

SOUTH AFRICA / JUDGMENT

Ribisi v S (A306/2023) [2024] ZAGPPHC 1301 (4 December 2024)

[2024] ZAGPPHC 1301

COURT

North Gauteng High Court, Pretoria

BEFORE

Matsemela, Bokako

CASE / FILE NUMBER

A306/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, PRETORIA

Case

No: A306/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO

OTHER JUDGES: NO

(3) REVISED

DATE:

4 December 2024

SIGNATURE

In

the matter between: THABISO
 RIBISI
 Appellant
 and
 THE
 STATE
 Respondent

Flynotes: Criminal Procedure/Single Witness/Uncorroborated Evidence of
 Identification/Identification in the middle of the night/Assailant
 wearing a facial mask/Identification by eyes and voice/Eyes of the
 assailant not unique/No voice identification parade was held/Appeal
 upheld.

JUDGMENT

MATSEMELA AJ (BOKAKO AJ CONCURRING)

INTRODUCTION

- [1] The Appellant was arraigned in the Regional Court sitting at Tsakane, charged on one count of robbery with aggravating circumstances, as intended in Section 1 of the Criminal Procedure Act 51 of 1977, read with the provisions of Section 51(2), 52 (2), 52 (a) and 52 (b) of the Criminal Law Amendment Act 105 of 1997, as amended. The aggravating circumstances were that a firearm was used during the commission of the crime.
- [2] The Respondent alleged that, on 22 February 2022 at Tsakane, the accused unlawfully and intentionally assaulted F[...] M[...] and, with force, took her cell phone in her lawful possession.
- [3] On 7 August 2023, the Appellant, who was legally represented throughout the proceeding, pleaded not guilty to robbery with aggravating circumstances.
- [4] On 14 August 2023, the Appellant was convicted as charged by Ms Verster, and a sentence of 7 years of imprisonment was imposed on 23 August 2023.
- [5] The Appellant applied for leave to appeal the conviction on 23 August 2023. The presiding magistrate granted leave to appeal the conviction.

EVIDENCE

- [6] The state called only one witness, the complainant. Ms F[...] M[...], told the court that she knows the Appellant, as she grew up with his mother and the Appellant grew up in front of her. They are neighbours.

- [7] She told the court that on 22 February 2022, she went out of the house at around midnight in search of her son who did not come back home. She was running and reached a stage where she needed to catch her breath. While she was running, she hid her cell in front of her private parts inside her trouser. She was wearing a denim trouser and golf T-Shirt. She did not tuck in the golf T- Shirt.
- [8] She saw two boys who approached her. The one who was wearing a khaki jacket grabbed her with her clothes around her neck and pushed her against the wall. He then put his forearm around her neck so that she could not move.
- [9] One of her assailants was Thabiso, the Appellant. The Appellant was wearing a black track pants and a Muslim hat at that stage. She recognized the Appellant's voice. She spoke to the Appellant almost every day She recognised him by his voice when he said to her:
- "Do not waste our time, we do not want to waste our bullets"
- [11] She recognised the Appellant also by his eyes. When the Appellant was searching and removing the cell from her private parts, they both had an eye contact. That is when he recognised the Appellant by his eyes.
- [12] Under cross examination she described the eyes of her assailant as "white with black lens". She however conceded that there was nothing unique about the Appellant's eyes. The alleged Appellant's eyes that she saw were the normal eyes which are white on the outside with a pupil which is brown or black.
- [13] During the robbery she identified muslim hat, mask and the jacket the Appellant was wearing. The area where the robbery occurred was bright, as an Apollo light was on the street. The Apollo light was 120 to 130 meters away from where she was robbed.
- [14] She realised that a firearm was pressed against her head. She does not know where the firearm came from however it ended in the Appellant's hand. After the robbery, the same night, the complainant went to the Appellant's house to demand her cell phone and she was informed that the Appellant had gone to Mafikeng.
- [15] She saw the Appellant next morning. He was at the main street of their area. It was put to her during cross examination that when she saw the Appellant the next day, he was wearing a blue overall. She insisted that he was wearing a jacket and red pants.
- [16] The state closed its case and the Appellant brought an application in terms of section 174 which was refused. He then closed his case.

ISSUES.

- [17] The basis of the Appellant's appeal are the following:
- (a) State did not prove its case beyond a reasonable doubt.

- (b) The court a quo erred in finding that the complainant's identification of her assailant's by his eyes and voice was sufficient and reliable.
- (c) The court a quo should not have accepted the evidence of the complainant who was a single witness and her evidence was not corroborated.
- (d) Negative inference must drawn to the failure of the Appellant to take the stand.

THE BURDEN OF PROOF

[18] The burden of proof is the standard by which a court determines whether sufficient weight can be attached to evidence adduced before an accused can be convicted of any crime. In *S v Van der Meyden* 1999 1 SACR 447 (W) 448G-H the Court held:

'In order to convict, the evidence must establish the guilt of the accused beyond a reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are

inseparable, each being the logical corollary of the other.'

[19] There is concept which plays a role in determining whether a standard of prove is satisfied in a Criminal case which is, whether:

(a) The state's case proves the guilt of the accused beyond a reasonable doubt.

[20] An accused cannot be convicted if his version can be regarded as reasonably possibly true. An accused can only be convicted if the prosecution is able to prove its case beyond a reasonable doubt. The manner to attain the standard of beyond a reasonable doubt and reasonably possibly true is dependent on the degree of probabilities of the truth of a case, as required by that particular case.

CAUTIONARY RULE

[21] Prior to the implementation of Section 208 of Act 51 of 1977, the courts struggled to acquit, or convict accused persons based on uncorroborated evidence. This led to the legislature to implement

Section 208 of Act 51 of 1977, which states that an accused person may be convicted of any offence on the single evidence of any competent witness.

[22] Then De Villiers JP in *R v Mokoena* 1932 OPD 79 at 80 sounded the dangers of relying exclusively on the sincerity and perceptive powers of a single witness. He then says the following at paragraph 80:

"Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [the section], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory

in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc. "

This, it would seem was the introduction of the cautionary rule in dealing with the evidence of single witness.

[23] The Appellate Court in *S v Teixeira* 1980 (3) SA 755 (A) at 761 it was said that, in evaluating the evidence of a single witness, 'a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities'.

[24] In *S v Pitsa* ZAGPJHC 283 (A253/2012, 8 November 2013), where *Teixeira* was relied upon, the Court says the following at para 48:

"[48] The evidence of the Complainant must be approached with great circumspection because it is of a single witness and is not satisfactory in all material respects. The numerous intrinsic improbabilities, omissions and contradictions in such evidence and the lack of corroboration by the witnesses fortify this court's resolve to reject the Complainant's evidence as most improbable.

[25] In *S v Ganiel*, 1967 (4) SA 203 (N) Leon and Harcourt JJ at page 206 G-H stated the following with regard to evidence of a single:

"The cases dealing with single witnesses do not, as we understand them, lay down any rule of law but merely indicate that a court should approach the evidence the evidence of a single witness with caution and should not easily convict upon such evidence unless it is substantially satisfactory in all material respects or unless it is corroborated. "

[26] The Appellate Court in *S v Webber* 1971 (3) SA 754 (A) at 758G-H), after examining the case law, concluded as follows (per Rumpff JA:

"Dis natuurlik onmoontlik om 'n formule te skep waarvolgens elke enkele getuie se geloofwaardigheid vasgestel kan word, maar dit is noodsaaklik om met versigtigheid die getuienis van 'n enkele getuie te benader en om die goeie eienskappe van so 'n getuie te oorweeg tesame met al die faktore wat aan die geloofwaardigheid van die getuie kan afdoen. "

[27] At page 757 the Appellate Court took the view that De Villiers JP did not purport to lay down a rule of law and held that the mere fact that a single witness has 'an interest or bias adverse to the accused' does not necessarily mean that he should not be considered a credible witness.

[28] It appears from the record that the court a quo was alive that it was dealing with evidence of a single witness. I am of the view that the court a quo should not have accepted the evidence of the complainant. The reason is that it lacked probability and uncorroborated as I will demonstrate below.

IDENTITY

[29] Counsel contended that the complainant's evidence regarding the identification of the Appellant was poor and she could not have seen the Appellant given the circumstances of the incident.

[30] In the case of *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-C, Holmes JA held as follows:

"Because of the fallibility of human observation, the Courts approach to evidence of identification 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 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 such as *R. v Masemang*, 1950 (2) SA 488 (AD); *R. v Dladla and Others*, 1962 (1) SA 307 (AD) at p. 310 C; *S. v Mehlape*, 1963 (2) SA 29 (AD)."

[31] During evidence in chief, the complainant said that the Appellant was wearing a mask for the duration of the robbery. She further testified that she recognised the appellant's white eyes and black lenses. The court a quo did not inquire as to what type of a mask was the complainant referring to. We have different types of masks. Some masks will cover the whole face with only the eyes protruding. Some will cover the whole face with the eyes and mouth protruding. Some will be a cloth which will cover the face to just above the nose.

[32] What is aggravating is that the incident took place in the middle of the night and relying on the Apollo light was 120 to 130 meters away from where she was robbed was of no assistance to her. Furthermore, the complainant conceded under cross examination that there is nothing unique about the Appellant's voice.

[33] She recognized the voice of the Appellant when he spoke to her demanding the cell phone. I hold the view that she would not have been in a position to hear the voice of her assailant properly if his mouth was covered with a mask. To make the matters worse, a voice identification or recognition parade was not held.

[34] The question is whether the Appellant was identified correctly. According to the Mthethwa above case it is of no use if the complainant:

- (a) was clear and consistent in her version of events.
- (b) she did not change or adapt her evidence throughout extensive cross- examination.
- (c) She gave straightforward answers to questions and did not contradict herself many way.

- [35] It is not enough for the identifying witness to be honest. Even an honest witness is capable of identifying the wrong person with confidence. The court a quo was supposed to test the reliability of her identification against other factors such as lighting, visibility, proximity of the witness, and opportunity for observation, factors influencing their identification, such as the build, features, colouring, and clothing of the person identified.
- [36] The clothing description was of no assistance, as the Appellant wore different clothing the following day.
- [37] The court a quo misdirected itself in relying on the evidence of Ms F[...] M[...], as a witness who could positively identify the Appellant as the perpetrator. It is my view that the court a quo should not have accepted the evidence of the state witness. It was not satisfactory in all material respect. It lacked probability.

FAILURE OF THE ACCUSED TO TAKE THE STAND

- [38] The Respondent raised the issue regarding the failure of the accused to testify. In *S v Boesak* 2001 (1) SACR (CC) it was stated:

'The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in *Osman and Another v Attorney-General, Transvaal*, when he said the following:

"Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice". '

- [39] The questions, in the present matter are:

- (a) Whether the evidence led by the State in relation to the charge against the Appellant was such as to call for an answer from the Appellant and

- (b) Whether in the absence of any such answer, the evidence led by the State is sufficient to prove the guilt of the accused beyond reasonable doubt.

Put differently whether the State was able to produce sufficient evidence to establish a prima facie case. If so, does the absence any rebuttal from the Appellant, suffice the evidence to prove the elements of the offence.

[40] In this matter there is an issue of identification of the Appellant by the complainant. The evidence by the state is of poor nature that it cannot be expected that the Appellant should be called to the stand to close the gap in the state's case. Therefore, looking at the evidence in totality, it is my view that it is not probable that the complainant herein was robbed by the Appellant.

[41] In the premises, the appeal should succeed, and the following order is made:

ORDER

1. The appeal is upheld.
2. The conviction of the Appellant is set aside.
1. The Department of Correctional Services is ordered to release the Appellant immediately.

MOLEFE MATSEMELA

ACTING JUDGE OF THE GAUTENG HIGH COURT

I agree, and it is so ordered.

TP BOKAKO

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be

04 December 2024.

APPEARANCES:

For the Appellant: Adv. LA Van Wyk Instructed by: Legal Aid South Africa, Johannesburg. For the State: Adv. Nethononda Date of Hearing: 5 September 2024 Date of Judgment: 4 December 2024.

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