

SOUTH AFRICA / JUDGMENT

Nhathe v S (A09/2020) [2020] ZAGPPHC 445 (18 August 2020)

[2020] ZAGPPHC 445

COURT

North Gauteng High Court, Pretoria

BEFORE

FMM Snyman, C G Lamont

CASE / FILE NUMBER

A09/2020

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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: NO

(3) REVISED.

CASE NUMBER: A09/2020

In the matter between:-

RICARDO FRANSCISCO NHATHE

Appellant

and

THE STATE

Respondent

JUDGMENT

FMM SNYMAN (AJ):

[1] The appellant was convicted of robbery with aggravating circumstances and assault in the Regional Court, Benoni on 26 May 2016.

- [2] He was sentenced to 18 years imprisonment in respect of robbery with aggravating circumstances and 1 year imprisonment for assault. The court ordered that the sentences run concurrently.
- [3] The appellant approached this court on petition and now appeals against the conviction with leave from this court.
- [4] The grounds of appeal are as follows:
- [4.1] The identification of the appellant was not reliable as identification was suggested under circumstances where the appellant was suggested as the suspect to the complainant; and
- [4.2] The conviction of assault amounted to a duplication of convictions, since the violence in assaulting the complainant was already taken into consideration to comprise the violence inherent in the robbery with aggravating circumstances.
- [4.3] The necessary cautionary rules in relation to single witness evidence was not adhered to by the court a quo.

Identification

- [5] The evidence before the court a quo was that Yongama Lucky Jongathe (the complainant) was robbed of his cellular telephone on 30 April 2015. He was also shot at when he attempted to run away.
- [6] The complainant testified that he saw the appellant frequently, at least two to three times a week for a period of a year. They were not friends, but knew each other in passing. The complainant testified in the court a quo that the complainant used to charge his batteries at a specific place, when they would pass each other. The complainant thus had prior knowledge of his assailant's identity.
- [7] On the relevant day, the complainant was busy with his phone and only noticed the appellant when the appellant was already very close to him. At first he thought the appellant was joking when the appellant asked the complainant to hand over his phone. The complainant laughed, but got frightened when the appellant grabbed the complainant's cellular phone and revealed a fire-arm and pointed it at him. The complainant realised the seriousness of the situation and ran away. The appellant shot at the complainant.
- [8] The appellant argues that the complainant did not have opportune time to identify the appellant and that the conditions of light was not favourable to a positive identification, resultant in an unreliable identification.
- [9] In *S v Charzen and Another* 2006 (2) SACR 143 (SCA), Cameron JA held as follows in paragraph 11:

[11] But, as our courts have emphasised again and again, in matters of identification, honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance can be 'dangerously unreliable', and must be approached with caution..."

[10] The following independent factors considered by the court a quo justifies a positive identification:

[10.1] The complainant had prior knowledge of the appellant. They saw each other on many occasions (about 3 times a week);

[10.2] The incident occurred around 18h00 when it was still visible. The evidence before the court a quo was that there was so- called "Apollo" lights in the area, which is a light high in the air with a bright light;

[10.3] The complainant had time to observe the appellant for approximately two minutes;

[10.4] That they had interaction prior to the robbery, they spoke to each other when the appellant demanded the cellular phone and the complainant thought the appellant was joking;

[10.5] That they were standing close to each other prior to the robbery, with the appellant close enough to the complainant that the appellant could grab the complainant's cell phone out of his hands;

[10.6] That the complainant had enough time to be able to identify the fire-arm as a revolver and not a pistol;

[10.7] That the community apprehended the appellant the morning after the shooting incident. This serves as confirmation that the community as well as the complainant could identify the appellant;

[10.8] That the complainant identified the appellant in an identification parade which was held in Modderbee Prison.

[11] The accused denied identification on the basis that another incident of rape and attempted murder took place at more or less the same vicinity and the accused was excluded as a suspect in the rape matter due to DNA evidence. The argument was that the person who committed the rape and attempted murder was the same person as the one who committed the relevant robbery and attempted murder.

[12] I am satisfied that the court a quo carefully considered all the relevant facts and came to a logic conclusion that the complainant positively identified the appellant.

[13] This ground of appeal cannot succeed and is dismissed.

Duplication of charges I convictions

[14] The appellant argues that the second charge of assault is a duplication as the assault was committed in the course of a robbery.

[15] It is useful to have regard to the legal definition of the crime of robbery. Burchell, Principles of Criminal Law 4 ed at 706, defines robbery as follows: "Robbery consists in the theft of property by intentionally using violence or threat of violence to induce a person to submit to the taking of the property."

[16] Per definition, violence or the threat of violence is an element of robbery. The charge of robbery against the appellant reads as follows:

"That the accused is guilty of the crime of robbery with aggravating circumstances as intended in section 1 of Act 5111977 and further read with section 51(2)(a) of Act 105 of 1977."

[17] The appellant was charged with robbery and attempted murder. The appellant was not charged with assault. The court a quo enacted the competent verdict of assault to the charge of attempted murder and found the appellant guilty of assault.

[18] The evidence before the court a quo was carefully analysed and the learned magistrate found that the appellant could have killed the complainant if he wanted to. This is based on the undisputed evidence that the appellant used a revolver, pressed it against the chest of the complainant and a round was fired only after the complainant pushed the weapon away.

[19] In this regard, the following is recorded in the judgment of the court a quo:

"It is my view that had he wanted to shoot the complainant he had ample opportunity to do so. There are, however, competent verdicts to a charge of attempted murder. Threatening to shoot a person with a firearm can also boil down to assault by way of a threat. That being the case, the court finds that the state succeeded in proving that count.

Therefore the accused is then convicted as charged on the first count of robbery with aggravating circumstances on Mr Jonga. In respect of the second count he is convicted of assault ..."

[20] The charge of assault (as well as the finding of guilt) as a competent verdict to the charge of attempted murder, has been set out in detail by the court a quo. The reasoning process of the magistrate is done logically and fair.

[21] The charge of assault is separate to that of robbery, and the appellant in this instance was found guilty on assault as a competent verdict to attempted murder.

[22] This ground of appeal cannot succeed.

Single witness evidence

[23] The court a quo took due notice of the cautionary rule against single witnesses. In its judgment, the court a quo said:

"Two complainants as stated when the judgment commenced, were both single witnesses with regards to the respective events they testified about. In view of that the court must apply the cautionary rules applicable to firstly the evidence of a single witness as well as that of an identifying witness to the evidence. The events that took place or which the witnesses testified about, were not placed in dispute. The court can therefore accept that the incidents took place in the way that they had testified.

That in itself is obviously corroboration for the evidence."

[24] In failing to dispute the evidence of the single witnesses, the accused has no basis to claim that the court a quo did not have sufficient regard to the cautionary rule in relation to single witnesses.

[25] This ground of appeal is consequently dismissed.

[26] S v Mabena 2012

(2) SACR 287 (GNP) dealt with the appeal court's powers in interfering with a magistrate's findings in assessment of the appeal: The following was said in paragraph [11]:

"[11] On appeal it was argued that the regional magistrate ought to have accepted that the evidence of the appellant was reasonably possibly true. It was, however, not suggested that the regional magistrate misdirected herself in any respect. The power of an appeal court, to interfere on fact with the findings of the court below, is limited.

Interference in this regard is only permissible where the findings of the court below are vitiated by misdirection or are patently wrong. I find no basis for interference in the present case. I think that the regional magistrate was correct in her finding that intercourse had in fact taken place and, in the light of that finding, rightly rejected the appellant's evidence. The appeal against conviction must therefore fail."

[27] I can find no instance in the record or judgment that the court a quo misdirected himself. There is no reason for this court to interfere with the finding of the court a quo.

[28] The appeal against the conviction is dismissed.

[29] The following order is made:

1. The appeal is dismissed.
2. The appellant is declared unfit to possess a fire-arm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

F M M SNYMAN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree

C G LAMONT

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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