

SOUTH AFRICA / JUDGMENT

Mtsumbei v S (A11/2020) [2020] ZAGPPHC 428 (24 August 2020)

[2020] ZAGPPHC 428**COURT**

North Gauteng High Court, Pretoria

BEFORE

D Makhoba, S Madiba

CASE / FILE NUMBER

A11/2020

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SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
1) REPORTABLE
YES/NO
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OTHER JUDGES YES/NO
3)
REVISED
Case number: A11/2020
24/8/2020

In the matter between:

ARGENT
MTSUMBEI
APPELLANT
versus
THE STATE
RESPONDENT

JUDGMENT**MAKHOB A J**

The Appellant was convicted and sentenced by the learned magistrate on three counts. Count 1 he was convicted for unlawfully breaking into the residence of one Eunice Wanda and Emanuel Ndlovu at plot [...]. Count 2 he was convicted of robbery with aggravating circumstances. Count 3 he pleaded guilty. The learned Magistrate sentenced the appellant to 3 years imprisonment, count 1 and 15 years imprisonment on count 2. It was ordered that counts one and three to run concurrently with count 2. It is also submitted to us that the learned magistrate erred by finding that the state managed to prove its case beyond a reasonable doubt. It is further submitted that the sentence is unjust and it induces a sense of shock.

In order to facilitate an easy understanding of the legal issues involved herein, a brief resume of the salient facts of this case is necessary. Mrs Eunice Wanda testified that she knows the Appellant from seeing him at the restaurant which is just in front of her one room dwelling. She personally have sold chips to him from this shop. She did not know the appellant's name.

On the 31st July 2018 at about 01:00 the appellant and another person broke the door of her room where she was sleeping. Inside, the electric bulb was switched on. The appellant came to where she was and he had a barret on and tried to use it to hide his face but his face remained exposed. The appellant picked up the pillow and a curtain and covered her face. She could not identify the other two persons in the house. Emanuel Ndlovu her husband was screaming. After the intruders left they discovered that the omega DVD, cash in the amount of R1000 and four cell phones were missing. The neighbour summoned the police and the police arrived. She told the police that she knows one of the robbers but did not know where he stays. After four days the police brought the appellant to her and she identified him as one of the perpetrators. The stolen items were not recovered.

Moreover, she testified that on the 28th, 29th and 30th July the appellant did come to the shop and also enquired about the owner of the shop's whereabouts.

Emanuel Ndlovu also testified that there were three assailants and they are unknown to him. He was assaulted with a steel rod.

The appellant testified that on the day in question he was at his place of residence and he was asleep at about 1am. The witness

Eunice Wanda is known to him very well.

The crisp issue in this appeal is the identity of the appellant. Whether the learned magistrate correctly applied the cautionary

rules in convicting the appellant. Again it must be borne in mind that the state witness is a single witness.

The evidence accepted by the trial court is that appellant came very close to her when he pulled the pillow from underneath her head and the Barrett that he tried to conceal his face with could not completely conceal his face since she has already seen him.

As far as the evidence of a single witness is concerned our courts have laid down the approach to be adopted by our courts to avoid convicting an accused person based on honest but erroneous evidence of a single witness. I will refer to a few decided cases to illustrate my point: “In *S v Sauls and others* 1981 (3) SA 172 (A) at 180E-G the court said : “there is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness...the trial Judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 (*R v Mokoena*), may a be guide to a right decision but it does not mean “that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence where well founded.....” it has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

In *S v Artman and another* 1968 (3) SA 339 (SCA) Holmes JA said the following: “ single witnesses- required that her testimony should be clear and satisfactory in all material aspects. The exercise of caution must not be allowed to displace the exercise of common sense”

The same applies when the court evaluates the evidence of identification. It was put succinctly by the court in *S v Mthetwa* 1972 (3) SA 766 (AD) 768 a-c: “ 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;...”

In the matter before us the witness who identified the appellant testified that it happened quickly and the appellant was wearing a barrette which covered the forehead. The husband could not identify anyone. Nothing was recovered from the appellant except that Ms Wanda testified that she knew the appellant from previous encounters with him when he came to the shop where she was selling.

Furthermore, in her Judgment the learned Regional Magistrate was scathing of the way the police handled the case. There was no identification parade and the appellant was arrested and taken to the Complainant to identify him. In this regard I agree with the magistrate. However, I do not align myself with the magistrate criticism of the police and / or their competency.

In S V Mthethwa supra the court said is it not enough for the identifying witness to be honest. In addition, the court said there

must be corroboration.

In the matter before us the witness (Ms Wanda) being a single witness could not tell the court by what features she identified the appellant. Moreover, there was no identification parade. In addition, nothing that was stolen found from the appellant. The identification which was quick was not corroborated.

Taking into account that the witness was a single witness and the intruder's forehead was covered, I am of the view that the learned Regional Magistrate misdirected herself in accepting the evidence of Ms Wanda as proof of guilt against the appellant beyond reasonable doubt. It is further my view that the court a quo should have given the appellant the benefit of the doubt and acquit him on all counts.

I make the following order:

16.1 The Appeal is upheld on counts 1 and 2 only.

16.2 The Conviction and Sentence on counts 1 and 2 only are set aside.

D MAKHOBA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION

I AGREE

S MADIBA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

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Prepared on 10 October 2026 · Esheria