

SOUTH AFRICA / JUDGMENT

Ngubeni v S (A8/2020) [2020] ZAGPPHC 693 (16 September 2020)

[2020] ZAGPPHC 693

COURT

North Gauteng High Court, Pretoria

BEFORE

Mokose, Collis

CASE / FILE NUMBER

A8/2020

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
(1)

REPORTABLE: NO
(2)
OF
INTEREST TO OTHER JUDGES: N O
(3)
REVISED.
16/9/2020
CASE
NO: A8/2020
In

the matter between: VUSI
KHAOLE NGUBENI
Appellant
and
THE
STATE
Respondent

JUDGMENT**MOKOSE J**

- [1] The appellant was convicted in the Regional Court sitting at Benoni on one count of robbery with aggravating circumstances. He was sentenced to 15 years' imprisonment. The appellant applied for leave to appeal both conviction and sentence but was granted it only in respect of conviction. He had been represented throughout the trial.
- [2] The complainant had testified that on 19 June 2016 at approximately 06H45 as she was on her way to work, she was approached by the appellant with a flick knife who demanded her cell phone. She handed it to him and he walked away with it. A few minutes later traffic officers appeared and she informed them of the robbery that had just taken place. She then climbed into the vehicle with the traffic officers which drove around the area in an endeavour to locate the appellant. About fifteen minutes later they spotted the appellant, questioned him about the complainant's cell phone and then arrested him. When searched by the traffic officer, the complainant's cell phone was not found on him.
- [3] During cross-examination the complainant testified that she had identified the appellant by the clothes he wore, a black leather jacket and a white hoodie. Furthermore, she recognised his face as well as lump which was part of a scar under his chin.
- [4] Constable Malaka, a Metro officer employed by the Ekurhuleni Metropolitan Municipality, testified that the complainant had reported to him that she had been robbed and had described the robber's apparel as a black leather jacket, was bald and had a lump on the right side of his face. He had arrested the appellant.
- [5] Warrant Officer Masondo testified that he was the cell commander on duty on the day in question and had booked the appellant into the Police cells. In so doing, he had found a flick knife hidden away in the appellant's tekkie.
- [6] The appellant testified in his own defence and confirmed that he had been arrested on 19 June 2016. He testified further that he had been walking along a street when he was stopped by a marked Metro Police vehicle. They asked him if he knew the lady who was seated in the car. He denied knowing her but was then arrested. He was found to be in possession of three cell phones, one of them being his own and the others having been picked up in rubbish bins. He testified that he picks scrap items.
- [7] In cross-examination he denied that he was the robber who had taken the complainant's cell phone. He testified that the complainant would have seen the scar on his face when he was resisting arrest and having a scuffle with the police officer. Furthermore, he is not the only person with a scar on his face.

- [8] The issue in this appeal is whether the trial court was correct in holding that there was proof beyond reasonable doubt that the appellant was the person who robbed the complainant of her cell phone.
- [9] The appellant contends that the alleged encounter was brief. In view of the robbery having taken place at approximately 06H45, no evidence had been led as to the quality of the visibility at the time of the incident. Furthermore, the complainant's cell phone was not found in his possession when he was arrested approximately fifteen minutes after the incident. No evidence had been adduced which suggested that the appellant had discarded the phone when he was approached by the Metro Police.
- [10] The appellant further contends that although the complainant was an honest witness, her evidence in respect of identification of him as the culprit is not reliable and as such, the case against him had not been proved beyond a reasonable doubt.
- [11] The respondent agreed that the incident was brief but contends that the complainant was able to give an adequate description of the attacker which corresponded with the description of the appellant. The robber's apparel, his facial features and the lump under his jaw were clearly visible and enabled the complainant to identify the appellant as the robber. As such, the identity of the appellant had been proved beyond a reasonable doubt.
- [12] It is trite that evidence on identification must be approached with caution. Holmes JA in the case of *S v Mthethwa* 1972(3) SA 766 (A) at 768 A-C held that:

"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, gait and dress; the result of the 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, must be weighed one against the other, in the light of the totality of the evidence, and the probabilities "

- [13] The Magistrate acknowledged that the evidence of a single witness was relied upon and that such evidence needed to be approached with the necessary caution. He accepted the evidence of the witnesses as being satisfactory in all material respects and not the explanation proffered by the appellant.
- [14] A court has a duty to assess and evaluate the cogency of the evidence of identification. It is not enough for the identifying witness be honest. The reliability of his observations has to be tested which depends on several factors including the opportunity for observation as to time and situation, the extent of his knowledge of the accused and the mobility of the scene.

Phetla and Another v The State 2016 ZAGPPHC 554

[15] Heher AJA in the matter of S v Chabalala 2003 (1) SACR 134 (SCA) at page 140 A - B said:

"The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence. •

[16] The appellant was identified by the complainant within 15 minutes of the incident, by his apparel, his face and the lump under his jaw. I am satisfied that the Court took into account the strengths, weaknesses, probabilities and improbabilities of both parties in determining the appellant's guilt. I am also satisfied that the State proved their case beyond reasonable doubt and having taken into consideration the principles as espoused in the case of S v Mthethwa (supra) .

[17] In my view, there is no evidence that the court a quo was misdirected. Accordingly, the following order is made:

The appeal in respect of the conviction is dismissed.

MOKOSE J

Judge of the High

Court of South Africa

Gauteng Division

PRETORIA

I agree and is so ordered

COLLIS J

For the Appellant:

Adv LA Van Wyk instructed by

Legal Aid SA

Pretoria

For the State:

Adv L Williams instructed by

The Office of the Director of Public Prosecutions

Date of Hearing: 9 September 2020

Date of Judgment: 16 September 2020

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