

SOUTH AFRICA / JUDGMENT

Maswanganye v S (A696/15) [2017] ZAGPPHC 840 (17 March 2017)

[2017] ZAGPPHC 840

COURT

North Gauteng High Court, Pretoria

BEFORE

Tuchten, N Janse van Nieuwenhuizen

CASE / FILE NUMBER

A696/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

17/3/2017

CASE

NO: A696/15

NOT

REPOTABLE

NOT

OF INTEREST TO OTHER JUDGES

In

the matter between:

TINYIKO

VINCENT

MASWANGANYE Appellant

And

THE

STATE Respondent

JUDGMENT

Tuchten J:

1. The appellant was convicted in a regional court of assault with intent to do grievous bodily harm and robbery in relation to a robbery committed at 563 Block M Soshanguve on 17 May 2010 and of attempted robbery committed at 1105 Block L Soshanguve on 30 July
2010. The complainants in relation to the earlier crime were Mr Chretien and Mrs Priscilla Baloyi. The complainant in relation to the later crime was Mr Morake Sydney Malope. The appellant was also convicted of the unlawful possession of a firearm on the scene of the later crime. The appellant was one of two men charged. He pleaded not guilty but was convicted as I have said and sentenced to an effective 20 years imprisonment. Leave to appeal was granted against the convictions only. The appellant was admitted to bail pending appeal.
2. It was not in dispute that the complainants on the two counts were robbed and that a firearm was recovered as alleged. The defence

related to the identify of the robber or robbers. The appellant's version was that he was incapacitated as a result of a gunshot wound he had sustained to his left lower leg on 29 January 2010 and was hospitalised at the Pretoria Academic Hospital the following day. During the appellant's case the records of the hospital were handed in by consent as to their accuracy.

3. The appellant was diagnosed with an open comminuted fracture of the left tibia. The bullet passed right through the leg; there was both an entry and an exit wound.
4. The contents of the hospital records are important because the appellant's defence was that he could not possibly have been the

robber on the occasion with which the earlier crimes were committed because when the robberies were committed, the appellant was still incapacitated by the injury to his leg.

5. In regard to the earlier crime, the appellant gave a plea explanation that on 17 May 2010, he was not in a position to commit robbery as he was discharged from hospital and walked with crutches and had a pop (plaster of paris cast) on his leg. In relation to the later crime, he said that although he was walking in the streets near the place of the incident he had not been the perpetrator but had seen people fleeing the scene.
6. Mr and Mrs Baloyi, the victims of the earlier crime, were severely traumatised by the incident. Their home was invaded by three men, all of whom were armed with firearms. Both of them were shot. Mrs Baloyi was nine months pregnant at the time. Mercifully, and in no way thanks to the robbers, Mrs Baloyi gave birth to her baby.

7. Both Mr and Mrs Baloyi testified and identified the appellant as one of the men who robbed them. The house was well lit and they were able to observe the features of the appellant. Mr Baloyi testified that the appellant had held a gun to Mrs Baloyi's head while the robbers demanded that Mr Baloyi give them the key to his BMW motor car. He ultimately did so. The appellant's features were not covered and the whole incident took some 15 to 20 minutes.
8. After the appellant was apprehended, Mr and Mrs Baloyi were called to attend an identity parade. They identified the appellant at the parade. But the evidence of the identity parade was found to be inadmissible because of the shortcomings of the procedures which attended the parade. I mention this not because the evidence of the parade may be used to reinforce the state's case but because it was argued on behalf of the appellant that the exclusion of the identity parade evidence should cast doubt on the evidence of Mr and Mrs Baloyi. I do not agree with this submission. The defective parade procedures have no bearing on the credibility or reliability of Mr and Mrs Baloyi.
9. Counsel for the appellant submits that although credible, Mr and Mrs Baloyi are not reliable witnesses. Their evidence must be evaluated as part of the totality of evidence which was before the court.
10. A useful and lucid analysis of the manner in which evidence should be dealt with in a criminal trial was presented in *S v Van Der Meyden* 1999 2 SA 79 W, where the court said the following at 80-81:

The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite

perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. In *R v Hlongwane* 1959 3 SA 337 A, after pointing out that an accused must be acquitted if an alibi might reasonably be true, Holmes AJA said the following at 340H-341B, which applies equally to any other defence which might present itself:

'But it is important to bear in mind that in applying this test, the alibi does not have to be considered in isolation....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.'

Counsel for the accused referred us to three cases which are frequently cited in this Court in elaboration upon that test. In *S v Kubeka* 1982 (1) SA 534 (W) Slomowitz AJ said the following at 537F-H:

'Whether I subjectively disbelieve (the accused) is not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true.'

That passage does no more, in effect, than to reiterate that the conclusion of a criminal court is not to be reached merely by choosing what it considers to be the better of two competing versions (Hlongwane's case *supra* at 341A; *S v Singh* 1975 (1) SA 227 (N)). Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true - there is not even a possibility that both might be true - the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation.

11. The learned judge went on to say at 82C-E:

The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

12. These passages have been cited with approval by the Supreme Court of Appeal. See *S v Mdlongwa* 2010 2 SACR 419 SCA para 11; *Director of Public Prosecutions, Gauteng v Pistorius* 2016 2 SA 317 SCA para 34.

13. Counsel for the appellant criticised the evidence of Mr Baloyi because in a follow up police statement taken on 1 June 2010 the following was recorded:

I CAN'T IDENTIFY the three suspects if I see them again.

14. Mr Baloyi testified that he had told the police officer who wrote down his statement: "I CAN identify the three suspects if I see them again" but because of the way the statement was written out he did not notice that his words had been wrongly recorded. The statement is before us and in my view, because of the way the words in question were written, Mr Baloyi could certainly have made the mistake to which he testified. As the regional magistrate

found, the fact that an identity parade was arranged at which Mr Baloyi was asked to identify the perpetrators is a strong indication that Mr Baloyi had indeed told the police that he could identify the robbers. The regional magistrate found Mr and Mrs Baloyi to be good witnesses and accepted their testimony. In my view he was right to do so.

15. The evidence relating to the later crime was that Mr Malope was leaving home in his car in his garage at home at 05h40. It was "a little bit dark." He got out of his car, leaving the car door open and taking the keys with him, and went to close the garage door and the entrance gate. On his way back to his car, he was approached by two men. One of them was armed with a firearm and fired a shot and Mr Malope decided to try to overpower this man. He seized him and they fell to the ground. A struggle for possession of the firearm ensued. The second man ran away. Mr Malope's daughter, Mahiti, came from inside the house to help him. They then dragged the man into the yard. Members of the community were then also on the scene, as was Mr Malope's son, Robbie. The assailant was disarmed and detained. The weapon was handed over to the police when they arrived on the scene as was the assailant who by that stage had been so severely assaulted by members of the community that he had to be hospitalised. After the assailant had been subdued, Mr Malope left to take children to school.

16. Both Mr Malope and Miss Mahiti Malope, who also gave evidence, identified the assailant as the appellant. The light was improving

throughout the incident and enabled them to make a reliable identification. The version of the appellant was that he was simply

dragged into Mr Malope's yard although he had nothing to do with the attempted robbery.

17. In view of the fact that the assailant was effectively in the custody of Mr Malope and then his children and members of the community until he was handed over to the police, there is simply no room for the version of the appellant which, if it were to be reasonably possibly true, must included the possibility that the true assailant somehow escaped and was replaced by the entirely innocent appellant.
18. The appellant's version becomes preposterous when it is analysed in the light of the hospital records and his evidence. The hospital records show that he was discharged from hospital on 5 February 2010. After a follow up examination on 17 March 2010 the appellant was walking on a single crutch.
19. However, the appellant's evidence was that at the time of the earlier crime, he was walking with two crutches and at the time of the later crime he was "just limping". He said he heard a shot being fired and tried to "walk faster" from the scene but could not run due to the effect of the gunshot injury to his leg. He was assaulted, he said, lost consciousness.
20. A further piece of evidence is that of the police witnesses who testified that the co-accused who featured as accused no. 2 in the court below pointed out the house where the key to Mr Baloyi's BMW motor car which had been hidden on a roof. The regional magistrate found

the police witnesses to be credible in this regard and once again there is no reason to differ from that finding. This evidence, even if not directly admissible against the appellant, reinforces the finding that the Baloyis were reliable witnesses because they identified accused no. 2 as one of the criminals. A further factor which reinforces the finding that the evidence of the Baloyis was reliable was that they were both able to give detailed accounts of each other's movements during their ordeal. And finally, the appellant has been shown to have relied on a false alibi and falsely denied his guilt in relation to the later crimes. This too reduces the risk that the appellant was wrongly identified by the Baloyis.

21. And finally, the regional magistrate has not been shown to have misdirected himself in his assessment of the evidence. The powers of an appeal court in a criminal appeal are circumscribed. Where it cannot be shown that the evaluation of the evidence by the trial court is flawed or tainted by misdirection, an appellate court, which does not have the benefit of seeing and hearing the witnesses and of being steeped in the atmosphere of the trial, will be slow to interfere with the findings of the trial court. *R v Dhlumayo* 1948 2 SA 677 A.

22. In my view the totality of the evidence against the appellant is overwhelming. There is simply no room for a finding that the

appellant's denials of complicity in the crimes are reasonably possibly true. It follows that the appeal cannot succeed.

23. I make the following order:

The appeal against the convictions is dismissed and the convictions and sentences imposed upon the appellant are confirmed.

NB Tuchten

Judge of the High Court

7 March 2017

I agree

N Janse van Nieuwenhuizen

13 March 2017

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