

SOUTH AFRICA / JUDGMENT

Mawele v S (A99/2014) [2017] ZAGPPHC 442 (2 August 2017) [2017] ZAGPPHC 442

COURT

North Gauteng High Court, Pretoria

BEFORE

S B Mngadi, TA Maumela

CASE / FILE NUMBER

A99/2014

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IN THE HIGH COURT
OF SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)
CASE
NO: A99/2014

DATE: 2 AUGUST 2017

REPORTABLE: YES/NO
OF
INTEREST TO OTHER JUDGES; YES/ NO
REVISED
IN

THE MATTER BETWEEN: TINYIKO
MAWELE Appellant
and
THE
STATE Respondent

JUDGMENT

MNGADI AJ:

1. The appellant with the leave of the regional magistrate appeals against both conviction and sentence. He, as accused number two, was charged with another with three counts of robbery with aggravating circumstances. The appellant was legally represented and he pleaded not guilty to all the charges. The regional magistrate at the conclusion of the trial acquitted him on one and convicted him on two counts. The two counts were treated as one, for the purposes of sentence and he was sentenced to twenty years imprisonment.
2. The incident which gave rise to the charges was testified to by Mr Michael Mathebula ('Mathebula') and Ms Mathabo Shubane ('Mathabo').

Mathebula testified that at about 18H00 soon after he and Mathabo got into their one room shack, the appellant's co-accused entered the shack carrying a firearm. He pointed the firearm at him. He said he had information that he, (Mathebula,) had R40 000 in the house and he wanted that money. He hit Mathebula on his head with a firearm telling him to show him where the money was. He placed his foot on Mathebula's head and placed his head under the bed so that Mathebula cannot see what is happening in the house. Mathebula heard that two other assailants had also entered the shack. Mathebula pointed out to the assailants a sum of R3500 which they took. The assailants searched the shack for the money. Mathebula stripped naked by removing his pants to show the assailants that he had no money on him. The assailants took three gold necklaces with three gold rings, two gold watches, two Nokia cellphones two Samsung cellphones, one Blackberry cellphone and one Apple iPod and other items.

3. Mathebula testified that he knew the appellant for many years from childhood. They were staying in the same section. Two days before the incident the appellant came to his shack with David Sithole to exchange motor vehicle tyres and he told the appellant about the items which were meant to be given to others as presents. He stated that at the time of the incident in the shack visibility was good. The source of light was an electric light and a TV set which was on. He testified that he recovered some of the stolen items. He was called by the police and he identified his three bags, two gold necklaces and an iPod, but he was not sure whether the iPod was his because it had the appellant's photo and an unknown security code. Mathebula said that he told Mathabo that he suspected that the appellant is one of the assailants. He told her before she was invited to attend an identification parade.
4. Mathabo testified that as the first assailant was busy robbing them a second man entered and they started searching the house. A third man joined them and closed the door. A boy they had sent to the shop returned and the third assailant opened for him. They made the boy lie on the floor and they tied him up. They took items and the money that they found from the house. She said Mathebula was also tied up. She stated that she was invited to attend an identification parade and she identified the appellant and his co-accused. Before the incident she had never seen them and they were unknown to her.

5. Mathabo testified that the appellant was the third person to enter the shack. He stood by the door and pointed a firearm at the boy. He went to the room divider and the wardrobe and took items. He also took items from underneath the bed. She testified that she would have positively identified the iPod if it had photos she had taken but the petrol was low. She said the boy was working for Mathebula. She confirmed that Mathebula told her that he suspected that one of the assailants is the appellant who had earlier come to change tyres. Mathabo testified that from the time the first assailant entered the shack to the time the third assailant entered, Mathebula was standing with her and he was next to the stove. She was standing next to the room divider. She said that the appellant was wearing Lacoste sneakers, blue jeans and a greyish jacket. Mathabo admitted that in the statement she made to the police she stated that she was able to give a full description of two assailants. The first assailant was tall and light-skinned and the other short and dark in colour with short hair. She was not sure that she would be able to recognise the face of the third assailant. In her police statement she referred to only two assailants.
6. The State also called David Sithole. He testified that the appellant is his friend. He testified that the iPod was given to him by the appellant to keep stating that he will come back to fetch it. The police phoned him and told him that they have arrested the appellant and he must bring the iPod to the police station. He had gone to the appellant's co-accused with the appellant. The co-accused produced the iPod and gave it to the appellant who gave the iPod to him. He testified that the iPod shown to him in court, the exhibit appeared to be a different iPod.
7. The appellant testified in his defence. He denied that he was involved in the robbery. He denied that he gave any iPod to David

Sithole.

8. The issue in dispute was the identity of the assailants. The identification of the iPod produced in court as an exhibit, as being

the one taken during the robbery, remained unresolved. Mathebula, Mathabo and David were unable to positively make the identification.

As a result the recovery of the iPod did not add anything in the identification of the assailants. In any case the evidence was that the iPod was with the appellant's co-accused when it was given to David Sithole. The only evidence which related to the identification

of the appellant as one of the assailants was the evidence of Mathabo. It was evidence of a single witness and it related to identity. The robbery incident took some time and only three assailants were involved. It took place in a small single room which was well-lit. Mathabo was adamant that she identified the appellant as one of the assailants and she pointed him out during the identity parade.

9. However, the evidence of Mathabo is required to be scrutinised closely as to whether it was clear and satisfactory in all material

respects (see R v Mokoena 1932 OPD 79 at 80). Further, in R v Shekelele and Another 1953 (1) SA 636 Tat 638F-G Dowling J stated:

"Questions of identification are always difficult. That is why such extreme care is always exercised in the holding of identification parades - to prevent the slightest hint reaching the witness of the identity of the suspect. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are often mistaken for old acquaintances. In all cases that turn on identification, the greatest care should be taken to test the evidence...A bald statement that the accused is the person who committed the crime is not enough."

10. The regional magistrate overlooked that the evidence relating to the appellant as one of the assailants was that of a single witness and it related to identification. He failed to warn himself of the need to approach the evidence with caution and it does not appear that the required caution was exercised in the approach, analysis and evaluation of the evidence.
11. Mathebula and Mathabo were staying together. Mathebula suspected that the appellant was one of the assailants and he conveyed his suspicions to Mathabo before the latter pointed out the appellant in the identification parade. There is no evidence that when Mathebula told Mathabo that he suspected the appellant to be one of the assailants, Mathabo told him that indeed one of the assailants looked like the appellant.
12. Mathabo did not furnish the police with a description of an assailant which fitted the appellant. She stated that she did not think she would be able to recognise the third assailant. If she did have a clear look at that assailant in ideal conditions, it is not clear why she thought she would not be able to identify the assailant. The appellant was arrested as a result of being pointed out to the police by Mathebula who had not seen the assailants.
13. Mathabo testified that the three assailants entered the shack when Mathebula was standing near the stove. It is inexplicable that Mathebula failed to identify the appellant who was well known to him. Mathabo also testified that the assailant she claimed is the appellant took out items underneath the bed at the time when Mathebula had his head under the bed. It is not explained how it happened that Mathebula did not identify the appellant as one of the assailants. The appellant was well known to Mathebula but there is no indication that he took any measures not to be identified by Mathebula. In my view, if the regional magistrate had properly warned himself and had exercised the required caution, he would have found that the evidence fell short of proving beyond reasonable doubt that the appellant was one of the assailants and he would have acquitted the appellant.
14. In view of the factors indicated herein, the appeal against conviction stands to be upheld. I propose the following order:

ORDER

1. The appeal against conviction is upheld The convictions and sentence of the appellant are set aside.

S B MNGADI

Acting Judge of the High Court

IT IS SO ORDERED.

TA MAUMELA

Judge of the High Court

HEARD ON: 24 April 2017

APPEARANCES:

FOR THE APPELLANT: Adv. LA van Wyk

INSTRUCTED BY:

Legal Aid SA, Pretoria

FOR THE RESPONDENT: Adv. A Roos

Deputy Director of Public Prosecutions, Pretoria

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