

SOUTH AFRICA / JUDGMENT

Mbuyane and Others v S (A445/12) [2015] ZAGPPHC 1105 (13 October 2015)

[2015] ZAGPPHC 1105

COURT

North Gauteng High Court, Pretoria

BEFORE

N Ranchod, SAM Baqwa

CASE / FILE NUMBER

A445/12

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A445/12

DATE:

13/10/2015

NOT

REPORTABLE

NOT

OF INTEREST TO OTHERS JUDGES

In

the matter between:

CHARLIE

MBUYANE AND

OTHERS

APPELLANTS

and

THE

STATE

RESPONDENT

JUDGMENT

RANCHOD J:

- [1] The appellants were 4 of 6 accused in the court a quo where they appeared as accused 1, 2, 3 and 5 respectively.
- [2] All the appellants were convicted on a count of robbery with aggravating circumstances, The third appellant was in addition convicted on a count of unlawful possession of a firearm. Accused 4 and 6 were acquitted on all counts.
- [3] Each of the appellants was sentenced on 27 November 2009 to 15 years' imprisonment for the robbery count. The third appellant was also sentenced to 3 years' imprisonment for unlawful possession of a firearm but it was ordered to run concurrently with the sentence on the robbery charge.
- [4] All the appellants were legally represented throughout the trial which was held in the Regional court sitting at Nelspruit.
- [5] The appeal is with the leave of the court a quo which granted leave as applied for to the first appellant on both conviction and sentence; and on conviction only to the second, third and fourth appellants.
- [6] The facts in this matter may be summarised as follows. The complainant lives on Sifikile farm in the Hazyview district. It appears that he lives there alone except for his helper or helpers who lived nearby on the farm.
- [7] On the night of 4 June 2007, the complainant returned home, opened the electrical remote-controlled gate, and drove up to his garage where he stopped. As he was getting out of his car, he saw a man with a balaclava over his face approaching him from his right with a pistol or revolver in his hand. The assailant pointed the firearm at him and told him to get out, take the keys out and to hand him his cellular phone. By then there were three others who approached him from behind. Their faces were also covered with balaclavas and they all had weapons in their hands. His hands were tied behind his back and he was assaulted on his head with a pistol butt.[1]
- [8] The robbery took place for over an hour during which time the complainant was repeatedly severely assaulted and threatened. The robbers demanded the keys to his house and several safes, money, firearms and so on. He was taken out of his house several times into the darkness where he was suffocated with a plastic bag. Eventually he succumbed and gave them all they wanted, including three firearms, keys to a Land Rover motor vehicle and a Nokia cell phone.[2]

- [9] The appellants' main ground of appeal is that they deny having committed the offences and in this regard they place identity in dispute. It is submitted on behalf of the appellants that the complainant could not have properly identified his assailants for several reasons. Firstly, the complainant (who was a single witness to the robbery) testified that the robbers had all worn balaclavas over their faces. Secondly, the incident happened at night. Thirdly, the complainant had not known the appellants prior to the incident. Fourthly, there were irregularities pertaining to the three identification parades that were held. Fifthly, that the complainant's evidence in court contradicted what he said in his police statement and sixth, the evidence of police officer Robert Khoza regarding recovery of certain stolen items from the first appellant were not properly identified as belonging to the complainant.
- [10] In *S v Charzen and Another* 2006(2) SACR 143 (SCA) it was held that in matters of identification, honesty and sincerity were simply not enough; these must be certainty beyond reasonable doubt that the identification was reliable.
- [11] In *S v Mthetwa* 1972(3) SA 766 (AD) it was held that 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, proximity of the witness, opportunity of observation, extent of prior knowledge of the accused, corroboration, suggestibility, the accused's face, voice gait, build and dress, the results of an identification parade, if any and of course, the evidence on behalf of the accused.
- [12] The complainant was quite certain that he had identified the correct persons as his assailants. He testified that "If you look at death in the face you never forget a face";[3] an apparent reference to his heightened sense of awareness from his experience as a fighter pilot, i.e. a fighter pilot's training to be observant and to overcome enduring stressful situations.
- [13] The complainant further testified that during this whole ordeal, which lasted more than an hour, his assailants from time to time removed their balaclavas and he could clearly see their faces. He recalled that one of the balaclavas was left on his kitchen stoep. He said they even put on his running caps (the learned magistrate referred to golf caps). The inference is inescapable that to do so they would have taken off the balaclavas. The complainant further testified that the fluorescent lights were on inside the house at the time.
- [14] He testified that the third and fourth appellants were the ones that dealt with him most of the time and assaulted him the most. He said third appellant was short in stature and was especially violent and arrogant.

[15] The complainant further testified that fourth appellant had assaulted him behind a tree by hitting him with a revolver on his head. Fourth appellant did most of the talking. It was argued that it was dark outside therefore the complainant could not have identified the fourth appellant. This argument overlooks the fact that the appellant had also been inside the house which was lit up. The complainant also identified the fourth appellant by his reddish eyes or conjunctivitis and an unusually skew jaw.

[16] The complainant was cross-examined at length about the facial features of the appellants that he claimed he could identify them by. He explained in evidence in chief that he has been a district surgeon for some thirty years after which time "we know people". He elaborated on this under cross-examination by saying that he is able to even recognise whether two persons are related by observing their facial features such as the forehead, nose, eyes and lips because he has worked in the community there.

[17] The court a quo accepted the complainant's evidence that the fluorescent lights were on in the house, the four assailants had

interacted with him for more than an hour during which time they took off and put on their balaclavas several times and they also talked to him. He at times tried to reason with them. The complainant said he recognised his assailants by their general facial appearances and their physical build. He could not remember the style and colour of everyone's clothing except that they all wore brownish/greyish colours. In my view, the complainant had ample opportunity to observe his assailants.

[18] The complainant was also cross-examined on the contents of his witness statement in the docket where the following appears:

"Daar was altesaam vier onbekende mans, waarvan drie mans gemaskerd was en een se gesig oop was."

And

"Ek sal die man met die gesig weer kan uitken en kan identifiseer."

It was argued that nowhere in the statement is mention made that the assailants from time to time took off their balaclavas and that he would be able to identify them should they appear on an identification parade.

[19] Complainant's response to the first sentence was that he thinks he was specifically asked at what stage it was when only one of the four had his balaclava off. His explanation about the second sentence was that it does not make sense the way that it reads, because "all of them had faces". The difficulty with this explanation is that he confirmed the statement was taken down in Afrikaans, his home language, probably, he said, by Inspector Grobler and that he had read through it before signing it.

[20] It then transpired that the statement had not been commissioned at the time it was taken down. Grobler, the investigating officer,

testified that it was not taken by him. He noticed some months later that it had not been commissioned. He thereupon asked the complainant to confirm the contents and commissioned it. It was never established who wrote down the statement. The court a quo found that the quoted sentences were not in good Afrikaans and were susceptible to more than one interpretation. Furthermore, that it was not a detailed and complete statement as was his (complainant's) evidence in court.

[21] In *S v Govender and Others* 2006(1) SACR 322 (ECO) it was held that when a witness' evidence in court differs from that in the police statement it should be borne in mind that the purpose of the statement is to obtain details of an offence to decide whether or not to institute prosecution. It is not intended to be the precursor to the witness' testimony in court. At 324i - 325a the learned judge quoted with approval from *S v Xaba* 1983(3) SA 717 (A) at 730 8-C:

"...that police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable..."

[22] It is further stated in *Govender* at 325 b-f:

"The statement, according to my experience, is also usually a summary of what the policeman was told by the witness and is expressed in language or in terms normally used by him and not necessarily the witness. That this is so, is apparent from what I shall refer to more fully later regarding witnesses who confirm that the statement correctly reflects what they said to the police, but do not know what the meaning is of a word or words appearing in the statement when they are asked about it... I am of the view that the fact that discrepancies occur between a witness' evidence and the contents of that witness' police statement is not unusual, nor surprising."

[23] Finally, I quote at length from the English headnote in *S v Mafaladiso en Andere* 2003(1) SACR 583 (HHA):

"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of

what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation

affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into

consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings. (At 593e - 594h.)."

[24] I am of the view, that if one bears the abovementioned dicta in mind and viewing the complainant's evidence holistically, it cannot be said that his evidence on identification must be rejected in toto, even though there may be some shortcomings. The magistrate provided a comprehensive and well- reasoned judgment in which he dealt with all the evidence in detail. In *S v Hadebe & Others* 1997(2) SACR 641 (SCA) at 645 e-f

"...it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary."

[25] I turn then to the alleged use of a cell phone by the complainant at the identification parades. The allegations were, as the learned Magistrate put it, "vehemently denied by the complainant and the persons (who testified) in charge of the parades". The court a quo accepted the evidence of the complainant and the police officers concerned - in my view correctly so as they were not shaken in cross-examination.

[26] The complainant concedes that he saw photographs of the third and fourth appellants before the identification parade which was held on 6 November 2007 where he had pointed them out. He explained that as far as he could remember, some photographs of wanted persons were posted at Hazyview Service Station prior to the identification parade. He recalled seeing a photograph of the fourth appellant there but could not remember whether he also saw that of the third appellant at the same time or whether it was shown to him later by the detective when he went to report that he saw the photo of the fourth appellant (and possibly third appellant). Of importance is that he recognised the fourth appellant (and possibly third appellant) on the poster at the Service Station as one (or two) of his assailants.

He went so far as to himself put up a reward of R10 000.00 for information that could lead to the arrest of the suspects.

[27] It is important to note that the evidence on identification is not the only evidence implicating the appellants. The court a quo found that in addition to the complaint's evidence:

"(a) Accused no 1 was during and after his arrest found in possession of some of the stolen items, the Land Rover key, the Maglite torch and the Nokia cellular phone [the complainant's belongings];

(b) Accused no 2 tried to evade apprehension and prosecution by refusing to hand himself over to the police, changing his cellular phone number and hiding underneath the bed. when he was eventually traced;

(c) Accused 3 had one of the stolen fire arms, to wit the 9mm cal pistol, in his possession during his arrest;

(d) Accused 5 tried to evade apprehension and prosecution, in the process trying to flee from eminent (sic) arrest, trying to fire shots at one of the arresting officers and having two unlicensed firearms in his possession."

First and third appellants never preferred an innocent explanation for the possession of the goods and pistol of the complainant which were recovered from them.

[28] Also, the evidence of the complainant on identification is corroborated by the evidence of the relevant police officials involved in the arrest of the appellants.

[29] When one looks at the mosaic of the evidence it is clear that the appeal ought to be dismissed on conviction in respect of all the appellants on the robbery count.

[30] I turn then to the third appellant's conviction on unlawful possession of a firearm. The arresting officer's evidence was to the effect that the third appellant had a 9mm calibre Smith & Wesson pistol between his feet on the floor where he was seated in the left back of a motor vehicle. Third appellant claimed he was unaware of the firearm at his feet. The court a quo, correctly in my view, rejected his evidence on the probabilities and convicted him accordingly.

Sentence

[31] The appeal in respect of sentence is by the first appellant only.

[32] It is not in dispute that the provisions of Act 105 of 1997 are applicable in that a minimum sentence is applicable for the

conviction on robbery with aggravating circumstances unless substantial and compelling circumstances are found to exist permitting deviation from the prescribed minimum sentence.

[33] The appeal on sentence is predicated on several grounds, viz; that the trial court failed to investigate the presence or absence of substantial and compelling circumstances before imposing sentence; that the sentence should have been ordered to run concurrently with that which first appellant was serving for an offence committed on 7 June 2007, i.e. three days after committing the offences for which he was convicted in the present matter; that the trial court over emphasised the seriousness of the offence and that the court did not take into account the time spent awaiting trial. Finally, that the sentence imposed is shockingly harsh and induces a sense of shock.

[34] In *S v Pillay* 1997(4) SA 531(A) at 535 it was stated:

"It is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial Judge [or the Magistrate] has a wide discretion in deciding which factors - I here refer to matters of fact and not of law - he should in his opinion allow to influence him in determining the measure of the punishment. See *R v S* 1958(3) SA 102 (AD) at p 106:

"As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

[35] In *S v Mhlakaza and Another* 1997(1) SACR 515 at 519 c-e Harms JA said:

"Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, (the appellants had been convicted of murder, attempted murder, armed robbery and possession of firearms and ammunition) the emphasis should be on retribution and deterrence"

That was in 1997. In casu, when the court a quo imposed sentence on 27 November 2009 it took into account that armed robbery was a prevalent offence in the country. It also took into account the seriousness of the offence, describing the appellants' actions as equally brutal, callous and heinous and was minded to impose a sentence of five years more than the prescribed minimum sentence. However, the magistrate took into account that the first appellant (as well as the others) had spent more than two years in custody awaiting trial. He also took into account the personal circumstances of the first appellant, namely that he was 28 years old at the time; he was not married but had two minor children whom he maintained; he had progressed to grade 12 in school; he did so-called piece jobs for which he earned R81.00 per day; he was treated as a first offender as the sentence he was already serving at the time of his conviction was for a crime committed three days after the crime committed in this matter. The appellant also showed no remorse.

[36] The learned magistrate also considered whether to let the sentence run concurrently with the one he was serving but decided against it. The first appellant was serving a sentence of 15 years in the other matter. The sentence was imposed on 6 November 2008 - a year before he was sentenced in this matter. The cumulative effect is a total of 30 years' imprisonment. In principle ordering a sentence to run concurrently with other sentences being served is permissible[4] . The learned magistrate considered this aspect carefully and decided not to let in run concurrently with the other sentence the appellant was serving. It is apparent that the other sentence was for an offence committed a mere three days after the offences in the present matter were committed. That is an factor which militates against ordering concurrency, either in whole or in part of the sentence in casu. The magistrate's view in this regard cannot be faulted.

[37] I propose the following order:

1. The appeal against conviction of all four appellants is dismissed.
2. The appeal against sentence by first appellant is dismissed.

N. RANCHOD

JUDGE OF THE HIGH COURT

I AGREE

S.A.M BAQWA

Appearances:

Counsel on behalf of Appellants :Miss Masete

Instructed by : Pretoria Justice Centre

Counsel on behalf of Respondents : Adv Pruis

Instructed by : Director of Public Prosecutions, Pretoria

Date heard : 3 August 2015

Date delivered :

[1] Typed judgment of court a quo at p 5 paragraph 9.

[2] Typed judgment pp 5-6 paragraph 10.

[3] Vide record pl78 line 7-8.

[4] A Terblanche: Guide to sentencing in South Africa; 2nd edition, p182 paragraph 3.2 and the cases cited there.

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