

SOUTH AFRICA / JUDGMENT

Mofo v S (CA 23/2023) [2024]

ZANWHC 45 (22 February 2024)

[2024] ZANWHC 45

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Mmolawa

CASE / FILE NUMBER

CA 23/2023

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IN THE NORTH WEST HIGH
COURT, MAFIKENG
CASE
NO: CA 23/2023

Reportable:	YES / NO Circulate
to Judges:	YES / NO Circulate
to Magistrates:	YES / NO Circulate to Regional Magistrates: YES / NO In
the matter between:	BONNIE MOEKETSI MOFO APPELLANT and THE STATE RESPONDENT

CORAM: HENDRICKS JP et MMOLAWA AJ
DATE
OF HEARING
:
29
NOVEMBER 2023
DATE
OF JUDGMENT
:
22
FEBRUARY 2024
FOR
THE APPELLANT
: ADV.
MODIBA
FOR
THE RESPONDENT
: ADV.
NTSALA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 22 February 2023.

ORDER

Resultantly, the following order is made:

- (i) The appeal against both the conviction and sentence is upheld.
- (ii) The conviction and sentence are set aside.

MMOLAWA AJ

INTRODUCTION

- [1] The appellant, Mr Bonnie Moeketsi Mofo, was arraigned before the Rustenburg Magistrate Court on one count of robbery. He was convicted and sentenced to 10 months imprisonment.
- [2] Aggrieved by the outcome of the trial, he then noted an appeal against both the conviction and sentence. The State opposes the appeal.

SUMMARY OF FACTS

- [3] On 23 Sunday May 2021, Mr Petrus Kolobe (the complainant), arrived at Capitec ATM machine in Rustenburg at 08h49 and withdrew an amount of R5 000-00 therefrom. Thereafter he proceeded to the place where he had parked his car. At that stage he was having the money in his right hand. Suddenly, and before he could reach his car, two people approached him from behind, grabbed his hands and one of them took the money away from him. The two people then parted ways by going into separate directions and fled with his money.
- [4] He said the one he was able to see clearly was the appellant, whilst he was unable to see the other one clearly. He said the appellant was wearing a brown jacket and brown shoes whilst the other person was wearing a white shirt, a blue jean and blue All Star tekkies. He did not lay a charge at the police station because he could not describe the appellant, but would be able to recognise and identify him if he could see him again.
- [5] The following morning he decided to go to the very same place where he was robbed of his money. He said he did this to see if per chance he would be able to see any of the people who robbed him, so that he could thereafter go to the police station to lay a charge. On his arrival in town at about six o'clock in the morning, he then saw a gentleman wearing a Mercedes Benz attire, whom he recognised as the appellant.
- [6] On seeing the appellant, he decided to approach the security guards who were nearby where he was. He pointed the appellant to them. He said when he realized that he was pointing at him, the appellant fled, asking what did he do. One of the security guards managed to stop him by grabbing him. The police were called, who on arrival, took the appellant to the police station.
- [7] He testified that the taking of money from him happened fast or quickly. That was the complainant's evidence in a nutshell.
- [8] Under cross-examination of the complainant, the following transpired:
- He was previously employed in the South African Police Service for a period spanning 12 years.
 - One person grabbed his left hand and the other one grabbed his right hand and took his money.
 - He was able to see the appellant because after he had taken the money from him, he looked at him.
 - Asked if it was correct that he said these people ran away after taking his money, he then said the other one walked away though he managed to see appellant.
 - When it was put to him that in his statement to the police he stated that after they took his money, they ran down Klopper Street, his response was that after they took the money, he did not see them running away.

- He could not estimate the time the robbery took, either in seconds or minutes.
 - Asked about the facial features of the appellant, the complainant said he was partly bald on the forehead.
 - When it was put to him that in this statement he said he was robbed by three African male persons, he said the person who wrote down the statement was lying.
- [9] After the cross-examination of the complainant, the State closed its case without calling any other witness.
- [10] Thereafter, the appellant testified in his defence and also called a witness on his behalf. His evidence was that on the day the complainant said he was robbed, i.e., 23 May 2021, he never set foot in town as he never left his yard on that day.
- [11] He said he only went to Rustenburg town the following day, 24 May 2021, as he had an appointment at the offices of Health and Safety for the Mines at the Department of Mineral Resources. His appointment there was in connection with the case he had with the Department relating to the injury he sustained while working at the mine.
- [12] From there he went back and met some people he knew, who he chatted with. He was surprised when at about 12h00, he was approached by three gentlemen and one of them said this is the one. This person kicked him and he ended up falling to the ground. He said this gentleman was the complainant.
- [13] When the people he was chatting were asked why were they assaulting the appellant, the complainant answered by saying he took his money on Sunday. The police were called and was arrested after the complainant said he took his money. He was then taken to the police station.
- [14] Suffice to state that he denied ever robbing the complainant.
- [15] He was cross-examined by the prosecutor after which the appellant called as his witness, Mr Buti Joseph Mabitso, a police officer. He testified that on 24 May 2021, he and his colleagues were doing patrol duties in Rustenburg town, when a certain gentleman by the name of General approached them and informed them that the complaint alleged that money was taken from him. They approached the complainant who at that stage was in the company of three other gentlemen. The complainant told them that he was robbed by three guys.
- [16] He testified further that the complainant told him that after withdrawing R5 000-00 from Capitec ATM, he was approached by three African males who were wearing masks. While he was fighting with the appellant, his mask fell off. The appellant was standing in front of him.
- [17] He said the complainant told him that he went to open a case of robbery the very same day he was robbed, being Sunday, 23 May 2021. On asking the appellant if he was aware of the allegations levelled against him, he said his response was that he knew nothing about the robbery.

- [18] He went on to say that at the scene of arrest, he was given a knife by General who told him that he took it away from the complainant.
- [19] After he testified in chief, he was cross-examined by the prosecutor, whereafter the defence closed its case.
- [20] When the prosecutor addressed the court on the merits, the learned Magistrate asked the prosecutor the following question:

“What is your submission regarding the discrepancies that exist”

EVALUATION OF THE EVIDENCE

- [21] On the totality of the evidence, can it be said that as a single witness, the complainant’s evidence was clear and satisfactory in all material respects, and whether the learned Magistrate approached the evidence of identification of the appellant by the complainant with caution.
- [22] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. It is apposite at this stage to quote the remarks made by De Villiers JP in *R v Mokoena* 1932 OPD 79 at 80, when dealing with this section, namely:
- “Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc.”*
- [23] I am of the view that as a single witness, the complainant’s evidence did not meet the threshold enunciated in *Mokoena’s* case. I am of the view that as a single witness, his evidence was not clear and satisfactory in every material respect. According to the complainant, after his money had been taken away from him, the robbers parted ways by going in different directions and fled with his money. However, when it was put to him that in his statement to the police he stated that after they had taken the money from him, the robbers ran down Klopper Street, he then changed his version by stating that he did not see them running away.
- [24] According to him, he was robbed by two people, yet in his statement to the police he said he was robbed by three African male persons. On this score he once more contradicted himself. Sight should not be lost that when he made his statement, the events regarding the robbery were still fresh in his mind.

- [25] The complainant testified that he did not go to lay charge on the day of the robbery for the simple reason that he could not describe the appellant. Contrary to this, he stated for the first time under cross-examination that the appellant was partly bald on the forehead. He never testified about the facial features of the appellant in his evidence in chief, nor did he make mention of this fact in his statement to the police. If the appellant had this special feature, one would have expected him to have mentioned this in his evidence in chief and in his statement to the police. One would not be faulted to say that this seemed to have been a recent fabrication of his evidence.
- [26] There is no indication that the learned Magistrate was alive to the dangers of convicting on the evidence of a single witness, and if so, whether he approached the complainant's evidence with caution.
- [27] The complainant could not give an estimation of how long did the robbery take place. This made sense because on his evidence, the robbery happened fast and quickly. The inference to be drawn from this is that he could not have had sufficient opportunity to be able to identify the appellant as one of the robbers. What is more is the fact that the robbers approached him from behind.
- [28] The complainant testified that he opened the case the following day. However, he contradicted himself on this score by telling Mr Mabitso that he opened the case the very same day of the robbery, being on Saturday, 23 May 2021.
- [29] Mr Mabitso testified that the complainant told him that during the robbery, the three African male persons, were all wearing masks, and as he was fighting with the appellant, his mask fell off and the appellant was standing in front of him. Needless to say, the complainant never testified to this fact in his evidence in chief.
- [30] It must be borne in mind that Mr Mabitso was an independent and neutral witness who naturally had no interest in the outcome of the case. There is no suggestion that he was fabricating his evidence. Contrary to the learned Magistrate's finding that Mr Mabitso's evidence did not take the appellant's case any further, his evidence was important in determining whether the complainant was a reliable witness. No reasons were advanced by the learned Magistrate in what respects his evidence did not take the case any further.
- [31] The above is not the only instance where the learned Magistrate misdirected himself in evaluating the evidence. During the address by the public prosecutor, the learned Magistrate interjected and asked her the following question:

"What is your submission regarding the discrepancies that exist"

This, to my mind, is a clear indication that the learned Magistrate was mindful of the fact that there were several inconsistencies and unsatisfactory features in the evidence as a whole, yet the learned Magistrate brushed them aside in order to convict the appellant. He never dealt with them at all in his Reasons for Judgment.

[32] The learned Magistrate misdirected himself by finding that the complainant testified that he was able to observe the appellant's face. There is nowhere in the record where the complainant testified that the appellant was ever in front of him. His evidence was that he was able to observe the appellant as he was on his side.

[33] In his evaluation of the evidence, the learned Magistrate stated as follows:

"The accused person seems to be a reliable witness. His evidence was not shaken during cross-examination. The contradictions that were pointed out by the defence are not material."

It is difficult to fathom why the trial court rejected the evidence of the appellant who the court regarded as a reliable witness.

[34] The appellant's case was not evaluated at all and there were no adverse findings made against him. Despite the fact that his evidence was not rejected by the trial court or found to be false, the appellant was nevertheless convicted.

[35] The reliability of the complainant's evidence of identification was not properly applied to the facts of this case by the trial court. It was only referred to in a perfunctory manner. The court seemed to have placed reliance on the fact that the complainant said he identified the appellant by his bald head and that the robbery took place during the day. No observation was made by any party during the trial that the appellant was bald-headed.

[36] From the above, the learned Magistrate failed to approach the reliability of the evidence of identification with caution. In my view, the learned Magistrate failed to apply the cautionary rule in his approach to the evidence of identification.

See: *S v Mthetwa* 1972 (3) SA 766 (AD) at 768 A - C

[37] Resultantly, I am of the view that the State failed to prove the guilt of the appellant beyond reasonable doubt on the charge which was brought against him. The appeal against the conviction and sentence should therefore succeed.

[38] Consequently, the following order is made:

(i) The appeal against both the conviction and sentence is upheld.

(ii) The conviction and sentence are set aside.

M. E. MMOLAWA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree

R. D. HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

For the Appellant: Mr V. KEKANA LEGAL AID SOUTH AFRICA BOREKELONG HOUSE 742 Dr JAMES MOROKA DRIVE SOUTHWING MMABATHO For the Respondent: Mr B. T. CHULU THE DIRECTOR OF PUBLIC PROSECUTIONS MEGA CITY, COMPLEX EAST GALLERY MMABATHO

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