

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: CA & R 291/06

In the matter between:

JOHAN TARENTAAL Appellant

and

THE STATE Respondent

JUDGMENT

EBRAHIM J:

Introduction

[1] The appellant was convicted in the Regional Court, Uitenhage, of housebreaking with intent to rob and robbery with aggravating circumstances and attempted murder and sentenced to imprisonment for fifteen and eight years respectively, which were ordered to run concurrently.

[2] The appeal, with the leave of the court *a quo*, is against the conviction on both counts.

Grounds of appeal

[3] A formal notice of appeal has not been filed. The application for leave to appeal was made orally in terms of s 309B(3)(b) of the Criminal Procedure Act 51 of 1977 immediately after the passing of sentence. The grounds articulated in support of the application were that the Regional Magistrate erred in finding:

- (a) The identification of the appellant was reliable;
- (b) The contradictions in the evidence of the State witnesses were not material;
- (c) The facts proved the offence of housebreaking with intent to rob and robbery with aggravating circumstances instead of housebreaking with intent to steal and theft; and
- (d) The appellant's version was not reasonably possibly true.

Submissions

Mr De Jager, who appeared for the appellant, focussed in the appellant's heads of argument primarily on the reliability of the identification by the two State witnesses, Iris Naomie Felix and Leonie Arries, of the appellant. He submitted that the Regional Magistrate erred in accepting the evidence of the witness Felix since he did not evaluate the contradictions in her evidence or the contradictions between her evidence and that of the witness Arries. Various factual findings including the rejection of the appellant's alibi were attacked. However, during argument Mr De Jager did not pursue the submission that 'the trial court erred in relying on the credibility of these 2 witnesses'.

[4] There are further submissions that criticise the manner in which the Regional Magistrate questioned the defence witness Samuel Tarentaal but Mr De Jager did not persist with this. He also did not pursue the issue of whether the evidence proved that the offence committed was theft and not robbery.

[5] Mr Els, who appeared for the State, submitted that the witness had sufficient time to identify her assailant. She had recognised him as she had seen him before. She also identified him immediately when she saw him in the police van.

Analysis of the submissions

[6] It is trite that in the absence of any obvious misdirection by the trial Court, its conclusions will not be disturbed on appeal. The learned Regional Magistrate was impressed with the demeanour of the State witnesses and stated that they were satisfactory witnesses. He described Ms Iris Felix as an honest and reliable witness, whose evidence was free of any material contradictions, and Ms Leonie Arries as an honest witness. He recognised there were contradictions between the evidence of these two witnesses but these were not of a material nature.

[7] I am satisfied that there are no grounds for interfering with the trial court's factual findings or its conclusions regarding the State witnesses. It is evident that the Regional Magistrate properly evaluated the evidence of the State witnesses. He was alive to any contradictions in their evidence and any adverse effect these could have on their credibility. There is accordingly no justification for this Court

to interfere with the Regional Magistrate's conclusion that they were honest and credible witnesses and their evidence reliable. It follows that the submission that the Regional Magistrate misdirected himself in this regard is without substance.

Is the identification of the appellant reliable?

[8] The crucial question regarding the identification by the witness Iris Felix of the appellant as her assailant is whether she had sufficient opportunity for observation to warrant the conclusion that her identification is reliable.

[9] Both witnesses testified that the bathroom was located opposite the door of the bedroom in which the Leonie Arries was sleeping. They also confirmed the bathroom light remained on every night and that it was burning on the night in question. Felix testified that when she approached the bedroom the appellant was standing at the door. The bathroom light was shining on him and they looked at each other. She spoke to him and asked how he had gained entry and what he was doing in her house. He did not reply but assaulted her with what appeared to be a cricket bat, striking her on her head a number of times. Even though she became unconscious, this did not occur after the first blow.

[10] Mr De Jager's contention that Arries contradicted Felix in respect of where she saw Felix and her assailant for the first time and where the assault on Felix took place is misconceived. The descriptions of the witnesses regarding what

had occurred would certainly not have been the same as they observed events from different vantage points.

[11] However, it is clear from the testimony of Arries that she had seen the intruder assault Felix in the passage. When Felix encountered the intruder in the passage Arries was still in the bedroom as he had told her to stay there. It was then that he assaulted Felix in the passage. Her evidence that she had seen them in the sitting-room and that the intruder assaulted Felix there and outside the house is not a contradiction in relation to the evidence as a whole. It is clear she only emerged from the bedroom after the assault on Felix in the passage and by then the intruder and Felix were in the sitting-room.

[12] The witness Felix was able to see her assailant clearly because of the bathroom light. There is nothing to indicate that this was unlikely or that she was untruthful in this regard. Before her assailant delivered the first blow she spoke to him, albeit briefly. The testimony of Arries does not contradict this. The submission that there were material contradictions between the evidence of these witnesses is, in my view, unfounded.

[13] Mr De Jager submitted that Felix had told the police officer, Cyril Preston Douglas, that 'an unknown coloured man' assaulted her. The evidence does not support this. The evidence confirms that Douglas had stated that Arries provided this description. Moreover, both Douglas and Arries testified that Felix was not in

a position to communicate after the assault. On the Monday when a detective visited Felix in the hospital, she informed him she knew her assailant and that the person was the appellant.

[14] The evidence establishes that Felix had sufficient opportunity to make a proper identification. She had on various occasions previously walked past the appellant in Malgas Street and they had greeted. Due to this, she recognised him as the person who broke into her house and assaulted the witness Arries and herself. The evidence reveals that after her discharge from hospital the police arrived at her house. The appellant was sitting on the front seat of the vehicle and she identified him as her assailant. Neither the State nor the defence, when questioning Felix, clarified what had transpired on this occasion but it appears that her identification was spontaneous.

[15] On the totality of the evidence, it is clear that the Regional Magistrate did not err in his finding that the identification by Felix of the appellant as the perpetrator of these crimes was honest and sincere. The evidence supports his conclusion that the identification was reliable beyond reasonable doubt.

Is the appellant's alibi reasonably possibly true?

[16] The appellant's alibi defence was that on the Sunday night he arrived home at 8:00pm and remained there until he awoke the following morning. His father, Samuel Phillip Tarentaal, testified that after the appellant arrived home he did not



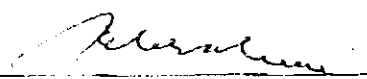
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leave again. If the appellant had done so, he would have heard him as the doors and windows opened and closed with difficulty. This was the high-water mark of the testimony of the appellant's father. Mr De Jager conceded his evidence did not exclude that the appellant may have left and returned without his knowledge.

[17] It is apparent that the father's evidence failed to corroborate the appellant's alibi. The trial Court correctly concluded that the father's testimony was false. Felix, on the other hand, was a credible witness whose evidence impressed the Regional Magistrate. She clearly placed the appellant on the scene. As I have stated previously there is no basis for rejecting the trial court's conclusions. I am satisfied that the Regional Magistrate did not err in his finding that the appellant's alibi was not reasonably possibly true.

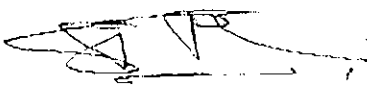
Conclusion

[18] I find no merit in any of the grounds of appeal. In the result, the appeal against the appellant's conviction on both counts is dismissed and the convictions are confirmed.


Y EBRAHIM
JUDGE OF THE HIGH COURT

5 MARCH 2007

I concur and it is so ordered


S MILLER
JUDGE OF THE HIGH COURT

5 MARCH 2007

Delivered on: 8 March 2007

Counsel for the Appellant: Mr A de Jager

Counsel for the Respondent: Mr D Els