

SOUTH AFRICA / JUDGMENT

Mthembu v S (A655/2016) [2017] ZAGPPHC 615 (22 September 2017) [2017] ZAGPPHC 615

COURT

North Gauteng High Court, Pretoria

BEFORE

C J van der Westhuizen, V V Tlhapi

CASE / FILE NUMBER

A655/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.:A655/2016

Not

reportable

Not

of interest to other judges

Revised.

22

September 2017

In

the matter between:

SIPHIWE

MTHEMBU APPELLANT

and

THE

STATE RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] The appellant was charged in the Regional Court, Benoni on one count of robbery with aggravating circumstances and one count of possession of suspected stolen property, to which he pleaded not guilty. The appellant was only convicted on one count of robbery with aggravating circumstances and was sentenced to 18 years imprisonment.
- [2] With leave from the court a quo the appellant appeals against the conviction only.
- [3] Throughout the trial the appellant was legally represented.
- [4] The State called 5 witnesses in support of its case and the appellant testified in his own defence. One of the witnesses called on behalf of the State was one Aubrey Mayisela, an accomplice and co-accused of the appellant. When the said Mayisela was called as a witness against the appellant, he was already convicted and sentenced. The said Mr Mayisela implicated the appellant in the commission of the crime.
- [5] The pertinent facts surrounding the incident in respect of which the appellant was arraigned before the court a quo is not in dispute. These can be summarised as follows:
 - (a) The appellant and the said Mr Mayisela went to a tavern. After leaving the tavern, they met 4 other men. The appellant was in possession of a firearm.
 - (b) The six of them approached the complainant who was with her boyfriend. The appellant produced the firearm and threatened to shoot the complainant. The said Mr Mayisela searched the complainant and took her cell phone and handed it to the appellant after which they left;
 - (c) The complainant's boyfriend managed to run away and alerted the community. The six of them were chased and while being chased, the cell phone was dropped;
 - (d) The two of them, i.e. the appellant and Mr Mayisela, were apprehended by the community and handed to the police who were passing. The two were arrested and placed in the police vehicle. Another person, who was earlier arrested for alleged illegal gambling, was also in the police vehicle;
 - (e) Whilst in the police vehicle, the appellant placed a number of cell phones in the spare wheel of the police vehicle. A dispute arose between the appellant and Mayisela in respect of the cell phones. These were then handed to the other person. When they arrived at the Police Station, that person handed the cell phones to the police. Among those cell phones was that of the complainant;
 - (f) The appellant was searched by the police and a firearm was found in his possession.

- [6] The appellant denied the foregoing facts. On his version he was en route and met up with the said Mr Mayisela. He knows the said Mr Mayisela who is a friend of one of his siblings. They met another person by the name of Frans. The said Frans told them that one Phindile was robbed, whereafter the said Mr Mayisela ran away. The appellant and the said Frans continued to a place known as Las Vegas. At Las Vegas, the said Phindile accused the appellant of the crime. The appellant was arrested and loaded into the police vehicle.
- [7] The nub of the appeal is that the State witnesses were not credible and did not corroborate one another. It was further submitted that the complainant was unable to make a proper identification of the appellant and that the court did not properly caution itself when accepting the evidence of the former co-accused, Mr Mayisela. Counsel appearing on behalf of the appellant did not press any of the issues raised in her heads of argument, or any of the submissions made therein, In my view, quite rightly so.
- [8] Considering the alleged contradictions the appellant relied upon in respect of the evidence of Mr Mayisela, those concern the said Mr Mayisela and not the appellant. (See Mafaladiso v S 2003(1) SACR 583 (SCA)).
- [9] Furthermore, Mr Mayisela did not testify whilst being tried in the same trial. He was tried earlier and convicted and sentenced prior to the trial of the appellant. (See S v Dlamini et al 2008(1) SACR 501 (N); S v Francis 1991(1) SACR)
- [10] The said Mr Mayisela in my view did not aggravate the position of the appellant in respect of the contradictions referred to earlier.
- [11] The appellant and Mr Mayisela were arrested moments after the incident. The complainant made a dock identification. She was certain of his identity. She could describe him. During cross-examination the complainant testified that the appellant's sister approached her after a number of postponements of the case and requested the complainant to sort the matter out. The court a quo considered the dock identification and applied the necessary circumspection in that regard.
- [12] In my view, the court a quo considered all the evidence and correctly applied the required cautionary principles applicable. On the evidence as a whole, taking into account the inherent strengths and weaknesses , as well as the probabilities on both sides, it cannot be found that the court a quo had erred in. (See S v Tshabalala 2003(1) SACR 14 (SCA)) The court correctly rejected the appellant's version.
- [13] It follows that the appeal against conviction cannot succeed. I propose that the appeal against conviction be dismissed.

C J VAN DER WESTHUZEN

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

V V TLHAPI

·JUDGE OF THE HIGH COURT

On behalf of Applicant: Instructed by:

Ms L A van Wyk

Legal Aid South Africa

On behalf of Respondent: Ms L Williams

Instructed by: Director of Public Prosecutions

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Prepared on 27 October 2026 · Esheria