

SOUTH AFRICA / JUDGMENT

Swanepoel v S (A130/2023) [2024] ZAGPJHC 1202 (26 November 2024) [2024] ZAGPJHC 1202

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mathunzi, Dosio

CASE / FILE NUMBER

A130/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

Number: A130/2023

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

In

the matter between: LEVINGE
 SWANEPOEL
 Appellant
 and
 THE
 STATE
 Respondent

JUDGMENT

MATHUNZI, AJ (DOSIO J concurring)

- [1] The appellant was originally indicted to appear before the court a quo in Alexandra on 22 June 2022 on two counts, namely:
- (a) Robbery with aggravating circumstances,
 - (b) Housebreaking with intent to steal and theft.
- [2] The appellant pleaded not guilty to both counts and was legally represented throughout the trial.
- (a) The first count relates to an incident that occurred at Rabie Ridge on 12 July 2021 where it is alleged that Petrus Mfisa was robbed of his white Nissan bakkie NP 200 and that a firearm was used during the said robbery.
 - (b) The second incident is alleged to have occurred on 15 July 2021 at no 7[...] Street Road Unit 1[...] U[...] R[...] E[...], H[...] W[...] H[...] G[...] in Midrand, at the residence of Dyani Skhumbuzo. The following items were removed, namely, three pairs of sneakers, one pair of boots, one green dress and two handbags, the total estimated value being R2 000,00.
- [3] On 15 July 2022 the appellant was found guilty on count one and acquitted on count two. He was sentenced to a term of fifteen (15) years in prison on count one. On 2 March 2023 an application for leave to appeal was instituted by the appellant against his conviction but it was refused by the court a quo.
- [4] Subsequent to the refusal, the appellant petitioned the Judge President of this division for leave to appeal the decision of the court a quo. The petition was granted on 11 September 2023 against both conviction and sentence. We intend to deal solely with the conviction which relates to count one.
- [5] The respondent called Petrus Mofisa ('the complainant'), who testified that he was robbed of a white Nissan Bakkie, with registration number C[...], on 12 July 2021 at 20h00. The complainant's identification of the appellant and his co-accused, amounts to dock identification. He stated that they were the people who opened his car doors and ordered him to alight his car and that when he refused, one of them pulled out a firearm. The complainant stated that street lights provided lighting on the evening of the incident.

- [6] The complainant testified that he kept the car keys and that he used his cellphone to call his brother. He watched as his car turned, followed by a Polo vehicle. Both vehicles drove off in different directions of Rabie Ridge. He then stopped a police vehicle which took him to the police station where he opened a case. He testified in examination in chief that he explained to the police that his car was taken by two white skin coloured men and that he was phoned by the police, after two weeks to collect his vehicle. When he collected his vehicle at the SAP13, the seats, the number plate and something under the ignition had been removed.
- [7] Under cross-examination, the complainant informed the court that he did not get to observe the assailants who opened the passenger door properly as he focussed on the one who was on his side. The complainant further testified that he informed the police in his statement that he would be able to identify the assailants if he saw them again, however, he testified that he did not inform them that one of them was bald-headed. The complainant was confronted under cross-examination with the fact that in his previous statement, he had testified that the one who had a green jacket was the one who opened the passenger door, yet in his oral evidence he stated that he is the one who came on the driver's side.
- [8] The next witness for the respondent was Teyane Skhumbuzo whose evidence relates to count two. The appellant was acquitted on count two and as a result, his evidence bears no relevance to this appeal. The next state witness in respect to count one, was Siyabonga Ndlovu. He testified that he was employed by the National Traffic Bike Unit, as a traffic officer inspector with national jurisdiction, yet he was stationed at Centurion. His evidence is that on the day of this incident, he stopped a Nissan NP 200 bakkie that drove through a stop sign. The Nissan NP 200 bakkie refused to stop and when it did, the driver pointed him with an object that looked like some form of steel pipe. The bakkie at that time did not have the front number plates. This witness identified the two occupants in court. His identification amounts to dock identification.
- [9] Siyabonga Ndlovu stated that the appellant was the driver of the vehicle. Upon searching the vehicle, a toy gun was found in the possession of the appellant. In accused two's possession, two knives and a R10 note were found. During the testimony of Siyabonga Ndlovu, the following crucial evidence was revealed, namely:

'Court: Okay. Okay. Yes further question. You then arrested them.

Mr Ndlovu: Okay I first called the control room first to check who is the owner of this bakkie Your Worship.

Court: Oh yes

Mr Ndlovu: Yes and the bakkie came up with a red flag. The red flag showed me that, if you put it on the street language, it was a twin. The bakkie was a twin. Because it gave me details of the bakkie that it had been red flagged, that they were looking for the bakkie because the owner, I think had been receiving fines or something.

Court: Yes

Mr Ndlovu: So we further phoned the owner. Your Worship to find out from the owner and say where is your bakkie?

Court: It was Petrus Mofisa

Mr Ndlovu: Yes. Your Worship. He said no he has got his bakkie with him. We said it cannot be. He said no. I do have my bakkie with me. It was then that I when I made up my mind that no this bakkie is not stolen or something you Worship.

Court: Wait a minute. I am not following. Yes Mr Prosecutor.

Prosecutor: who did you call?

Mr Ndlovu: I phoned control room

Prosecutor: Yes

Mr Ndlovu: To find out information of the bakkie your worship. To find out who does this bakkie truly belongs to.

Prosecutor: Yes'

[10] The witness in the next pages testified that the bakkie did not have a key, the ignition was not tampered with but the steering wheel did not lock. The witness further testified that the assailants were stopped and found in possession of vehicle on 15 July 2021 not 12 as the complainant testified.

[11] At the end of the state's case, the defence called the appellant into the witness stand. He testified that he was helping a friend Wandile, who at the time stayed in Midrand, to move his luggage in a Nissan NP

200. Wandile, who was his friend, dropped off the bakkie at the appellant's place situated at 347 Falcon street, Rabie Ridge. The vehicle had a key which kept falling out of its ignition. The appellant admitted that he was with accused two and that he skipped the stop sign because the car overrevved, as it had a problem with the clutch.

[12] Under cross-examination of the appellant, the following evidence was revealed, namely:

- (a) that the appellant received the bakkie on 12 July 2021 and only assisted to move the luggage on 15 July 2021,
- (b) that Wandile had a Polo 1.6 Vivo,
- (c) that the appellant alleged that perhaps the key fell out of the ignition since it was loose when he was pulled out of the vehicle by the police,
- (d) the appellant denied pointing the traffic officer with anything,
- (e) he denied committing any of the offences with which he had been charged with,

(f) the appellant informed the court that he was at home with his mother on 12 July 2021.

[13] In evaluating the evidence, the starting point is that 'it is a trite principle that in any criminal proceedings the prosecution must prove its case beyond a reasonable doubt that a mere preponderance of probabilities is not enough' (see *S v Shackell* [1]).

[14] In this appeal, the pertinent point pertains to whether the vehicle found in the appellant's possession, belongs to the complainant on count one. The respondent led the evidence of the complainant and Siyabonga Ndlovu to support its evidence in respect to the identity of the Nissan bakkie NP 200. As regards corroboration, the principle was well expressed in the matter of *S v Centle* [2], where the Supreme Court of Appeal stated that:

'by corroboration it is meant other evidence by other state witness which supports evidence by the complainant and which renders the evidence of the accused less probable on the issues in dispute'.

[15] In this appeal the identity of the subject matter, namely, the Nissan NP 200, is in serious dispute. The evidence of Siyabonga Ndlovu is that when he sought to find out who the owner of the bakkie was, the system revealed that it was owned by Petrus Mofisa, who is the complainant. However, when he called him to inform him that his car had been found, the complainant informed him that his vehicle was with him. It must be borne in mind that the evidence of the complainant is that after his bakkie was allegedly robbed from him, he only recovered it two weeks later when he was called by the local police station to come and identify the vehicle at the police station where it had been booked into the SAP 13 register. When the complainant retrieved the car, it had no seats. It therefore follows that the identity of the Nissan bakkie cannot be said to have been established beyond a reasonable doubt. As a result, it cannot be said that the evidence of Siyabonga Ndlovu is corroborative of the evidence by the complainant as to the identity of the Nissan bakkie NP 200 which was owned by the complainant at the time of the incident.

[16] The next aspect is the identity of the appellant as one of the assailants who assaulted and robbed him of his Nissan NP 200 on the day of the incident. The starting point is that there is no identification parade held. The respondent sought to rely on the dock identification of the appellant and on the evidence of the complainant.

[17] When it comes to identity, the matter of *S v Mthethwa*[3], stated the following:

'that because of the fallibility of human observation evidence of identification is approached by the court with some caution. It is not enough for an identifying witness to be honest, the reliability of his observation must 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 an situation, the extent of his prior knowledge of the accused, the visibility of the scene, corroboration accused's face, gait, the results of the identification parade. Evidence on behalf of the accused, these factors weighed against each other in the light of the totality of evidence and the probabilities.'[4]

[18] In the appeal before this court there appears to be a material contradiction in the complainant's oral evidence and the previous statement he had made at the police station. His evidence is unclear on who had a green jacket between the assailants and who opened the passenger door and who opened his door. In addition, by his own admission, he states that he omitted to inform the police who took down the statement, that one of the assailants was bald.

[19] The appellant testified that his friend, Wandile, had a Polo vehicle and he admitted that he was arrested by Siyabonga Ndlovu. The principle adopted in the matter of Shackell[5] *supra* is that:

'equally trite is the observation that in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of the accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable, it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

[20] The appellant admitted to driving the Nissan NP 200 on 15 July and that he received it on 12 July. He testified that on 12 July he was at home and even called a witness to confirm his alibi.

[21] The principle applicable in respect to appeals is found in the classical case of *R v Dhlumayo & Another* [6], namely that:

'the trial judge has advantages which the appellate court cannot have in seeing and hearing the witness and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance. This should never be overlooked, consequently, the appellate court is very reluctant to upset the findings of the trial judge, the fact that the trial judge has not commented on the demeanour of the witness can hardly ever place the appeal court in a good position as he was. An appellate court should not seek to discover reasons adverse to the conclusion of the trial judge, no judgment can ever be perfect and all embarrassing, where there has been no misdirection on fact by the trial judge the presumption is that his conclusion is correct, the appellate court will only reverse it where it is convinced that it is wrong but where the appellate court is merely left in doubt as to the correctness of the conclusion then it will uphold it.'

[22] Our view is that the identity of the Nissan NP 200, as the subject of the alleged robbery on count one, has not been established by the respondent beyond reasonable doubt, furthermore, the identity of the appellant as being one of the assailants who allegedly robbed the complainant of his Nissan NP 200 bakkie, has also not been proved beyond a reasonable doubt. The version of the appellant should have been accepted as being reasonably possibly true and his alibi should also have been accepted as true.

Order

[23] In the result, the following order is made:

- (a) The conviction by the trial court is overturned and set aside.
- (b) The sentence imposed by the trial court is also set aside.

MATHUNZI AJ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

I AGREE AND IT IS SO ORDERED

DOSIO J

JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII.

The date and time for hand- down is deemed to be 10h00 on 26 November 2024 .For the Appellant:

For the Respondent:

BG Leisher instructed by Paul T Leisher & Associates

VE Mbaduli instructed by National Prosecuting Authority

Date of Hearing: 05 August 2024 Date of Judgment: Date of Judgment:

[1] S v Shackell ZASCA 72 [2001] 4 ALL SA 279 (A)

[2] S v Centle 2005

(1) SACR 420 SCA

[3] S v Mthethwa 1972

(3) SA 766 (AD)

[4] Ibid page 768 para A-C

[5] S v Shackell (note 1 above)

[6] R v Dhlumayo & Another 1948

(2) SA 677 (A)

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