

SOUTH AFRICA / JUDGMENT

Mohlathi v S (A884/16) [2017] ZAGPPHC 710 (3 November 2017)

[2017] ZAGPPHC 710**COURT**

North Gauteng High Court, Pretoria

BEFORE

PA Van Niekerk, Maumela

CASE / FILE NUMBER

A884/16

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NO: A884/16****DATE:**

03/11/2017

In

the matter between:

A

MOHLATHI

APPELLANT

and

THE

STATE

RESPONDENT

JUDGMENT**VAN NIEKERK AJ:****INTRODUCTION**

- [1] Leave to appeal against a conviction on a charge of robbery with aggravating circumstances was granted to appellant on petition by this Court per Kubushi, J and Nobanda, J on 29 November 2016. The appellant was convicted and sentenced to 8 years imprisonment and declared unfit to possess a firearm by the Evander Regional Court

- [2] During the trial the state called two witnesses, who were also the complainants, to testify about the events which took place around 01h00 on 10 April 2014, being a husband and wife. According to their evidence, three men entered their residence and committed an act of armed robbery, inter alia stealing a large television set, a motor vehicle, and various other household goods. The first witness, being the wife was lying asleep on a couch in what she referred to as "the TV room" and was awoken when her daughter's dog started barking when the three men entered the room, two of them being armed with fire-arms.
- [3] At the time her husband, the second witness, was asleep in the main bedroom and a house guest who stayed with them overnight was asleep in another room. Both these witnesses testified that they were able to observe the appellant who, according to the evidence, wore a bandanna over the lower part of his face, covering part of his nose. The wife testified that she could discern the facial features of the appellant under the bandanna, and both these witnesses testified that they observed the eyes of the appellant, as well as his prominent cheekbones. Both the witnesses positively identified the appellant in court.
- [4] The State called a further witness, referred to in the area where she lives as "Admira", who testified that on the 10th April 2014 at around 04h00 a person known to her as Msika, accompanied by two other males, one of which she knew as Mpandlana, arrived at her residence and requested to store certain items at her home. She identified the appellant in court as the person known to her as Mpandlana. It was eventually common cause during the trial that the appellant accompanied the aforesaid Msika at that time to the residence of the witness. The goods which she was requested to store consisted inter alia of a big screen television set, two speakers and a vehicle tyre.
- [5] According to the evidence of this witness, the police arrived at her home at around 06h00, searched her yard and home, and found the items referred to supra. She explained how she came to be in possession of the goods,, and was then told by the police to accompany them and identify where the persons who left the goods at her home could be found.
- [6] The evidence as a whole clearly establish that the goods found in her possession at 06h00 on 10 April 2014 were goods that were stolen during the robbery as testified by the first and second witnesses referred to supra, and clearly establish that at around 04h00 on 10 April 2014 the appellant and two other male persons were in possession of the goods. These facts were not disputed by appellant.
- [7] Appellant's evidence attempted to establish that he was asleep when, at around 03h55 on 10 April 2014, he was awoken by Msika and two other persons referred to supra and requested to show them where the witness referred to in par [4] resided. He complied and they drove to her house in a black Isuzu vehicle, which fitted the description of the vehicle stolen during the robbery. He further testified that he saw the goods referred to supra, and that it was offloaded at the residence of Admira.

[8] On appeal, it was argued that the conviction should be set aside, as the evidence of the two witnesses, husband and wife, who identified the appellant, was unreliable. It was further argued that it was improbable that they could have identified the appellant in the dark, partially covering his face.

[9] The evidence of these two witnesses corroborated in material respects.

There is no reason to reject any part of their evidence, thus the only issue is whether or not reliance can be placed on their ability to identify the appellant, given the circumstances relating to the event. In this regard, appellant relied on the partially covered face of the appellant and the darkness to urge this court on appeal to find that the evidence of these two witnesses identifying the appellant is unreliable.

[10] In this respect these two witnesses were adamant, vigorous cross-examination notwithstanding, that they were able to identify the appellant. It was common cause that the perpetrators used electric torches to create a measure of light. The wife was in the presence of the accused for a period of time, being instructed to show firstly where her husband and houseguest were sleeping, and later to point out the locality of the safe in the house. Both witnesses described the same prominent facial feature, and it was never disputed that the appellant does have this facial feature.

[11] It is trite law that the appellant could only be convicted if the evidence establish beyond reasonable doubt that he is guilty, and therefore he should be acquitted if a reasonable possibility exist that he may be innocent. The conclusion to be reached in this regard must however account for all of the evidence, some of which may be unreliable. None of the evidence may, however, be ignored.

Vide *S v Van Der Meyden*, 1999(1) SACCR 447 on 449 b-450 c

[12] On the evidence, the appellant is factually linked to the goods robbed at around 01h00 when he testified that he assisted in conveying the goods to the house of Admira at around 04h00. Two witnesses identified the appellant at the scene of the robbery. In the light of such evidence, the evidence of the appellant to the effect that he was asleep in his house that night and only awoken at 03h30 to assist in identifying the house of Admira must be considered to determine whether such version as placed before the trial court established a basis to find that it is reasonably possible that the appellant is innocent of the crime charged. The version of the appellant in this respect is improbable and is rejected, considering the evidence as a whole. No proper reason is advanced why it was necessary for the appellant to identify the address of Admira or why this had to be done at that early hour of the morning.

[13] In the context of this evidence linking the appellant to the goods removed during the robbery some two and a half hours later, the evidence of the wife and husband who testified positively that they identified the appellant as the "leader" of the group of perpetrators, and the improbability of the appellants version why he was in proximity of the stolen goods shortly after the robbery took place,, the appellant's version must be rejected.

[14] In the premises the appeal is dismissed.

PA VAN NIEKERK

ACTING JUDGE GAUTENG DIVISION PRETORIA

I concur

MAUMELA

JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPELLANT: Mr KGAGARA

INSTRUCTED BY: LEGAL AID SOUTH AFRICA

FOR RESPONDENT: ADV. HARMZEN

INSTRUCTED BY: THE STATE ATTORNEY

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