

SOUTH AFRICA / JUDGMENT

Ncobela and Another v S (A15/2022)

[2024] ZAFSHC 123 (29 April 2024)

[2024] ZAFSHC 123**COURT**

Free State High Court, Bloemfontein

BEFORE

Vanzyl, Boonzaaier

CASE / FILE NUMBER

A15/2022

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Source record**FREE****STATE HIGH COURT, BLOEMFONTEIN****REPUBLIC****OF SOUTH AFRICA****Reportable: YES/NO****Of****Interest to other Judges: YES/NO****Circulate****to Magistrates: YES/NO****Case****No: A15/2022****In****the matter between:**

MDUDUZI
NCOBELA
1st APPELLANT
MOEKETSI
ISHMAEL MAKORO
2nd
APPELLANT
and
THE
STATE
RESPONDENT

CORAM:

VANZYL, J et
BOONZAAIER,
AJ

JUDGMENT

BY:

BOONZAAIER, AJ

HEARD ON:

4 MARCH 2024

DELIVERED ON:

29 APRIL 2024

- [1] The Appellants and a co-accused were charged on a count of Robbery with aggravating circumstances, two counts of being in possession of two unlicensed firearms and being unlawfully in possession of ammunition. The co-accused was acquitted on all charges. Appellant 1 and Appellant 2 were convicted on the charge of Robbery with aggravating circumstances but acquitted on the other charges by the Regional Court, Bloemfontein on the 13 May 2016. Both the Appellants were sentenced to 8 years imprisonment.
- [2] The Appellants pleaded not guilty on all four (4) charges and offered no plea explanation.
- [3] The appeal is against the conviction only.
- [4] It is common cause that on 25th day of August 2013 an armed robbery took place at Milwaukee Spur at Preller Plein, Bloemfontein. Approximately eighty thousand Rands (R 80 000) in cash, cell phones, Volkswagen car keys and a Toshiba laptop were taken by force.
- [5] According to the evidence the perpetrators were armed with firearms. The Appellants simply denied any involvement in the commission of the crime.
- [6] The events giving rise to the Appellants conviction were briefly as follows:

The complainant, Magdalena Gouws testified that on the specific day at about 22h00, she was on duty as a manager at the Spur at Preller Plein.

The lights were on. She was sitting at a table doing administrative work when two African males walked in. Something about the way they looked at her when they had entered, scared her. She immediately phoned Bloemsec Security services.

- [7] She went to her office to fetch her car keys and laptop before she tried to leave the shop. On her way out she talked to one Tina, a co-worker. When she looked up, she saw a person with a gun. The one guy instructed Tina to open the till, whereafter he told the complainant to open the safe. At that stage he was facing her.

- [8] Complainant went into the office, opened the safe and took out the money to put into a bag. It was roughly Eighty Thousand Rand (R 80 000). This person wanted to reload or cock the shotgun, but it got stuck. While he tried to fix the gun, he asked her where all the camera boxes were. After she showed him where the cameras were, he removed it.
- [9] He also asked her where her cell phone was and she told him that the previous person took it. He instructed her to leave the office and to lie down. He then instructed all of them in the restaurant to go into the storeroom. She then heard a gunshot. They closed the door, whereafter several more gunshots were fired outside. Somebody later came to open the door and released them.
- [10] Complainant was unable to identify this person. She only said that he was wearing a red hoody. They took her Samsung Galaxy X3 cell phone, Toshiba laptop and her Volkswagen Vivo car keys.
- [11] Everything that was robbed was later recovered at the Police station.
- [12] Sydney Makatsa testified that he was serving customers at their table when two people walked in just before closing time at 22h00. They pointed guns at the customers. They ordered the customers and waiters to the front of the restaurant. Another person entered from the front also armed with a shotgun and blocked the people from outside. They ordered all to lie down on the ground and ordered Tina to open the safe. Thereafter they ordered them all to go to the storeroom. Someone fired a shot in the storeroom. They also heard gunshots outside. The security forces came in and released them.
- [13] Mr. Makatsa also testified that there were four persons in the restaurant and the fifth one came from the stairs.
- [14] Mr. Makatsa was able to identify Appellant 2 in the dock. He testified that he served Appellant 2 earlier that night. Appellant 2 was also the one with a shotgun. He later also identified Appellant 2 at an identification parade.
- [15] Captain Thabo Robert Mokhobo with 27- years' experience in the South African Police testified that he was the officer in charge of the identification parade ("ID parade") which was held at Mangaung Police station. This ID parade was held according to the specifications and requirements of the Criminal Procedure Act.[1] At the identification parade were fifteen (15) male persons, including the Appellants. Three witnesses made a positive identification by pointing out the two Appellants at the identification parade. The witnesses were not able to see the persons who were lined up for the identification parade beforehand.
- [16] Gert Hendrik Prinsloo is employed as an armed response officer at Bloemsec Security Service. The night in question he was called from the control room at about 22h45 and instructed to stop as a back-up around the corner from where the suspects were. Two of the suspects ran down the stairs where they grabbed Piet, the FNB Fidelity Guard. He shouted and they left Piet and Prinsloo fired a shot. Both of the suspects ran away. One had stolen goods in a light blue rubbish bag. Prinsloo couldn't run as fast as them as he was wearing a

bullet proof vest.

- [17] He still heard shots as he ran to the opposite side of Lauw Wepener Street where his senior officer and another patrol security was. He helped Louw van Jaarsveld to arrest the one suspect in possession of the keys of a White Opel Kadette. Appellant 1 was the driver of the Opel Kadette.
- [18] By looking through the window he saw a Bible and a blue shotgun shell lying on the backseat of the car. The visibility was good as many lights were on. He identified the co accused on his was tall and skinny appearance.
- [19] Kagisho Molejane testified that he was a waiter at the point where the food is prepared. It was a Sunday night. He heard a noise from the side where the customers were seated. He saw that there were people running in different directions. He went to the front side of the restaurant when he was pointed with a firearm by one of the perpetrators. He was about a meter from the perpetrator when he pointed him with the firearm. It was Appellant 2.
- [20] Appellant 2 directed Mr. Molejane to go where the other people were lying on the ground. Appellant 1 stood right in front of him when he directed him to put his cell phone in a plastic bag. It was a Samsung Omnia. The two other robbers' faces were covered and he could not identify them. They were all ordered to go to the storeroom where they were kept. Mr. Molejane heard a gunshot and about five minutes later they heard some gunshots outside the restaurant. He later recovered his cell phone from the Police.
- [21] He further revealed during cross examination that he saw the two Appellants and the co accused amongst other people about a week before the incident. He served them and he could remember that Appellant 2 took the sweets from the bowl they keep on the desk. He said that he was taking the sweets for his children. Appellant 2 was also under the influence of liquor at the time. Mr Molejane identified Appellant 2 positively together with three (3) other people at the Identification parade.
- [22] Constable Teboho William Motabeng testified that he is a member of the South African Police Service and also the investigating officer in this matter. He was also the one who later arrested the co accused in this case, at Batho location. He and Warrant Officer Lebudi together with Appellant 2 went to the co accused's house where they recovered a shotgun and ammunition from the premises where the co accused was staying. The firearms were all sent for ballistic analysis. Constable Motabeng took the exhibits (nine firearms) to Pretoria to be tested.
- [23] Warrant officer Dawid Gerhard Raath a policeman with 22-years' experience stationed at the police emergency services testified that at the night in question he was in full police uniform and driving with Warrant officers Opperman and April in a marked police vehicle. They received a call of a business robbery in progress at Milwaukee Spur. They were not far from the Spur and just when he drove into the parking area beside the Spur, he saw a black male running from the Spur towards the police vehicle.

- [24] Warrant Officer Opperman and himself got out of the vehicle and Opperman instructed the guy running towards them to stop and lie down. Opperman apprehended the and Raath together with Lieutenant Colonel van der Merwe went up to the Spur to enquire what happened. After they had been informed about the robbery, they left the Spur at the top level where there is another parking area for vehicles.
- [25] In that area there was a white Opel Kadette parked. It was locked. On the backseat of this vehicle was a blue shotgun round. He took down the vehicle's registration number and went down to the Police vehicle to verify the owner of. vehicle. On his way to the police vehicle Raath received a call from Constable Schlebush of Park Road Police station. He asked Raath to accompany him to a house at, 55 General Hertzog Street about 400 to 500 m from the Spur at Preller.
- [26] Schlebush indicated that when they were passing that house, they saw two unknown black males in front of the private residential house trying to get over the wall. The gates were locked but found the door in the side wall was open and they obtained entrance to the premises. When they entered the garden, they saw on top of the steps going up to the house a blue plastic bag lying on the ground. Raath and Schlebush searched the area. When they opened the blue plastic bag they found some cash money, cell phones, a car key and a laptop there.
- [27] Schlebush looked over the fence and saw fresh shoe marks in the garden next door. The owner of number 53 opened the gate for them and there was a passage between the house and the garage. They went through that passage to enter the backyard to search the back side as well. At the end of the passage, they discovered a black shotgun standing upright against the wall. Raath noticed that the rounds inside the shotgun were also of a blue colour. There was a steel table and a pile of steel construction against the back wall of the premises. Schlebush climbed up on that steel construction to have a look. He took the flashlight and lighted the top of the roof. He called Raath immediately and indicated that there was an unknown black male lying on top of the roof. This black male also had a backpack with him. He was arrested and they opened the backpack and there was a lot of money inside the backpack. Sergeant Nel from Park Road Police station arrived and helped them to descend from the roof.
- [28] The person who was taken from the roof was Appellant 2. Raath also identified him in the dock at the hearing.
- [29] Warrant officer Willem Gerhardus Opperman a police officer at the Flying Squad Unit with 28 -years' experience confirmed what Raath testified about the robbery that evening. He further testified that after he arrested the perpetrator, he asked him to identify himself. The names he gave Opperman was Dudusa Petrus Ncobela, Appellant 1. He also provided his ID number and where he lives.
- [30] The First Appellant's version:

Appellant No.1 testified that he went to the Spur that night to buy a take away. He drove up the parking area with to park but the doors were closed. He went downstairs to enter where the doors were open. At th t stage he was on foot Before he could enter, he was arrested. The security guard pointed a firearm at him and instructed him to lay down. This Security guard wore a black uniform. This Security guard explained to him that there was a robbery. He kneeled down with his arms in the air. Then he heard shots going off. After a while Police Officers appeared and cuffed him. His rights were not explained to him. He tried to explain to the Police that he was only there to buy a take away. They searched him and found a car key, a cell phone and a wallet. He also explained to the police that he parked his vehicle where vehicles are normally parked.

[31] An identification parade was held sometime after his arrest. His evidence is that the witnesses saw him prior to the identification

parade. He doesn't know Appellant 2.

(32) The Second Appellant's version:

He came from duty and was walking in the street when he was arrested. He was carrying a black bag and inside the bag was his ID and his lunchbox.

[33] Counsel for the state submitted t at on a proper

analysis

of the totality of the evidence there are some inherent improbabilities namely:

i)

Would the police arrest appellant 2 when merely walking in the street at night?

ii)

Would appellant 1 be arrested for merely going to the Spur as a customer to buy takeaways?

iii) Is it a coincidence that the very people, the Appellants, who were arrested so innocently as they allege are the same people which the witnesses identified as the robbers?

iv) Is it a coincidence that both witnesses, Sydney Makatsa and Kagiso Molejane, testified that Appellant 2 was in possession of a shotgun during the robbery but both say that Appellant 1 was unarmed.

v) Is it a mere coincidence that the person whom the two abovementioned witnesses say was in possession of a shotgun (Appellant2) was arrested at house 53 General Hertzog Street where a shotgun was later recovered?

vi) Is it a coincidence that the shotgun that was recovered at the house where Appellant 2 was arrested had a blue round(ammunition) in it and a blue cartridge was also seen in Appellants 1's Opel Kadette?

- vii) Is it a further coincidence that Appellant 2 was arrested with a backpack containing money?
- viii) Is it probable that Appellant 2, being wrongly accused of a robbery he did not commit, would not call his employer to support his version that he was at work and had just knocked off?
- x) Is the evidence of the police officers and the identifying witnesses a conspiracy against the appellants in as far as it is unfavourable to them?
- [34] It is the State's submission that the requirements for sufficient identification of the Appellants have been fully satisfied.[2]The State proved its case beyond reasonable doubt and accordingly, the Appellants were correctly convicted.
- [35] The Appellants' issues raised in the appeal can be summarised to be that the trial court erred in finding that the identity of the Appellants had been proved beyond a reasonable doubt.
- [36] The Appellants submit that the identification of the appellants as the assailants were not properly made due to the following:
- i) The court a quo relied on the evidence a per the identification parade to convict the appellants; however, the co-accused was also identified in the identification but was acquitted because the witnesses testified that they could be making a mistake to his identification.
- ii) The witness Kagiso Molejane's identification of Appellant 1 is unreliable. He identified two wrong persons unrelated to this case during the identification parade and only while testifying in court did, he identify Appellant 1. This amounts to dock identification.
- iii) During the time, that Kagiso Molejane identified Appellant 2, he was afraid and his attention was focussed on the firearm as well as the person pointing the firearm. A further aspect is that he never informed the police that he saw Appellant 1 and 2 in the Spur a week before the incident. Therefore, this witness's testimony cannot be trusted because he was not sure of the identity of the perpetrators.
- iv) The identification of Appellant 2 by Mr. Sydney Makatsa was also unreliable. This witness pointed out a person unrelated to the offences that the Appellant was charged with. Even though this witness pointed out both Appellant 2 and 2 the co-accused, the court found that there was doubt to the identification of the co-accused.
- v) The witnesses never saw Appellants 1 and 2 before the date of the incident except for Kagiso Molejane.
- [37] The Appellants are also of the view that the court a quo erred in finding that there were no improbabilities in the state's case.

i) According to the evidence of Mr. Raath, Appellant 2 was found on the roof not far from where the items were found. However, there were no fingerprints and or footprints found that linked Appellant 2 to the blue bag that contained the stolen items or to any of the stolen items or the firearms.

ii) The evidence of Mr. Raath, Mr Schlebush was never tendered which raised a question why he was not called to testify?

iii) Appellants submit that the police were looking for the suspects in the area and it is probable that Appellant 2 could have just been walking in the street on his way home.

[38] The court a quo also erred in finding that the witnesses testified in a satisfactory manner. Me. Abrahams submitted that that there were material contradictions in the evidence of the state witnesses;

i)

The arrest of Appellant 1 is a material aspect especially when Appellant 1 is denying how the arrest happened.

ii)

According to Mr Gert Prinsloo of Bloemsec he assisted Louis van Jaarsveld in the arrest of Appellant 1, however Mr. Willem Opperman contradicted this version. According to Mr Opperman, he arrested Appellant himself.

iii) This issue is further exacerbated by the fact that Louis van Jaarsveld was not called to give evidence.

iv) Based on the contradictions as to the arrest of Appellant 1, appellant 1 's version that he went to buy a take - away and never entered the Spur is probable.

v) Only in cross-examination did Mr. Willem Prinsloo testify that he asked Appellant 1 where he came from however this aspect was not mentioned in evidence in chief.

vi) According to Mr. Kagiso Molejane's evidence, appellant 2 pointed him with the firearm in the face and Appellant 1 asked him for his cell phone. However, in his statement he said that he handed his cell phone to the person who pointed him with the firearm.

THE LAW:

Appeal on the Conviction:.

[39] Section 322(1) of the CPA reads inter alia as follows:

"In the case of an appeal against a conviction ... the court of appeal may-

- (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
- (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
- (c) make such order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect." [My own emphasis]

[40] It is thus trite that a trial court must consider the totality of the evidence which led to determine whether the essential elements of a crime have been proved. As Nugent J stated in *Van der Meyden*,^[3] cited as follows:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[41] In dealing with this matter this court is mindful that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong. In *S v Monyane and others* 2008 (1) SACR 543 (SCA) at paragraph [15] the learned Ponnann JA stated the following which is relevant.

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited.... In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e - f)."

[42] It is consequently settled law that the powers of a court of appeal to interfere with the findings of fact of a trial court are strictly limited. If the court of appeal is satisfied that there has been no misdirection on the facts, it ought to accept that the trial court's evaluation of the evidence is correct. A court of appeal will interfere if it is convinced that that the evaluation is wrong. *S v Bailey* 2007 (2) SACR 1 (C). It is therefore only in exceptional cases that an appeal court will be entitled to interfere with a trial court's findings of fact and credibility^[4]

[43] The cautionary rule requires that courts treat evidence of identification of the accused person with caution, as eyewitness identifications are notoriously fallible and prone to error.

"[i]t 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." [12]

[44] The reliability of a witness testifying as to the identification of an accused must be considered against the evidence as a whole.

[45] In *S v Lubaxa* [5] it was held that what a fair trial entails must be determined by the circumstances of each case. The circumstances of this case required independent corroborative evidence on the identification issue, in particular the presence of the Appellants when the robbery was perpetrated and their involvement therein.

[46] The State tendered the above evidence to link the Appellants to the crime.

CONCLUSION:

[47] Considered holistically, it is clear what exactly happened the night of this event.

[48] Applying the principles as stated above to the facts, the court a quo found the State witnesses to be beyond reproach and the appellant's version as riddled with improbabilities.

[49] I am satisfied that the conviction of the Appellants by the court a quo in respect of count 1 was correctly arrived at. There was no irregularity and/or misdirection in the conviction as alleged by the Appellants. There are consequently no grounds on which this court is entitled to interfere with the conviction of the Appellants.

[50] In the premise the appeal, which is against the conviction only, stands to be dismissed.

ORDER

[51] In the result the following order is made:

51.1. The appeal against the conviction is dismissed.

BOONZAAIR, AJ

I agree and it is so ordered.

VAN ZYL, J

For the Appellants: Adv.Venecia Abrahams Instructed by: Legal Aid South Africa 4th Floor,
Fedsure Building 49, Charlotte Maxeke Street BLOEMFONTEIN For the Respondent: Adv. Moseme
Lencoe Komane Counsel for the Respondent Office of the Director of the Prosecutions Waterfall
Building BLOEMFONTEIN

- [1] CPA, Act 51 of 1977.
- [2] S v Charzen (2006) 2 ALL SA 371(SCA).
- [3] 1999(2) 79 W p 82.
- [4] S v Francis 1991' (1) SACR 198 (A) at 204b - e; S v Hadebe and Others 1997(2) SACR 641(SCA) at 645e - f.
- [5] [2001] ZASCA 100;2001(4) SA 1251 SCA para 21.

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