IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

12/09/2008.

CASE NO. A423/2008:5/9/2008

NOT REPORTABLE

In the matter between:

MONWABISI NIKANE GUMEDE — APPELLANT

and

THE STATE — RESPONDENT

JUDGMENT

MAVUNDLA, J.,

[1] The appellant, was convicted at the Regional court Benoni on 13 May 2004 on a count of theft out of a motor vehicle in that he unlawfully and intentionally stole a handbag with its contents out of motor vehicle with registration number JXW 703 GP the property of one Diana Ferreira. The appellant was sentenced to 8 years imprisonment.

[2] The appellant is appealing against both the conviction and sentence after he was granted leave to appeal against both the conviction and sentence. The notice of appeal reflected at paginated page 72 was prepared by the appellant himself. Instead of tabulating the grounds of appeal as it is expected of an appellant, the appellant is rehashing his version he gave in court. With regard to sentence the appellant is merely stating

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

08/09/12
DATE — SIGNATURE

his version. The appellant cannot be faulted for the failure to tabulate the grounds of appeal as it would be expected where the appeal is being noted by an attorney. W e shall condone nonetheless the shortcomings I have pointed out and deal with the appeal, especially having regard to the fact that the appellant is being assisted by counsel instructed by the Pretoria Justice Centre who has also submitted heads of argument on behalf of the appellant.

[3] The appellant who was dully legally assisted during the trial, pleaded not guilty to the aforesaid count. The appellant diced to exercise his right of silence.

[4] The conviction of the appellant is premised on the evidence of Ms Diana Ferreira who is the complainant in the case; Mr. Michael Mohlape who witnessed the incident in resulting to the charges against the appellant and also chased after the appellant and eventually apprehended the appellant. The appellant testified in his own defence and did not call any witnesses either on the merits or on sentence.

[5] The circumstances of the case are briefly that Ms. Ferreira had stopped at red robot and her car's window was broken and her handbag was grabbed by what she described in her evidence by a "black thing". She did not see who broke her window nor who grabbed her handbag. After she had recovered from her momentary shock she proceeded to the Benoni police station

where reported the incident. While there the appellant was brought to the police station and she was informed that this is the person who was apprehended for breaking into her motor vehicle. She was seeing the appellant for the first time at that moment.

[6] The accused was convicted on the strength of the evidence of the second State witnesses. Mr. Michael Mohape. The effect of his evidence is that the appellant is the person who broke the window of the complainant's motor vehicle and he handed it over to the person who was in his company and they both ran into a passage. Mr. Mohape set pursuit after the two. He could not drive through the passage the two had ran into . He got out of his motor vehicle and set pursuit on foot . They ran to a ceratin place called Benoni Plaza or mall. He fired a warninig shot at the two commanding them to stop but they did not. They split and ran into different directions. He decided to run after the appellant whom he caught up with. He asked the appellant why was he doing that. The appellant responded by saying that he was taking a chance he was hungry.

[7] The version of the appellant was that he was not involved in the alleged offence. He had alighted from a taxi. He was walking to the centre of the town to where he works in washing taxis at a taxi Sasol Taxi Rank. He was apprehended by the security officer who accused him of damaging or braking a certain motor vehicle's window. He wanted to explain but he was not given ay

chance to do so. He said that he was arrested at the corner of Voortrekker and Ampthill Avenue.

[8] The magistrate rejected the version of the appellant and accepted that of the State and found that the security officer Mr. Mohape was a reliable witness.

[9] Ms. Henzen has submitted that the magistrate misdirected himself in finding that Mr. Hohape's evidence was reliable and that he had positively identified the appellant as being one of the culprits who he had been pursuing from the moment he saw them running away from the scene of the braking of the complainant's motor vehicle. She further submits that the onus of proving its case rest on the State and that there is no onus on the part of the appellant and that if his version is reasonably possibly true then he is entitled to an acquittal.

[10] Mr. Sibara, on behalf of the State submitted that the magistrate correctly accepted the evidence of the State witnesses and rejected that of the appellant. He, inter alia, submitted that the appellant was positively identified as being one of the culprits by Mr. Mohape because he never lost sight of the appellant while he was giving chase after him.

[11] Where the identity of the accused person depends on the evidence of a single witness, it is trite that the evidence of that single witness must be approached with caution.[1] Generally the evidence of a single witness is accepted if such evidence is satisfactory in all material respect or there is corroboration,[2] and the witness is truthful.[3] It is important to look at, inter alia, the opportunity the identifying witness has had to see the identified person, whether the identified person is known to the identifying person, the illumination and the prevailing circumstances. One must also look at whether there is real risk of an error by the identifying witness.[4]

[12] Mr.Mohape in his evidence in chief that he was the second car parked at the robot. He felt something like a bang on the door and afterwards he heard a lady screaming. That is when he looked at his right hand side mirror and saw a person crashing or jumping over to the right hand side pavement. He suspected something[5]. Under cross examination he said that "I saw a person running away from a person who was screaming. I ran across the street, as a security officer, that is when I realised

[1] R v Mokoena 1956 (3) SA 81 (A) AT 85—6; S v Lesedi 1963 (2) SA 471 (A) at 473F; S v Sauls and Others 1981 (3) SA 172 at 180E—G); Leburu v S [2003] 2 ALL SA 531 (NC) at 535d-g
[2] S v Artman and Another 1968 (3) SA 339 (A) at 341A-B .
[3] S v Sithole and Others 1999 (1) SACR 585 (W) at p591
[4] S v Sithole (supra) at 591c-f the Court said that: Where a conviction depends on that evidence alone, a court must quite obviously be satisfied that the witness is truthful. What is perhaps more important, though, is that there must be no reasonable doubt that the witness is not mistaken. In our view that will generally require something more than the mere assertion by the witness that he has correctly identified the culprit, if the inherent risk of error is to be guarded against. It may be that the person concerned is well known to the witness. Or it may be that the person has some distinctive feature. But once one accepts that there is an inherent potential for mistaken identification, which a court is bound to do, it would seem to us that without something more, the mere assertion by a witness that he recognizes the offender will seldom suffice."
[5] Page 8 line 5-11.

that there was a burglary.[6] In his evidence in chief he said that after seeing the two boys running away he then faced the oncoming traffic.[7] I understood his evidence in chief to be that he was stationery in his motor vehicle which was second motor vehicle at a red robot.[8] His evidence is self contradictory because in his evidence in chief he said nothing about he running across the street.

[13] in his evidence in chief he said that he saw "pieces of glasses from his arm. I suspect that something was wrong."[9] He also said that he saw on the appellant "pieces of blood falling from his hand."[10] However, under cross examination he said that the appellant had no injuries[11]. If indeed Mr. Mohlape had seen, as he put it "pieces of blood" from the arm of the person who he said was the appellant at the time when he handed the bag to his companion, it would have been expected that injuries would have been present on the person who he subsequently apprehended. The fact that the appellant had no injuries, tend to give some credence to the version of the appellant that he was not at the scene of crime. This material discrepancy brings doubt whether the appellant is indeed the person who Mr.

[6] Page 12 line 2-5
[7] Page 8 line 16-17.
[8] Page 8 4-6: "I was in the second lane from the right side and there was motor vehicle in front of mine your worship. I was second car parked at the robot. That is when, as I was parked at the red robot.'

[9] (page 8 line 13-14)
[10] Page 10 line 7-10: "Now, the accused before court, which one of the two was he, was he the one who wsa carrying the handbag, or the one who received the handbag?- He was carrying the handbag and I saw pieces of blood falling from his arm. He handed over the short one the handbag he had."
[11] Page 18 line 11-12; "Did you notice any injuries on the person of the accused when you arrested him, there on his hands/-No injuries."

Hohlape saw at the scene of crime. Mr. Mohlape's insistence under cross examination that he saw what the persons did at the crime[12] does not tally with his earlier in chief evidence.[13]

[14] The discrepancy that I have just pointed out clearly demonstrate that Mr. Mohlape's evidence is unreliable. It is not safe to convict the appellant on the strength of the evidence of this witness, vide S v Sithole case footnote 4 (supra). Besides the appellant bears no onus to prove his innocence[14]. Any doubt that arises on the State's case must benefit the appellant. The magistrate need not believe the appellant, it suffices if his version is reasonably possibly true. As I have indicated herein above the absence of any injury on the part of the appellant negates the possibility that he is the person who broke the window of the complainant's motor vehicle, as testified to by Mr. Mohlape.

[15] In the light of what I have stated herein above, I am of the view that the magistrate misdirected himself in convicting the appellant o the strength of the evidence of Mr. Mohlape. The magistrate should have found that the State had not proven beyond reasonable doubt the doubt of the appellant. The

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[12] Page 13 line 17-22: "We agree with each other, you only saw the people running., you never saw what happened behind. is that so?—I saw what they did behind me. What is it that they did?- They hit the motor vehicle window, or broke the motor vehicle window. It was the tallest amongst the two."
[13] Page 12 line 1-5: "Before you could give chase, did you see what actually happened, or did you see the car that was allegedly broken?—I saw a person running away from a person who was screaming. I ran across the street, as a security officer, that is when I realized that there was a burglary in the car, people broke, or damaged the car."
[14] Vide S v Liebenberg 2005 (2) SACR 355 (SCA) at 358i-359b.

magistrate should have given the appellant the benefit of doubt and acquitted him.

[16] In the result I am of the view that the conviction cannot stand and should be set aside together with the sentence. Consequently the following order is made:

(1) That the appeal against both the conviction and the sentence is upheld.

(11) That both the conviction and sentence of 18 October 2006 are set aside.

(111). That the Registrar is directed to immediately remit a copy of this order to the relevant prison where the appellant is incarcerated, for his immediate release in so far as his incarceration relates to this matter only.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

I agree

DATED 12 SEPTEMBER 2008

W AJ VAN ZYL
ACTING JUDGE OF THE HIGH COURT