

SOUTH AFRICA / JUDGMENT

Tshandu v S (A248/21) [2022]

ZAWCHC 123 (14 June 2022)

[2022] ZAWCHC 123**COURT**

Western Cape High Court, Cape Town

BEFORE

Rogers, Mantame

CASE / FILE NUMBER

A248/21

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Policy**THE****HIGH COURT OF SOUTH AFRICA****WESTERN****CAPE DIVISION, CAPE TOWN****Case****A248/21****In**

the matter between:

MPUMELELO

TSHANDU

Appellant

And

THE

STATE

Respondent

Coram:

Rogers and Mantame JJ

Heard

on: 10 June

2022

Delivered:

14 June 2022 (09h30 by email)

JUDGMENT

ROGERS J (MANTAME J concurring):

- [1] The appellant was tried with three others in the Wynberg Magistrate's Court on a charge of robbery with aggravating circumstances. He was No 4. No 1 was discharged at the end of the State's case. The appellant, and No 2 and No 3, were convicted as charged. He and No 2 were sentenced to 15 years' imprisonment of which five years were suspended. No 3 received a lesser sentence. The trial court granted the appellant leave to appeal against conviction and sentence. No 2 sought leave to appeal only against conviction. That appeal succeeded in this Court in June last year. However, the circumstances relating to the conviction of No 2 and No 4 are quite different.
- [2] It was established by the State that on 16 October 2016, a Sunday evening, Mr Hilton Allison was the victim of a robbery in the driveway of his home at [...] Birkett Road, Rondebosch. This was between 22:00 – 22:15. He was accosted by four men, one of whom held a gun to his head. There was probably a fifth perpetrator in a getaway car. One of the robbers happened to press a panic button on Mr Allison's remote control. The robbers fled. Three of them went down a side alley of Mr Allison's house and climbed over a gate. The fourth robber fled from the front of the house and down the road.
- [3] Officers from the security company, ADT, as well as police officers, were soon on the scene. Two suspects were found hiding on Mr Allison's roof. A third suspect, who was the driver of a car accosted by the police on their way to the scene, was also arrested. No 2 and No 3 were charged as being the suspects found on the roof, but on appeal this Court held that it had not been proved beyond reasonable doubt that No 2 was one of those two men. No 1 was the driver, and he was discharged at the end of the State's case. The weapon used by the robbers was found at the back of Mr Allison's property. Upon forensic examination, it turned out not to be a firearm as defined in the Firearms Control Act.[1]
- [4] The appellant was arrested between 05:00 – 06:00 the next morning. The State's contention was that he was hiding in some bushes at or outside a house in Greenbank Road. This house was claimed to be behind Mr Allison's house. The appellant was alleged to have had burn marks on his leg, which the State surmised had been suffered when he jumped over the electric fence at the back of Mr Allison's property.
- [5] The appellant testified in his own defence. He stated that on the Sunday in question he attended a party at a student residence in Mowbray. Following an altercation, he decided to leave the party. He was drunk. He could not find a taxi to take him back to Khayelitsha, and eventually he lay down and slept under a hedge where he was found by ADT. He denied any involvement in the robbery.

- [6] Mr Allison, in court, identified the appellant as the man who had held the gun to his head. He testified that he could remember the man's face, because the man was very close to him for quite a while, and there was sufficient light in the street. He described the man as being a bit shorter than himself and as having a slender face with high cheekbones.
- [7] In closing argument, the appellant's legal representative called Mr Allison's height assessment into question, saying that the presiding officer could ask the appellant to stand up: "He is much taller than Mr Allison. We saw him stand and testify." In another important respect, Mr Allison's testimony was inconsistent with the State's case. He testified that the appellant was apprehended on his property. It subsequently became common cause that the appellant was only arrested some hours later, under a hedge or bushes outside [...] Greenbank Road.
- [8] Mr Allison testified about 18 months after the incident. There was no evidence that he gave a physical description to the police before testifying. There was no identification parade. A dock identification in these circumstances can carry very little weight.[2] Honesty and confidence often go hand-in-hand with mistaken eyewitness identification. The lapse of time, the traumatic nature of the incident, the fact that the perpetrators were unknown to Mr Allison, and the circumstances under which he saw the appellant in court, would be sufficient to reach this conclusion. Problems in cross-racial identification might add a further complication.[3]
- [9] The timing and location of the appellant's arrest cast significant doubt over the State's case. The event giving rise to his apprehension was a housebreaking incident at [...] Greenbank Road between 05:00 and 06:00 the next morning, some seven hours after the robbery at Mr Allison's home. The incident at [...] Greenbank Road was reported to ADT, who attended at the scene. The appellant was found under bushes or a hedge opposite [...] Greenbank Road. He was initially arrested as the suspected perpetrator of the housebreaking. It was claimed that he had burn marks on his leg. It was only some time later that he was charged with the robbery at [...] Birkett Road.
- [10] The appellant denied involvement in either of the crimes. He testified that when the occupant of [...] Greenbank Road saw him after his apprehension, she said that he was not the perpetrator, and that the man who broke into her house had been dressed entirely in black clothing. The appellant's legal representative put to a police witness, Const Nyanda, that the appellant had been acquitted on the housebreaking charge. He could not comment.
- [11] The State's theory was that the appellant had sustained the burn marks while jumping over the electric fence at the back of Mr Allison's property. Although it was implied, in the presentation of the State's case, that the appellant was found on or just outside the property in Greenbank Road backing onto Mr Allison's house, this was not established by the evidence. In fact, the house that backs onto Mr Allison's property is [...] Greenbank Road, and there are several intervening houses between 12 and [...] Greenbank Road.

- [12] Then there is the question of timing. It seems implausible that somebody who had narrowly evaded arrest for an armed robbery committed at around 22:00 would have remained in the immediate vicinity for around seven hours rather than making good his escape. Moreover, it was not established that the appellant was hiding (as the court a quo found), rather than sleeping, when he was apprehended. The only ADT officer called as a witness, Mr Mathews, was inside the house at [...] Greenbank Road with the occupant when the appellant was found, and so could not testify about the precise circumstances of the apprehension.
- [13] Sgt Rala, who formally arrested the appellant after the latter was handed over to the police by the ADT officers, could not recall any of the details. He explained that, in preparation for testifying, he had refreshed his memory with reference to his statement in the docket for the robbery at [...] Birkett Road. He had dealt with the arrest of the suspected perpetrator outside [...] Greenbank Road in his statement in the docket for the housebreaking case, and had not refreshed his memory on that incident. The prosecutor did not ask for an adjournment so that Sgt Rala could look at the housebreaking docket. Sgt Rala could not even confirm that the appellant was the person arrested outside [...] Greenbank Road.
- [14] Neither Mr Mathews nor Sgt Rala were asked what the appellant was wearing when he was apprehended. This might have been important, because Mr Allison testified that the gunman (the man he identified as the appellant) was wearing shorts.
- [15] Regarding the alleged burn wounds, Mr Mathews could not recall whether he saw any injuries on the appellant. What did emerge from his evidence is that there was an electric fence at the front of [...] Greenbank Road. If the appellant indeed had a burn injury, and if he was indeed the perpetrator of the housebreaking, there is no greater likelihood that he suffered the burn while jumping over Mr Allison's electric fence than over the electric fence at [...] Greenbank Road. There was, I may add, no evidence that either of these electric fences was actually damaged.
- [16] It is unfortunate that the admirable promptness with which the police attended to the crimes at [...] Birkett Road and [...] Greenbank Road was not matched by thorough investigation and a proper presentation of evidence at the trial. What this would have revealed we cannot say, but as it is the State did not come close to establishing the appellant's guilt beyond reasonable doubt. Counsel for the State, while not conceding the appeal, frankly acknowledged the formidable difficulties which confronted her in supporting the conviction.
- [17] The following order is made:
1. The appeal succeeds.
 2. The order of the court a quo convicting the appellant is set aside and replaced with an order acquitting the appellant.

O L ROGERS

Judge of the High Court

B P MANTAME

For the Appellant:

S Kuun, Legal-Aid South Africa, Cape Town Justice Centre

For the First and Second Respondents: C J Teunissen, Office of the Director of Public Prosecutions, Cape Town

[1] 60 of 2000.

[2] S v Tandwa and Others

[2007] ZASCA 34; 2008 (1) SACR 613 (SCA) at paras 129-131.

[3] See Elizabeth F Loftus Eyewitness Testimony, with a New Preface (Harvard University Press 1996) at 136-142, citing studies demonstrating that people are better at recognising faces of persons of their own race than a different race. Loftus is the pioneer and doyen of the study of memory in its forensic context.

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