

SOUTH AFRICA / JUDGMENT

S v Masekwa and Another (377/2011)

[2012] ZAFSHC 64 (29 March 2012)

[2012] ZAFSHC 64**COURT**

Free State High Court, Bloemfontein

BEFORE

S Naidoo, A Kruger

CASE / FILE NUMBER

377/2011

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Review No. : 377/2011

In the review between:

THE STATE

versus

SIMON SUPING MASEKWAFIRST ACCUSED

ZACHARIA TSIETSI PITSOSECOND ACCUSED

CORAM: KRUGER, J et NAIDOO, AJ

JUDGMENT BY: NAIDOO, AJ

DELIVERED ON: 29 MARCH 2012

REVIEW JUDGMENT

[1] This is a review which came before this court in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (“the CPA”). In this matter the accused were charged with Robbery, read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of

1997. They were convicted as charged on 12 September 2011. Accused 1 was sentenced to two years’ imprisonment, while accused 2 was sentenced to eighteen (18) months’ imprisonment. Both accused were unrepresented in this matter.

- [2] The magistrate was requested to correct and complete the record, and furnish reasons for his decision. He furnished a lengthy response, which I will deal with where necessary.
- [3] The facts briefly are that the complainant, Dawid Pheelo Snymes had left a tavern called Mopathe Tavern (Mopathe) and was on his way to another tavern called Lee's Tavern. As he reached the door of Lee's Tavern, he was accosted by four men, two of whom were the two accused before court. The latter were armed with knives. Accused 1 stabbed him on his head and accused 2 and the other two men searched his pockets and removed his wallet which contained R130,00. The light of the tavern, according to the complainant, provided illumination outside the tavern. He sustained some injuries which were stitched. The complainant's further evidence was that when he left Mopathe the accused were seated in the tavern, drinking, and, when he left, they followed him.
- [4] Accused 1 denied any knowledge of the incident. He alleges that he and accused two were drinking at Mophate's when they were joined by two other people. These latter two people advised the two accused that they had a problem with someone and had stabbed him outside Lee's Tavern. It also emerged from the evidence of accused 1 that earlier that same day the complainant was in the company of the two accused and the two other men who joined them at a tavern called Las Vegas where they were all drinking. The following day he and accused 2 were at the Las Vegas tavern again and he saw the complainant again, but did not know it was he who was stabbed the previous night. He and accused 2 were arrested and after his arrest he learned that it was the complainant who had in fact been stabbed.
- [5] The version of accused 2 was similar to that of accused 1. He also testified that when he and accused 1 were seated at Las Vegas tavern the following day, the complainant's friends arrived and asked why their (the accused's) friend Nzala had stabbed the complainant. He did not answer but told them to ask accused 1. Prior to this he was gambling at another place and saw the complainant who asked him for a cigarette. They shared the cigarette after it was lit. Thereafter he went to Las Vegas tavern.
- [6] Accused 2 called two witnesses, Henry Tshikila (Tshikila) and Moses Tsubane Tau (Tau). Tshikila's evidence was that on the Friday evening he met a person called Sipe at Lee's Tavern and this person asked where are his brothers. He said he was looking for them. Sipe then started slapping him. He became angry and retaliated by picking up a beer bottle (which he described as a "dumpy bottle") and hitting this person with it. He thereafter ran away, but Sipe, who gave chase, kept falling down as he was drunk.
- [7] Tau testified that he arrived at Mopathe and soon after that he received a call from his girlfriend to say she was at Lee's tavern and requested him to go and fetch her as she was afraid to walk alone. He left Mopathe and was followed by Tshikila, who accompanied him to Lee's tavern. When they arrived at Lee's tavern, they met a person there. He left Tshikila outside with this person and went into the tavern. When he came out again, he saw Tshikila stabbing the person that he left him with. They then returned to the tavern with Tau's girlfriend.

[8] The magistrate was requested to attend to reconstructing the record, as there is hardly a page in the record which does not reflect many instances where the evidence was “indistinct”. In his response, the magistrate indicates that he did attend to such reconstruction where the recording is audible. While some effort appears to have been made in this regard, the record is, however, to a large extent the same as it previously was. This is a very unsatisfactory situation and the presiding officer should always take care to ensure that a proper record is placed before the Reviewing Judge.

[9] I deal now with the evidence before the court. The complainant was a single witness, while four witnesses testified on behalf of the defence. It is common cause that

the complainant and the two accused are known to each other

the two witnesses for the defence know the accused

the two accused, the two defence witnesses and the complainant were in each other’s company at Las Vegas tavern during the course of the day on Friday 12 August 2011, where they were all drinking.

Later that same evening they had all visited Mopathe Tavern.

The two accused continued to drink at Mopathe Tavern.

[10] The two accused deny any involvement in the attack on and robbery of the complainant, their version being that they were at Mopathe when their two friends arrived and advised that Tshikila had stabbed someone. It was only the next day that they had learned that it was the complainant who was stabbed. No evidence was specifically led regarding the state of sobriety of either the two accused or the complainant. However, Tshikila mentioned that the person he stabbed was so drunk that when he gave chase after Tshikila stabbed him, he kept falling down.

[11] The magistrate was asked why he preferred the version of the complainant over that of the accused and defence witnesses, given that the complainant was a single witness whose evidence was that he had been drinking. The magistrate’s response was that “The court did not believe their story and that of the witnesses because that was a made- up story. Their story was so contradictory that the court could not accept as the truth. The complainant was firm with is evidence and did not contradict himself he spoke the truth of what happened on that day therefore his evidence was accepted and that of the accused rejected even though he was a single witness”. No reasons were given as to why the magistrate was of the view that the version of the accused and witnesses was “a made-up story”.

[12] On the complainant’s own version he had been drinking during the course of the day. I find his evidence that he went to Mopathe’s tavern and did not drink there somewhat improbable. He advanced no other reason for his visit to Mopathe. I am inclined to believe that at the time that he was stabbed and robbed, he was in fact intoxicated. He says four people accosted him, while the version of the defence witnesses is that the altercation

happened between Tshikila and the complainant. It is common cause that the four people named by the complainant were in fact together, in the company of the complainant, for the better part

of the day. It is rather improbable that Tshikila would admit to stabbing the complainant, and run the risk of himself being arrested.

It is true that there were some discrepancies in the versions as told by Tshikila and Tau, particularly Tau's evidence that his girlfriend called him shortly after he had arrived at Mopathe, requesting that he fetch her at Lee's Tavern. Neither Tshikila nor the two accused mentioned this or that Tshikila and Tau returned to the tavern with Tau's girlfriend. There also appeared to be differences in the versions of the two accused and that of the two defence witnesses with regard to who left Mopathe's first. While that is so, it is significant that all four did not leave together.

[13] The complainant alleges that he slapped his assailants when he was attacked and that this repelled the attack on him and he ran away. Tshikila's evidence is that the complainant slapped him, which led to his stabbing the complainant, and thereafter the complainant chased him as he ran away. There is nothing in the evidence led by the state to gainsay Tshikila's evidence, yet the magistrate appears to have made up his mind that he, as well as Tau are lying. To my mind, it seems very probable that the complainant's state of inebriation prevented him from properly identifying his attackers or even from having a proper recollection of what in fact happened to him. That coupled with the fact that the light from Lee's tavern provided the illumination outside the tavern may well have contributed to the complainant being mistaken about the identity of his attackers, albeit that the accused were both known to him prior to the incident.

[14] An identifying witness must be not only be honest but he must also be trustworthy (see *S v Mehlape* 1963 (2) SA 29 (A)). In the case of *R v Shekelele and Another* 1953(1) SA 636 (T) at 638 F-G, the court remarked that honest but mistaken identification frequently causes gross injustices. To avoid such injustices, the court expressed the view that in all cases that turn on identification of an alleged offender by a witness, the greatest care should be taken to test the evidence. A bald statement that the accused was the person who committed the offence was not enough. If answers to relevant questions about the alleged culprit's physique, complexion, peculiar features and apparel, are not properly interrogated, it can leave the door wide open for the reasonable possibility of a big mistake. See also *S v Charzen and Another* 2006 (2) SACR 143 (SCA) at 149 G-I.

[15] In the present matter the complainant's bald statement that the two accused were part of a group of four that attacked him was accepted without further interrogation. The possibility that there may be some truth to the versions of the two accused was not explored at all. In my view the magistrate's failure to do so amounts to a misdirection. I am aware of the contradictions in the evidence of the two defence witnesses, but hold the view that when weighed against the circumstances of the case, they do not justify complete rejection of the defence versions. I am, consequently, of the view that, in spite of the differences and

contradictions between some aspects of the versions of the two accused, and the evidence of the two defence witnesses, their versions are reasonably possibly true.

- [16] Where an accused is unrepresented, it is the duty of the court to assist such an accused, especially during cross-examination. In the present matter, this was not done, and consequently, the versions of both accused were not pertinently put to the complainant. The magistrate then attempted to “cross-examine” the complainant, and in his response to the queries raised said “the court put questions to the complainant, as to whether he was not at Las Vegas, and he admitted having been there, though he said he did not see the accused. In my view, I think the court tried to put the version of the accused to the complainant”. I do not agree. This is clearly not what is envisaged in the concept of the court’s assistance of the accused. The magistrate appears to be aware of this, as he referred to the case of *S v Sebatana* 1983(1) 809 (O) at page 812 G-H. The dictum of the learned judge Malherbe AJ (as he then was) is translated in the Headnote as follows:

“Experience has repeatedly taught that, particularly in the case of illiterate and untutored Black accused, they may put a few irrelevant questions to a State witness, or no questions at all, and then subsequently give evidence which conflicts with that of the State witness in material respects. This may be the result of ignorance about the true nature and purpose of cross-examination, notwithstanding an explanation by the magistrate of the accused’s “rights” in that connection. The presiding officer in such a case has a duty to assist the accused in presenting his defence by way of cross-examination by, for example, expressly asking him whether he agrees with each material allegation made against him by a State witness. In this way it should in most instances rapidly become clear which evidence is disputed, and the presiding officer can himself put the necessary question or contention to the State witness. This would at least give the accused the impression that he is being fairly treated during the trial.

Reliance upon an accused’s failure to cross-examine may, in such circumstances, be unfair and unjust.”

- [17] The magistrate clearly did not comply with the procedure envisaged in the *Sebatana* case, and merely attempted to get onto the record the complainant’s denial of certain aspects of the versions of the two accused, which were elicited in their rather superficial cross-examination of the complainant. This coupled with what, in my view, amounted to an undesirable descension into the arena by the magistrate raises questions as to the fairness of the trial.
- [18] Reference to the record (pages 22-25) indicates that the manner in which the magistrate questioned accused 1 is more akin to cross-examination than an attempt to obtain clarity on certain issues. Similarly reference to pages 29 to 33, the magistrate’s questioning of accused 2 reveals a similar trend. In addition, it appears from the record that there was a degree of pressure being brought to bear on the respective accused persons, which may well have had the effect of intimidating them. Questioning of the defence witnesses by the magistrate was conducted in similar vein, and the tone of the questions by the magistrate suggested that he did not believe the witnesses. In this regard refer to pages 37 -39 of the record in respect of the questioning of Tshikila and pages 50 -55 in respect of Tau. In my view the magistrate fell

far short of maintaining impartiality in this matter. In this regard, I refer to the guidelines set out in *S v Le Grange* 2009(1) SACR 125 (SCA).

See also *S V Mseleku and Others* 2006(2) SACR 237 (N).

[19] In the circumstances, I am of the view that the convictions and sentences in this matter cannot be sustained. And make the following order:

- a. The convictions and sentences in respect of the two accused are hereby set aside;
- b. The order of the trial court is accordingly set aside and replaced with the following:

Both accused are found not guilty and discharged.

S. NAIDOO, AJ

I agree.

A KRUGER, J

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