Regional court and sentenced to fifteen years' imprisonment. The appeal is directed against conviction and sentence and is with leave to appeal granted to a full court of this Division, on petition by this court.
- [2] The robbery of the complainant, Ms Mpho Ndhlovu, was not in dispute at the trial, nor before us. The sole issue for determination in this appeal is the adequacy of the evidence of identification of the appellant. The appellant, although admitting that he was pointed out by the complainant to the police the morning after the robbery and that he was arrested, denied that he was the person who had robbed the complainant.
- [3] At the trial two witnesses testified on behalf of the State. They were the complainant and the arresting police officer, Warrant

Officer Dipuko. The appellant was the only witness to testify in his defence.

- [4] The robbery consisted of a handbag snatching. The incident occurred on 15 October 2014, at approximately 23h00, in Windsor East,

Randburg. The complainant told the court that she was walking alone in the street on her way home, when she was accosted by an unknown man who took out and held a flick knife in his hand. He snatched her handbag and her cell phone fell to the ground. She screamed and he ran away with her handbag. The next morning the complainant saw the assailant again where he was sitting with his friends at the shops in the same area where the robbery had occurred. She recognised him by the same clothing he was wearing during the incident. She waited for and waved down a passing police vehicle and pointed the appellant out to them. The appellant denied the robbery and was searched but nothing was found on him.

- [5] This brings me to the evidence of the complainant who was a single witness in regard to the incident. Her identification of the appellant is solely based on recognising the clothing the robber was wearing at the time of the incident. She testified that he was wearing 'a black t-shirt, it was written with white on his left' and also had 'a woollen hat which looked like a cap, it had yellow stripes'. To this she added that his complexion was 'not light skinned', but dark and that 'his height is close to mine, he was not taller than me'. The complainant moreover, elaborated that she recognised the appellant's voice the next morning when he was interrogated by the police at his arrest. She described his voice as 'slightly

bold' and 'not loud'. She was unable to describe the knife but said that she 'could see it was a knife'.

- [6] In cross-examination she conceded that the visibility at the scene that night was 'not very clear' because 'the place has a lot of trees' and that she was scared. Although she maintained that the appellant was near to her, she was unable to see his face 'clear enough because he had his hat on'. She accordingly was unable to describe any facial features of the appellant.
- [7] Warrant Officer Dipuko confirmed that he was on duty in a marked police vehicle that morning, at 08h00, when he was stopped by the complainant. She related to him that she had been robbed the previous evening and that she was able to point the suspect out. The appellant was sitting with a group of people near the supermarket and the complainant pointed him out. The appellant was searched but nothing was found on him. The appellant was informed of the description given to them by the complainant 'that he was wearing certain clothes and his complexion' and that he was going to arrest him 'because of (sic) you were pointed out because of the allegations'.
- [8] Under cross-examination W/O Dipuko elaborated on the description of the clothes the suspect was wearing, given to him by the complainant, as follows: 'Yes, she explained that he was wearing a woollen hat or a cap and black trousers with black shoes or sneakers' to which he added, and 'a brown t-shirt'. As to the visibility at the scene the previous evening the complainant told him that it happened 'at a certain street where there is a light'.
- [9] The court a quo found the evidence of the complainant 'to be good and reliable' and the visibility at the scene of the robbery 'was sufficient for the complainant to be able to observe the accused through his voice, height, clothes and

complexion'. The appellant's denial of any knowledge of the robbery was rejected as false having regard to the complainant's

evidence and the appellant's failure to call any witnesses to corroborate his version, which consisted of an alibi.

- [10] It is trite that the State has to prove its case against an accused beyond reasonable doubt and the evidence of a single identifying

witness must be clear and satisfactory in all material respects. The correct approach to the evaluation of an alibi defence was set out by Holmes AJA in *R v Hlongwane* 1959 (3) SA 337 (A) 340H-341B:

'The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. *R v Biya* 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation. I do not consider that in *R v Masemang* 1950 (2) SA 488 (AD) Van den Heever, JA had this in mind when he said at pp 494 and 495 that the trial Court had not rejected the accused's alibi

evidence "independently" In my view he merely intended to point out that it is wrong for a trial Court to reason thus: "I believe the Crown witnesses. Ergo, the alibi must be rejected." See also *R v Tusini and Another*, 1953 (4) SA 406 (AD) at p 414. The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.'

In my view the court a quo attached undue weight to firstly, the credibility and honesty of the complainant and secondly, the appellant's failure to call corroborating witnesses. The correct approach, on the facts of this matter, in my view is to consider the reasonable possibility of a mistaken identification by the complainant having regard to, firstly, the visibility at the scene of the robbery, secondly, the reliability of the complainant's identification in only being able to describe the clothing the suspect had worn, thirdly, the description of the clothing she gave to W/O Dipuko, and, finally, considering all the above aspects on the evidence as a whole.

[11] From the plethora of cases on identification it is merely necessary for the purposes of this appeal, to refer to the locus classicus, *S v Mthetwa* 1972 (3) SA 172 (A) 180E-G, where Holmes JA made the following observation with regard to the approach to be adopted when considering evidence of identification:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities'

[12] Applied to the facts of the present matter, the complainant had limited opportunity and in less favourable circumstances to identify the appellant. It was late at night and 'lot of trees' she referred to in her evidence, compounded the difficulty in identifying the appellant. Surprisingly and inexplicably, no further information concerning the lighting or visibility at the scene was elicited from her either in evidence in chief or in cross-examination. The only reference to the visibility at the scene

is to be found in the evidence of W/O Dipuko, who told the court that the complainant in her report to him, mentioned 'the incident happened at a certain street where there is light'. His evidence on this aspect, for what it is worth, stands alone and was not corroborated by the complainant.

[13] The essence of the complainant's reliability in the identification of the appellant concerns her description of the clothing he was wearing at the time of the incident. On this very aspect her evidence is contradicted by the evidence of W/O Dipuku,

who testified that the complainant mentioned a brown t-shirt in contrast with her version that he was wearing a black t-shirt with

white writing. But W/O Dipuko added that she also mentioned 'black shoes or sneakers', the mentioning of which one looks in vain for in the complainant's evidence.

[14] An important if not decisive feature in the evidence is that she did not see the appellant's face, resulting in an absence of any description concerning facial features and characteristics. In the absence thereof, the complainant's evidence concerning height, complexion and her attempted voice identification which was not corroborated by the evidence of W/O Dipuko, apart from lack of prior acquaintance and moreover distinctiveness, carries little probative value in deciding the reliability of her identification (S v M 1972 (4) SA 361 (T) 364 B-G).

[15] The regional magistrate was mindful of the cautionary rules applicable to the consideration of the evidence of a single witness

(cf S v Carolus [2008] ZASCA 14; 2008 (2) SACR 207 (SCA) para [15]) but, although having referred to Mthetwa, failed to consider any of the aspects I have referred to above. On the facts as a whole the identification of the appellant rests entirely on the reliability of the complainant's observations in fleeting moments and in less than optimal circumstances prevailing at the time of the incident. I am satisfied that the complainant's identification of the appellant is open to doubt and that the State accordingly has failed to dispel the reasonable possibility of a mistaken identification.

[16] For all the above reasons, the conviction cannot stand and the appeal must succeed.

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

1. The appeal against conviction is upheld.
2. The appellant's conviction and sentence are set aside.

FHD VAN OOSTEN

JUDGE OF THE HIGH COURT

I agree.

TM MASIPA

TP MUDAU

COUNSEL FOR APPELLANT ADV GY SIDWELL

COUNSEL FOR RESPONDENT ADV D VAN WYK

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