

SOUTH AFRICA / JUDGMENT

Mpumelelo and Another v S (A47/201; SS96/20019) [2019] ZAGPJHC 310 (22 August 2019) [2019] ZAGPJHC 310

COURT

South Gauteng High Court, Johannesburg

BEFORE

M M MabeSele, P Johnson, M Motgotsi

CASE / FILE NUMBER

A47/201

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

APPEAL

CASE NO: A47/201

CASE

NO: 5596\2009

In

the matter between:

MLILO,
MPUMELELO
1st
Appellant
ZUMA,
PHELELANI 2nd
Appellant
and
THE
STATE Respondent

CORAM:

MABESELE J; JOHNSON AJ AND MOGOTSI AJ

JUDGMENT

MABESELE, J:

- [1] This is an appeal against convictions on the following counts: three counts of housebreaking with intent to steal and theft; two counts of robbery with aggravating circumstances; murder ; read with section 57(1) of Act 105 of 1997; two counts of unlawful possession of firearm and two counts unlawful possession of ammunition.
- [2] Central to this appeal are the following issues: (i) identity of the perpetrators at the crime scene (ii) pointing out made by the first appellant and (iii) confession made by the second appellant. The appellants contend that the identity of the perpetrators was not proved beyond reasonable doubt and that the first appellant made pointing out under duress and the second appellant was not the author of the confession alleged to have been made by him.
- [3] At the outset it should be mentioned that part of the record of the proceedings which include plea, leave to appeal and judgement on leave to appeal went missing, thus resulting in the appeal being heard way beyond the time frame. The notes of the late judge who presided over the matter could not be found. On 8 September 2017 the appeal was removed from the roll to enable the parties to reconstruct the record. This court proceeded with this appeal after all the parties expressed their satisfaction with the reconstructed record.
- [4] The charges against the appellants arise out of the incident which occurred in the evening of the

24th April 2009 at Avianto Wedding Centre, Mulderdrif,t where the complainants and the deceased had attended a wedding ceremony. They left their bags in different rooms booked at the same venue but a distance away from where the ceremony was taking place. At around 21h00 Leigh Venter, the complainant in count 4, felt cold and asked the deceased, Rodrick Barrington, to drive her to their rooms to get warm clothes . When they reached the parking area the deceased remained inside the vehicles as Venter went to the room. The parking area at which the vehicle was parked, was dark. On her way back from the room Venter got into the vehicle and occupied the front passenger seat. It came to her attention at that stage that the deceased was no longer in the vehicle. Before she could close the door she felt someone pushing her head downwards. That person put his head inside the vehicle and demanded her handbag. Assisted by the lights inside the vehicle she was able to recognise the face of the first appellant as he was demanding her bag. She said that she had ample opportunity to observe the first appellant when he robbed her of her handbag,

ring, a suit case containing toiletries and perfume, amongst others. During robbery, she noticed the deceased and someone approaching the vehicle. She was not certain where the two of them came from. However she noticed that the boot of the vehicle was opened. After the deceased got into the vehicle and occupied the driver seat, the man who was in his company put his head

inside the vehicle, apparently trying to switch the engine off. She looked at the man when his head was inside the vehicle and identified him as the second appellant. She observed the dreadlocks on the second appellant and a dark face.

- [5] The witness testified that whilst the second appellant was demanding the keys to the motor vehicle the deceased got out of the vehicle and tried to fight the second appellant. She then heard the second appellant say he would shoot the deceased. Subsequently, she heard a gunshot. Following that incident she got out of the vehicle and called the name of the deceased and there was no response. Subsequently, people gathered at the scene and one of them informed her that the deceased died.
- [6] Two to three weeks after the incident, the witness attended the identification parade. At the parade she was asked to identify the suspects from the parade through the one way mirror of her mistake. At first she pointed out a wrong person but immediately alerted the police officer of her mistake. Thereafter she took few seconds and went on to point the two appellants out of the fourteen people at the parade. Constable Mulungi who assisted at the identification parade as the interpreter of the appellant testified, contrary to the version of the second appellant, that it was impossible for him and the persons at the parade (including the appellants) to see through the one way mirror what was happening on the side of the witness. The deceased's wife testified that she was at the identification parade to give support to Ms Venter and that at no stage did a police officer tell Ms Venter to point out the appellants. She said that the deceased was robbed of a Rolex watch, a wallet containing cash credit cards and a cellphone.
- [7] Mr Renier Claasen, a manager of Drift Reaction Services, testified that he responded to a call made by his colleague, Dwain, by driving to the place where he was directed by Dwain. On arrival, he, together with Dwain stopped a certain taxi wherein the first appellant was a passenger. The first appellant had a green plastic bag between his legs. Inside the bag was a flat screen computer monitor. The first appellant was then arrested, taken to their offices and later handed over to Constable Sebelemetja and inspector Joubert of the Flying squad unit. The witness denied that he was part of the officers who assaulted the first appellant at the scene of the arrest, as alleged.
- [8] Constable Sebelemetja and inspector Joubert confirmed that they attended the offices of Drift Reaction Services. On arrival, the first appellant was handed over to them. They asked him about the firearm that was used to shoot the security guard during housebreaking the previous evening. Following information supplied by the first appellant, they drove to Hillbrow where they arrested the second appellant. Subsequent to the arrest of the second appellant, the first appellant took them to a house in Diepsloot to show them a firearm they were looking for. On arrival at a certain shack they found a suitcase with neatly packed clothes and a revolver with four rounds of ammunition.

[9] Captain Letlake testified that he conducted an interview with the second appellant at Muldersdrift police station on the evening of 15th May 2009 and that the signatures, thumbprints and handwriting on exhibit 'L' are those of the second appellant. Inspector Chauke was the investigating officer. He testified that he played no role in arranging for the pointing out and confession made by the appellants.

[10] Evidence of pointing out made by the first appellant was challenged on the basis that same was not made freely and voluntary in that the first appellant was assaulted by the police. That objection necessitated trial within trial during which the trial judge ruled the evidence to be provisionally

admissible.

[11] The evidence of Superintendent Sherman was that she received a phone call from inspector Droskey, requesting her to help out with a pointing out. On her arrival at the police station she commenced with the interview of the first appellant. She testified that after she had explained the rights of the first appellant, the latter indicated that he did not need a lawyer then, but would require one later when he goes to court. She said that the first appellant was willing and prepared to do a pointing out. She said that the first appellant did not tell her that the police assaulted him.

[12] Sherman testified that after he had interviewed the first appellant, she, together with inspector Droskey and Constable Similane who was the interpreter, and the first appellant left the police station to Avianto Wedding Centre. The photographer was following behind in his own vehicle. She testified that the first appellant gave directions to Avianto Wedding Centre. On arrival at the centre, the first appellant pointed out certain spots and explained how he and the second appellant gained entry into the rooms, took four bags and robbed the owner of white Mercedes Benz. Constable Similane and inspector Droskey corroborated the evidence of Sherman. The contents of pointing out made by first the appellant was handed in as exhibit 'J'.

[13] Mrs Hornseveld attended the wedding at Avianto centre on the day on which the deceased was shot and killed. She testified that her firearm, a 38 special calibre rossie model 27 which was stolen from the room she was booked into at the centre was returned to her by the police as it was amongst the items stolen in various rooms.

[14] Mrs Pieterse too, attended a wedding at Avianto and booked into a room.

She testified that her room was locked when she left for the function. After she heard that there was a shooting incident, she returned to her room and found that it was broken into. All her suitcases, white handbag and toiletry bag were stolen. On 17 May 2009 she was called by the police to identify some of her items. She identified her black suitcase, blue bulls jackets and Nike tekkies which were worn by the first appellant. Her evidence with regard to the identification of her belongs was corroborated by inspector Chauke.

[15] The first appellant confirmed that he was arrested by the drift security officers whilst travelling in a taxi. He was in possession of a computer flat screen which he bought from Melusi. He said that the security officers took him out of the taxi, assaulted him and later on handed him over to inspector Joubert and constable Sebelemetja who assaulted him, too. He admitted that he took the police to Diepsloot where he had bought the computer flat screen and that inside the shack the police found a suitcase with clothing and a firearm. According to him, after the firearm was discovered, inspector Joubert phoned someone whom he gave the firearm serial number. He admitted driving with Superintendent Sherman to Avianto Wedding Centre where he pointed out certain spots and gave certain explanations to Superintendent Sherman. He testified that everything that he pointed

out and informed Superintendent Sherman about was related to him by inspector Joubert. He denied that he was involved in the commission

of the crimes and testified that the takkies which he worn on the day of his arrest are his.

[16] The second appellant denied that he made any statement to captain Letlake. Although he admitted that the signatures and the thumb print on exhibit 'L' are his. He denied that he was the author of the statement.

[17] As correctly pointed out by the trial judge in his judgement, the onus is on the state to prove the guilt of the appellants beyond reasonable doubt in order to secure conviction.

In light of the serious comments and displeasure expressed by the trial judge in his judgement with regard to the manner in which evidence of pointing out and confession made by the appellants was presented, I deem it necessary to address this issue first.

[18] With regard to this issue the trial judge said the following: ' the decisions to hold a pointing out and take a confession were taken around the investigation officer, not with his involvement. The investigating officer should have coordinated such issues, he was left out completely. Certain chains of events in the state case were left unconnected, such as the evidence of

whoever the accused had informed that they desired to either point out or confess in this case..... Notwithstanding the warnings and explanations given by officers conducting the pointing out and taking confessions. the absence of evidence leading to the decisions by the accused to point out or confess impacts negatively upon the state's case[1] .

[19] Having said this, the trial judge, strangely in my view, says the following: 'The court is ·convinced not only that the exclusion of such evidence[2] will render the trial unfair, but also that it will bring the administration of justice into disrepute'. This seems to be the main reason not to exclude evidence of pointing out and confession made by the appellants despite the fact that these issues were contested and the trial judge was expected to give a ruling with sound reasons.

- [20] In my view, the versions of the first appellant and second appellant respectively, that the pointing out was not made freely and voluntary and that the second appellant was not the author of the confession, viewed against the absence of evidence leading to the decisions by them to point out or confess, suggest that their versions are reasonably possibly true, taking into account also that the appellant were not arrested for this case, initially. This means that evidence of pointing out and confession should not have been considered.
- [21] The evidence of Joubert and Sebelemetja is that the first appellant took them to a shack in Diepsloot in order for the first appellant to point out a firearm alleged to have been used in housebreaking which occurred the previous night during which a guard was shot. On arrival the police found items (which were latter found to have been stolen from Avianto Wedding Centre). This shack, according to police officer Chauke, belongs to the father of the first appellant. Despite the fact that the father of the first appellant could be reached by Chauke, it was not established from him whether he occupied that shack or not or whether he lived there with the first appellant. Therefore it was not established that the items found in that shack were possessed by the first appellant.
- [22] This brings me to the evidence of Ms Venter insofar as it relates to the identity of the perpetrators at the crime scene. It is trite that evidence of identity should be approached with caution.
- [23] In *S V Mthetwa*[3] Holmes JA made the following observation with regards to the approach to be adopted when considering evidence of identification:

'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..... '

- [24] The parking area at which the vehicle of the deceased was parked, was dark. The witness testified that before she could close the door of the vehicle she felt someone pushing her head downwards into the vehicle and asked her for her handbag. She testified that since the first appellant had put his head inside the vehicle she was able to see him because the inside lights of the vehicle were on. It was not established from her how she managed to observe the face of the first appellant whilst her head had been pushed downward and for how long did she observe the first appellant[4]. She also described the first appellant as short whereas the first appellant, according to her, put his head only, inside the vehicle

and there is no evidence that she had ever since then saw the first appellant at the crime scene. When asked whether she observed the second appellant she responded that she saw him when he put his head inside the vehicle, trying to switch the engine off. Again, it was not established from her whether the deceased, who had occupied the driver seat, did not obstruct her view and for how long did she observe the second appellant. It was not established also as to where exactly inside the vehicle were the lights situated in relation to the perpetrators and how the first appellant managed to take her suitcase, clothes, perfume and the bridesmaid dress since the first appellant put his head only inside the vehicle and demanded a handbag, according to her. Identification of the second appellant by the dreadlocks does not take the case anywhere because dreadlocks is a hairstyle that is common to African men. For all these reasons, it cannot be said that the witness properly identified the first appellant and second appellant as perpetrators. At the identification parade, the witness, whilst relaxed and calm, and in broad daylight, pointed out the wrong person before pointing the first appellant and second appellant whom she alleges that she clearly saw at night by means of the inside lights of the vehicle which are not as clear as daylight and was surely in

a state of shock. All these, demonstrate possibility of her making a mistake of identity as correctly argued by counsel for the appellants. For these reasons the appeal should succeed.

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In the result, the following order is made:•

1. The appeal against convictions on all counts in respect of the first appellant and second appellant is upheld.
2. Convictions are set aside.

M M MABESELE

JUDGE OF THE HIGH COURT

I agree,

P. JOHNSON

ACTING JUDGE OF THE HIGH COURT

I agree

MOTGOTSI

ACTING JUDG OF THE HIGH COURT

Date of hearing 6 May 2019

Date of judgment 22 August 2019

For the appellant E Milubi

Instructed by Legal Aid South Africa

For the respondent Adv. N Muller

Instructed by Director of Public Prosecution

[1] Emphasis added

[2] Pointing out and confession

[3] 1972(3) SA 172(A) 180EG; S v Mehlape 1963(2) SA 29 (A)

[4] RV Mokoena 1958(2) SA 212(T) at 215 D

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