

SOUTH AFRICA / JUDGMENT

Mvana and Another v S (CA&R212/2017) [2018] ZAECHGC 18 (7 March 2018)

[2018] ZAECHGC 18

COURT

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas, J Smith

CASE / FILE NUMBER

CA&R 212/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GRAHAMSTOWN

Case

No.: CA&R 212/2017

In

the matter between:

KHAYALETHU

MVANA

First

Appellant

SANDISO

TENGWA

Second

Appellant

And

THE

STATE

Respondent

JUDGMENT**REVELAS J:****Introduction:**

- [1] The two appellants were charged with and convicted of counts of robbery with aggravating circumstances, despite the fact that they pleaded not guilty to both counts. The two counts were taken together for purposes of sentence and both appellants were sentenced to an effective term of eight years' imprisonment. This appeal is directed at their convictions. Leave to appeal was obtained on petition.
- [2] The following undisputed facts gave rise to the charges levelled against the appellants: The two complainants, Simthembile Blom and Sibusiso Dolonga were walking in a street in Ebhongweni during the early hours of Sunday, 1 May 2016, just after midnight. They were on their way to a shop to purchase certain items. The nature of the items to be purchased was not common cause. On their way they were approached by three young men who were armed. One carried a firearm and the other two carried knives. One of the men, brandishing a firearm, cocked his weapon and ordered the two complainants to kneel. They both complied. The same robber demanded money from Blom who handed over R30.00 which is all he had. He was nonetheless searched by the robber with the firearm, who, on finding no money, took Blom's hat, t-shirt and the jersey he wore, but which was lent to him. One of the robbers who was armed with a knife, removed Blom's white "Lacoste" tackies.
- [3] The third robber, also armed with a knife, searched Dolonga and removed R100.00 from his pocket. One of the robbers- he did not see which one
- robbed him of his shoes. He also witnessed how the the robber with the firearm pistol-whipped Blom on his head. Dolonga concluded that Blom was hit because he did not have more money. Blom himself did not understand why he was assaulted with the firearm. Both complainants testified that they were ordered to look downwards during their ordeal. Having been relieved of their various possessions and money, the two complainants were ordered to lie down and the robbers disappeared.
- [4] It was further common cause that the complainants and the appellants were known to each other for a substantial time, an that the

complainants were aware that the appellants were cousins, and that the second appellant frequently visited the first appellant. The complainants usually saw the appellants at a Ghanian man's shop. There was no bad blood between the appellants and the

complainants. They were actually all on good terms with each other. Dolonga's older brother went to the same school as the first appellant and Dolonga used to take food to the first appellant when he was undergoing traditional initiation.

- [5] The two complainants maintained that they recognized two of the three robbers, as Kayaletu and Sindiso (the first and second appellants).

According to both complainants, the first appellant was the robber with the firearm and the second appellant was one of the robbers

armed with a knife. Neither of the two complainants recognised the third assailant as anyone they knew.

- [6] Both appellants denied that they were the robbers in question and contended that the complainants were mistaken as to their identity.

Both appellants relied on alibi defences.

- [7] According to the first appellant he was at his home in his shack since 17h00 the previous day, 30 April 2016. On arrival he was seen by his sister Tuniswa. His version was he went to bed that night between 20h00 and 21h00 and never left the house at any stage. At one point he said he went to bed five minutes after he arrived home.

- [8] The second appellant testified that on the evening of 30 April to 1 May 2016, he was at a birthday party of a girl named Nozuko Malinde who lived across the street. She invited him just after he returned home. There he enjoyed dancing and music with the other guests and he only left Nozuko's party at about 04h00.

- [9] The only issue to be determined as far as the appellants' conviction is concerned, is the reliability of the identification of the appellants as the assailants. The magistrate found that the complainants' evidence was reliable in this regard. He based his conclusion on credibility findings, in the course of which he rejected the versions of the two appellants, as well as the testimony of Nozuko Malinde who testified on behalf of the second appellant.

- [10] The State's case was challenged on several grounds. It was contended on behalf of the appellants that there were material

discrepancies between the testimony of the appellants in court and their statements made to the police. It is correct that the testimonies of the complainants as to their possible state of sobriety and which shop they were heading to when they were attacked,

differed from their statements to the police. According to their police statements, both complainants told the police that they had been drinking liquor with friends on the night of 30 April, a Saturday, and decided to go to a shop which was still open that time of night, to buy more beers. On their way there, they were attacked. In court, they denied that they had been drinking that night - they were just visiting with the friends they said - and on their way to buy bread (at a different shop than they had told the police), they were attacked. The complainants denied telling the police anything about consuming liquor that night and wanting to buy more beers.

- [11] According to Blom, he identified the appellants because the moon was shining bright that night and their heads and faces were uncovered. Dolonga testified that the moon was shining, but not brightly and according to him, there was sufficient light to make a proper identification of a person. The appellants and Nozuko Malinde testified that that it was a dark night with no bright moon. The second appellant even said that it was raining that night. The appellants argued that given the different versions between the State witnesses as to the brightness of the moon that night, the magistrate ought to have taken judicial notice of the moon phase at the relevant time, which was, according to the calendar entering its last quarter, at the time of the incident. The appellants submitted further, that the magistrate had erred in accepting that there was sufficient natural light to make a reliable observation as to identity.
- [12] Both complainants testified that they were in a state of shock and that the robbery lasted only a few minutes. The appellants emphasised that this fact and the fact that one of the complainants was assaulted and both were threatened with knives and a firearm. The appellants argued that in such circumstances, compounded by the darkness of that night, the appellants could easily have been mistaken about their identity. In addition, they submitted there was a witness (Nozuko Malinde), who placed one of assailants at completely different venue and that she corroborated the second appellant's version in all material respects. According to Nozuko, she met the second appellant and his brother near a taxi drop off point. She had just returned from work in a taxi and it was 18h00. She invited the two of them to her 26th birthday party which would take the form of a braai and was due to start soon. The second appellant's version is that he was at home watching television when Nozuko arrived and invited him to her party. This was after 19h00, he said. The magistrate did not regard the discrepancies as immaterial. There were also other discrepancies.
- [13] It is trite that that a court of appeal should refrain from lightly interfering with the credibility findings of a trial court which are presumed to be correct. This is so because the trial court had the benefit of being steeped in the atmosphere of the trial court and observing and hearing the evidence firsthand. The trial court is therefore "in the best position to determine where the truth lies." (See *S v Leve* 2011
- (1) SACR 87 (ECG) wherein the following well-known cases on this subject were cited and relied upon: *R v Dhlumayo and Another* 1948
- (2) SA 677 (A) at 705, *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 e and *S v Francis* 1991(1) SACR 198 (A) at 204 c-f)
- [14] The discrepancies between the complainants' police statements and their testimony in court in respect of their alcohol consumption that evening cannot be explained away by a possible misunderstanding between themselves and the police. They were simply not truthful on this aspect. I assume that they naively tried to create a good impression in court. However, this flaw in their evidence is not fatal to their entire testimony as it was not germane to the

relevant issues in dispute. The complainants did not did not fabricate any evidence about the robbery itself. In that regard they corroborated each other in all material respects. There was no evidence to suggest that they were inebriated to the extent that their powers of observation were adversely affected. Their testimony was in any event not challenged on that basis in the appeal, but on the basis that they made a mistaken identification in the dark and because they were in shock. The magistrate found that they were both very confident about their identification of the two appellants.

[15] Much was made about the amount of moon light, or lack of it, on the evening in question during argument in the appeal. The fact that it may have been a dark night does not assist the appellants. Assuming that it was a dark night, it has to be considered that the incident in question occurred outdoors and not in a dark room for instance, where star light and other sources of light were blocked out. It can therefore not be a given fact, as the defence would have it, that it was too dark to make a reliable identification. The complainants had been walking in the dark for some time, sufficiently long for their eyes to adjust to the dark. The complainants were not only well acquainted with the appellants, but they also had a close physical encounter with both appellants and a third assailant, for some minutes, thus making their identification of the appellants all the more reliable.

[16] The most significant aspect of the testimony of both complainants was that they knew the appellants very well. They had also seen the appellants very recently prior the incident in question. The magistrate's substantial reliance on this aspect of the evidence is not open to criticism. In well-known case of *S v Mthetwa* 1972

(3) 766 (AD) the test for identification was enunciated at 768 a-c of the judgment as follows:

"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; see cases as R.

v. Masemang, 1950 (2) S.A. 488 (A.D.); R.

v. Dladla and Others, 1962 (1) S.A. 307 (A.D.) at p. 310C; *S v Mehlahe*, 1963 (2) S.A. 29 (A.D.)."

[17] The manner in which the magistrate dealt with the question of identification was in accordance with the aforesaid test.

[18] It is also noteworthy that only hours after the robbery, the complainants took the police to the homes of the appellants to point

them out as the robbers who had robbed them the night before. Also significant is the testimony of the police officer, sergeant Tenge, who testified that when he arrested the appellants and explained to them the reason for their arrest, there was no protest from either of them or members of their families to the effect that they each had an alibi. Even if cross-examination did not sufficiently damage the appellants' alibi evidence and no substantial criticism can be levelled at it, this type of evidence cannot be viewed in isolation as a separate issue to the question of identification. In *S v Nqina* 2007

(1) SACR 19 (SCA) it was held that an alibi defence is essentially a denial of the State's case on the question of identification. In an assessment of the evidence in its totality the fact that an accused's version, when viewed in isolation, cannot be criticised, does not mean that there can be no question of a positive rejection of his version. The quality and weight of the opposing evidence may be so persuasive that the court is compelled to eliminate the possibility that an accused's evidence may be true. This principle was very recently restated by Pickering J in *S v Sonamzi*, Unreported case No CA254/2016, dated 19 February 2018 (ECG). See also *S v Van Tellinghen* 1992 (2) SACR 104 (C).

[19] The magistrate's findings of fact and credibility were premised on a proper analysis of all the evidence which was properly considered and his reasoning was not flawed by any irregularity or patent error. Consequently the appeal should be dismissed.

[20] Accordingly the following order is made:

1. The Appeal against conviction is dismissed.

E REVELAS

Judge of the High Court

I concur:

J SMITH

Appearances:

For the Appellant: Adv D.P Geldenhuys, instructed by Legal Aid

For the respondent: Adv D Els instructed by National Director of Public Prosecutions

Date heard: 21 February 2018

Date delivered: 07 March 2018

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