

SOUTH AFRICA / JUDGMENT

Ndlovu v S (A216/2017) [2018] ZAGPJHC 16 (15 February 2018) [2018] ZAGPJHC 16

COURT

South Gauteng High Court, Johannesburg

BEFORE

B A Mashile, D Fisher

CASE / FILE NUMBER

A216/2017

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OFFICE OF THE CHIEF JUSTICE

REPUBLIC OF SOUTH AFRICA

HIGH COURT

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE

NO: A216/2017

Date of Hearing: 01

February 2018

Date

of Judgment:____

February 2018

In the matter

between:

OSCAR

NDLOVU Appellant

and

THE

STATE Respondent

JUDGMENT

MASHILE J:

[1] The Appellant, who was throughout the duration of this trial legally represented, appeared before the Regional Court for the Regional Division of South Gauteng held at Johannesburg charged with robbery with aggravating circumstances as read with the provisions of Section 51(2) of the Criminal Law Amendment Act No 105 of 1997 (“Act 105 of 1997”).

[2] The Appellant pleaded not guilty to the charge and chose not to lay a basis for his plea by tendering an exculpatory statement. He was nonetheless convicted and sentenced to 10 years imprisonment on 21 July 2016 and 20 September 2016 respectively. The matter is before this Court pursuant to a successful petition on conviction alone granted by this Court on 27 June 2017, the Court a quo having refused him leave to appeal against both conviction and sentence on 27 October 2016.

[3] The Appellant founded this appeal on the basis that the Court a quo erred by finding that:

3.1 The State has proved the guilt of the appellant beyond reasonable doubt;

3.2 There were no improbabilities in the version of the State;

3.3 The State witnesses gave their evidence in a satisfactory manner; and

3.4 The evidence of the State witnesses can be criticised on matters of detail only.

[4] The terse background facts from which the conviction stems are that:

4.1 On 17 May 2015 during the early evening between 18H00 and 19h00, the Complainant was in the company of his friend, Jonathin Rashid (“Rashid”). They were walking in a leisurely manner in the street when an unknown person suddenly threw his arm around the Complainant’s neck from behind and choked him.

4.2 The Complainant managed to free himself from the suspect. He turned around to face him and a struggle ensued. They fought for approximately 4 minutes. He managed to see the suspect as they were fighting. The area of the scene of the crime was illumined by lights from the surrounding buildings and headlamps from motor vehicles that drove past.

4.3 The suspect ultimately stabbed him on his shoulder and hip. He became weak and fell to the ground following which the suspect pick-pocketed him and took his mobile phone. He could not relate how matters unfolded thereafter other than that he woke up in hospital.

4.4 Two days later Rashid told him that the suspect who stabbed him has been apprehended. Rashid drove him to the local police station where he saw the suspect. He was asked to make a statement which he did.

4.5 In court, he identified the Appellant as the suspect who attacked and robbed him of his mobile phone during the evening in question.

4.6 As the Complainant was being attacked Rashid ran across the street and observed the tussle between the two from the other side. He confirmed that the fight took approximately

for 4 minutes. He picked up a brick and was approaching the scene when he noticed the suspect take out the mobile phone of the Complainant and ran away.

4.7 Two days thereafter, he saw the suspect go into one of the buildings in the same vicinity. He called the police and on their arrival, he told them that a suspect who had stabbed the Complainant two days ago had gone into the building.

4.8 While the police were inside the building the suspect ran out of the building and both the police and members of the public including Rashid gave chase until the suspect was arrested around the area of Park Station.

4.9 Constable Mthombeni largely corroborated the evidence of Rashid on how he acquired knowledge of the suspect, that he ran out of the building, that he was chased by the police and members of the public, and that he was caught by the police in the area of Park Station. The police searched him and found a knife in his possession.

4.10 The Appellant denied that he was involved in the stabbing and robbing of the Complainant. His legal representative applied for a discharge in terms of Section 174 of the Criminal Procedure Act No 51 of 1977. The Court a quo dismissed the application whereupon the Appellant closed his case without testifying.

[5] The State must adduce evidence and establish beyond reasonable doubt that the suspect who attacked, stabbed and robbed the Complainant of his mobile phone is one and the same person as the Appellant. The Complainant and Rashid believe that the Appellant is the suspect and the Appellant thinks that they are mistaken in identifying him as that person. The main issue is therefore one of identity.

[6] The onus of proving the accused's guilt beyond reasonable doubt rests with the State. If the accused's version is reasonably possibly true then he stands to be acquitted. See in this regard *S v Trickett* 1973(3) SA 526(T) and more recently, *S v Mavinini* 2009 (1) SACR 512 (SCA). This remains the position even if the version of the accused is found to be improbable or even if the Court subjectively disbelieves him, he will be entitled to his acquittal provided his version is reasonably, possibly true. See *S v V* 2000 (1) SACR 453 (SCA) and later, *S v Mafiri* 2003 (2) SACR 121 (SCA).

[7] When evaluating the evidence led, the Court must not decide the matter in a piecemeal fashion. All the evidence presented must be taken into account. The cases of both parties must be weighed against each other. See *S v Van Aswegen* 2001

(2) SACR 97 (SCA) and *S v Chabalala* 2003 (1) SACR 134 (SCA).

- [8] The Appellant's denial makes it evident that this matter is one that concerns his identity. Accordingly, it is incumbent upon this Court to distinguish between the reliability and the credibility of the tendered identifying evidence. See *S v Nango* 1990 (2) SACR 450 (A). The Appellate Division, as it then was, held in *S v Khumalo* 1992 (2) SACR 601 (A) that honesty and conviction of a witness must never influence the separate investigation into the reliability of the identification made. Also pertinent in this regard is the case of *S v Charsen and Another* 2006 (2) SACR 143 (SCA).
- [9] In *S v Mputing* 1960 (1) SA 785 (T) it was held that it is also the duty of the court to take into account the identifying witness' ability to observe as well as the witness' recollection of the incident. It was further held that the process by which a person identifies someone or something is regulated by the subconscious mind. A person may possess the ability to accurately identify a perpetrator without consciously being aware of any specific characteristics or circumstances assisting him/her with this identification. In practice, this leads to many instances where a witness would positively identify an Accused by merely looking at his/her face without being able to indicate any distinct characteristics or circumstances, which could explain this identification.
- [10] This case also involves dock identification of the Appellant by the Complainant. In that regard it is instructive to refer to the matter of *Mdlongwa v The State* (99/10) [2010] ZASCA 82 (31 May 2010) where the court found that:
- "Generally, a dock identification carries little weight, unless it is shown to be sourced in and independent preceding identification. But there is no rule of law that dock identification must be discounted altogether, especially where it does not stand alone".*
- In making that finding in *Mdlongwa* supra, the court was following in the footsteps of *S v Tandwa* 2008 (1) SACR 613 (SCA).
- [11] The other legal aspect that is raised in this case relates to the fact that the only evidence that was before the Court a quo was that of the State because the Appellant exercised his right to remain silent thereby depriving the State the opportunity to cross-examine him. It is trite law that statements put to witnesses during cross examination is not evidence. See *S v Katoo* 2005 (1) SACR 522 (SCA).
- [12] Besides, it is trite law that a court is, under appropriate circumstances, entitled to draw adverse inference where an accused person consciously desists taking the stand to put his version of the case.
- [13] The Court a quo cannot be faulted for its conclusion that the identification of the Appellant by the Complainant and Rashid was proper and for using it in his subsequent conviction. At face value, the Appellant and Rashid seem to have contradicted themselves on how visibility was around the area of the scene of the crime but a closer analysis of their

testimony is essentially similar.

[14] The time of the occurrence of the incident is common, between 18h00 and 19h00. They both testified that the area received light from the surrounding buildings and passing cars. Rashid however, stated that visibility was not good as it was in the evening. His evidence therefore must be understood against the background that he was still able to identify the Appellant the fact that it was in the early evening and dusky notwithstanding.

Apart from this, it must be borne in mind that Rashid recognised the Appellant as a familiar figure in the area.

[15] By running away from the building in which the police were looking for him without any explanation, the Appellant made it inexorable for the Court a quo to infer, correctly so, that he knew that he was wanted for the crime that he had committed two days earlier. One would have expected him to immediately stop running if he was innocent. He therefore acted in a manner that was consistent with how a suspect who attacked, stabbed and robbed the Complainant would act.

[16] As though that was not enough, upon his apprehension, the police retrieved a knife from his person. It is hard to refrain from linking the knife to the stabbing of the Complainant by the Appellant on that evening. Counsel for the Appellant asserted that the Appellant and Rashid failed to give precise features with which they identified the Appellant other than testifying that he was tall, dark and slim. That could be so but again I revert to the Appellant's own behaviour of running away once he had been identified by Rashid and cornered by the police. In any event, the statement of the Supreme Court of Appeal in *Mputing supra* is relevant in this regard.

[17] The Complainant also testified that he had seen the Appellant on more than one occasion in the area. It is therefore not without significance that he was able to point him out at the police station and in court while in the dock. Furthermore, he fought for his life against the Appellant when he was eventually overpowered and robbed of his mobile phone. I do not understand the logic in the argument that the Complainant could not have identified the Appellant because he was attacked from behind and that the incident did not last for long. Well, 4 minutes can be very long in circumstances where one finds oneself

fighting for one-self's dear life. The testimony of the Complainant is that he freed himself and then came face to face with the Appellant as they were tussling. The contention here is that he had an opportunity to observe the Appellant.

[18] Although the dock identification must be approached with some measure of circumspection, it adds significant value to the overall evidence especially against the background that I have laid in the few preceding paragraphs. In other words it is extremely valuable when understood in the light of the other testimony of the police officer, Mthombeni, Rashid and the Complainant himself. In this regard the court has in mind the Appellant's choice to remain silent thereby placing the Court a quo in a position where it had to draw a negative inference against him, that he ran away after realising that he was being pursued and that. The Complainant and Rashid know him from seeing him in the area. The

case of Mdlongwa supra finds application here.

- [19] Counsel for the Appellant argued that there were numerous discrepancies in the evidence of the witnesses of the State. That might have been so, but those witnesses did not contradict themselves on material aspects of the case. The fact that the one witness testified that they were coming from work and the other said that they were sauntering in the street is completely here nor there when viewed against the crime that has been committed. Thus, in *S v Sithole* 2006 JDR 0739 (SCA), it was held that the contradictions in the evidence of the State witnesses, who corroborated each other on material aspects of the case, were not sufficiently material to justify rejection of the State's version.
- [20] Everything said, the last nail in the coffin for the Appellant is his choice to remain silent on the face of all this incriminatory evidence against him. His decision to remain silent left the Court a quo no choice but to rely squarely on the testimony adduced by the State witnesses alone. The case of Mputing supra finds application in this regard. He was legally represented and one would think his election to keep silent, imprudent as it might have been, was thoroughly deliberated.
- [21] I agree that the State has proved beyond reasonable doubt that the Appellant attacked, stabbed and robbed the Complainant on 17 May 2015 at or near corner Du Ponte and Harris Street in the Regional Division of Gauteng. In the circumstances, I am constrained to uphold the decision of the Court a quo to convict the Appellant as charged and I propose the following order:
1. The appeal is dismissed.

B A MASHILE

Judge of the Gauteng High Court

I agree

D FISHER

APPEARANCES:

For the Appellant: Adv C Xamsana.

Instructed by: Legal aid.

For the Respondent: Adv GE Market.

Instructed by: The Director of Public Prosecutions.

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Prepared on 13 October 2026 · Esheria