

SOUTH AFRICA / JUDGMENT

Molopo v S (A57/23) [2024] ZAGPPHC 641 (21 June 2024)

[2024] ZAGPPHC 641**COURT**

North Gauteng High Court, Pretoria

BEFORE

Coetzee, N Davis

CASE / FILE NUMBER

A57/23

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

SIGNATURE:

DATE: 2024/6/21

Case Number: A57/23

In the matter between:

ALPHEUS

MOGASE MOLOPO

Appellant

and

THE

STATE

Respondent

This judgment was

handed down electronically by circulation to the parties and/or
parties' representatives by email. The date for

hand-down is deemed

to be 21 June 2024.

JUDGMENT

COETZEE,AJ

INTRODUCTION:

- [1] This appeal is directed against the conviction of the Appellant, who was found guilty on the 3rd of April 2013, of housebreaking with intent to rob, robbery with aggravating circumstances, and murder by the Gauteng Division of the High Court, Circuit Local Division of the Northern Circuit District, Polokwane. He received a sentence of 20 years imprisonment for housebreaking and robbery with aggravating circumstances, and life imprisonment for murder. Leave to appeal in respect of conviction only was granted on petition.
- [2] The charges against the Appellant arise from an armed robbery in the early hours of the 22nd of August 2011, at the Tolo family's home in Gamasha Village, Sekhukhuni District. While the family was asleep, they were attacked and robbed by a number of assailants. During the robbery, Lekota Jack Tolo ("the deceased") was shot and killed. The Appellant was accused no. 6 in the matter.
- [3] The main issue to be determined is whether the Appellant was correctly identified as a perpetrator based on the reliability of the two state witnesses' testimony and whether the trial court erred by relying on dock identification.

EVIDENCE:

- [4] The State led the evidence of Salome Mashego Tolo, the deceased's wife and Lydia Hlaledi Tolo, daughter of the deceased, regarding the identity of the Appellant. The Appellant testified in his own defence.
- [5] Mrs. Tolo, testified that on the 22nd of August 2011 in Gamasha Village, she, the deceased, their two children, and granddaughter, were asleep in their house. She and the deceased were in the same bedroom, while the children were in separate rooms. She and the deceased were awakened by the sound of men opening their bedroom door. The deceased rushed to the door and tried to block it, but the men broke in and fired a first shot at him. A second shot was fired as he stood by the door, and a third shot at Mrs. Tolo. The shots fired at Mr Tolo proved fatal. The men switched on the bedroom lights, revealing four intruders. The faces of three of the men were covered with balaclavas, while one was wearing only a woolen hat.
- [6] All the men carried torches and guns. The uncovered man, pointed a gun at Mrs. Tolo, demanded money. He was at arm's length from her. He followed her to a drawer where she handed him R7000. They had a brief conversation where he claimed the amount was insufficient. This man then searched the room for more money. Mrs. Tolo's daughters and granddaughter were brought into the room by the other men and tied up by the uncovered

man. She observed this man the whole time, noting his face, arms, and whole body. She identified

him in court as the Appellant, noting that at the time of the crime, he had a moustache and was wearing blue jeans, a blue lumber jacket, and white canvas shoes. She also observed that he did not have a moustache during the trial.

[7] Miss Lydia Tolo testified that she is the daughter of the deceased. On the 22nd of August 2011, at around 3:15 AM, she was asleep in her bedroom when she was awakened by a loud gunshot coming from her parents' bedroom. She heard a second shot from the same direction. Calling out for her mother and attempting to open her bedroom door, she received no response but could hear muffled voices she couldn't understand. She distinctly heard her father asking twice, "What are these men doing?" before a third gunshot rang out. When she exited her bedroom, she encountered a man who pointed a firearm at her, took her cell phone, and escorted her to her parents' bedroom. Inside, she saw three men, one of whom was not wearing a balaclava. The light was on, providing clear visibility, and she observed the uncovered man's face from about one and a half meters away. He demanded to know where the money was and then tied her up. She stated that she would never forget his face and identified him in court as the Appellant. During cross-examination, she confirmed that she focused her attention on the man without the balaclava, as she was trying to be observant and courageous for her mother's sake, and that she had taken a good look at his face.

[8] The Appellant claimed in his testimony that Ms. Tolo and her daughter mistakenly identified him as a participant in the robbery and murder at their home. He asserted that he was at his own residence at the time of the offenses, looking after his child. During cross-examination, he did not deny having a moustache on the 22nd of August 2011, confirming that he sometimes has a moustache and sometimes does not. He also did not deny owning blue jeans, a blue

lumber jacket, and white shoes.

[9] The trial court convicted the Appellant on the charges mentioned, concluding that he participated in the crimes under the doctrine of common purpose. The court relied on the testimony of the two state witnesses, who unequivocally identified the Appellant's involvement. The trial court was satisfied with their evidence and deemed it adequate to convict the Appellant for participating with the other accused in committing the crimes.

[10] The Appellant raised several grounds of appeal, asserting that the trial court erred in placing undue reliance on unreliable dock identification that lacked confirmation from an identification parade. Furthermore, he argued that his version was inadequately scrutinized during cross-examination, which he deemed cursory at best. The Appellant also contended that the trial court misdirected itself in finding that his version could not be reasonably possibly true warranting his acquittal.

EVALUATION:

[11] When identification is in question, the evidence purportedly identifying the person accused of the crime should be examined with caution. The frequently cited words of Holmes JA in *S v Mthetwa*[1] remain relevant:

'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, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities ... '

[12] In *Nkomo and Others v The State*[2] the Supreme Court of Appeal confirmed that:

"The potential risks of mistaken identification require a thorough assessment of the reliability and credibility of such evidence before placing significant weight on it. Factors that impact the reliability of the identification evidence are, amongst others, the lighting, visibility, mobility of the scene, proximity of the witness and their opportunity for observation and ... prior familiarity ...".

[13] The Appellant's conviction in this matter was not based solely on dock identification but also on the witnesses' prior opportunity to observe him during the crime. To assess the reliability of this identification, several factors as mentioned above are considered:

- a) it is undisputed that the two state witnesses had approximately 15 to 20 minutes of direct interaction with the Appellant during the robbery, affording them ample opportunity to observe him closely.
- b) they were in close proximity, approximately at arm's length. The room was well-lit, ensuring optimal conditions for clear observation and visibility without any obstructions.
- c) both state witnesses provided mutually corroborative testimonies, consistently detailing the Appellant's actions and appearance. Mrs. Tolo, in particular, provided a detailed account due to her extended period of interaction with him during the commission of the crime.

[14] Counsel for the Appellant argued that the witnesses were under enormous stress and traumatized, which could potentially affect their reliability. However, stress and trauma can also be that factor that burn a lasting image of a person in one's memory. Despite the stressful circumstances, the witnesses provided consistent and detailed descriptions of the Appellant, including his moustache and attire (blue jeans, blue lumber jacket, and white shoes).

- [15] The Appellant was one of six accused, which reduced the likelihood of mistaken identity due to suggestive elements in the dock identification process. Both witnesses positively identified the Appellant, with one noting the change in his appearance, particularly the absence of his distinctive moustache during the trial. This ability to recognize the Appellant despite his altered appearance adds further weight to the reliability of the identification. The Appellant did not deny having a moustache on the date of the crime, and his own testimony confirmed that he occasionally had a moustache.
- [16] The Appellant's argument that his alibi was not thoroughly addressed in the judgment is secondary to strong, positive identifications made by the witnesses. Once the identification evidence is thoroughly tested, weighed, and accepted, the weight of the alleged alibi diminishes.
- [17] The evidence supporting the identification of the Appellant is convincing. The dock identification, though not ideal on its own, is supported by prior identification opportunities and the consistent descriptions provided by the witnesses. In these circumstances, there is no room for mistaken identity.
- [18] After considering the totality of the evidence, the trial court's acceptance of the evidence, identifying the Appellant as a perpetrator, cannot be faulted. In the absence of any misdirection by the trial court, this court declines to interfere with its findings.

[19] In the result I make the following order:

The appeal is dismissed.

L COETZEE

ACTING JUDGE OF THE HIGH COURT

I, agree

N DAVIS

JUDGE OF THE HIGH COURT

B NEUKIRCHER

Appearances:

On behalf of the Appellant: Mr. H.L. Alberts Instructed by: Legal Aid South Africa
On behalf of the Respondent: Adv. M. Shivuri Instructed by: The Director of Public Prosecutions
Date heard: 29 April 2024 Date of judgment: 21 June 2024

[1] 1972

(3) SA 766 (A) at 768 A-C.

[2] (Case no 130/2022) [2024] ZASCA 61 (26 April 2024) at par. 17.

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