IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A79/2019
DPP REF NO: 10/2/5/1-2019/73

1. Reportable: No
2. Of interest to other judges: No

In the matter between:

NTSHANGASE, MZWELENI

Appellant

v

THE STATE

Respondent

Appeal against conviction in respect of robbery and unlawful possession of a firearm and ammunition based on alleged mistaken identification. Appeal dismissed.

JUDGMENT

DE VILLIERS, AJ

[1] The appellant appeals his conviction on 11 August 2015 with the leave of the court *a quo*, the learned magistrate Mr Petersen in the regional court for Johannesburg, Gauteng. There is one issue on appeal: alleged mistaken identification. It is the only matter addressed in this judgment.

[2] The learned magistrate found the appellant guilty of three charges: count 1 robbery with aggravating circumstances, count 2 the alternative charge of contravention of section 4(1)(f)(iv) of the Firearms Control Act 60 of 2000 for being in unlawful possession of a prohibited firearm namely a .375 Magnum revolver where the serial number and identifying markings were removed without the permission of the registrar, and count 3 for being in possession of six .357 Magnum calibre cartridges without having a license, permit or other authority therefor in contravention section 90 of the Firearms Control Act 60 of 2000.

[3] The issue before this court is to establish if the learned magistrate erred with regard to conviction and the identity of the appellant in respect of the three crimes of which he was convicted.

[4] The facts in this matter could be summarised in four overlapping chapters of the narrative, the robbery, the pursuit, the arrest, and the recovery of the firearm and stolen items.

[5] Mr Cheng and Mr How testified that on 26 February 2013 at about 10H00 in the morning they were driving in a Volkswagen Caddy vehicle near Troyville, Johannesburg. Four men driving a stolen silver Audi A4 arrived in the area. The Audi blocked the path of the Caddy in Gous Street in order to execute the robbery that followed. Three of the men got out of the Audi, approached the Volkswagen Caddy and robbed the men of their bags, whilst pointing firearms at them. Mr How recalled that the person who robbed him, held a silver firearm. The driver of the Audi remained in the car. The bags taken from Mr Cheng and Mr How were recovered by the police in the Audi at the scene of the collision described later herein, and handed back to them. The revolver in respect of which the appellant was convicted, was silver in colour. It was later found by

the police between the left front passenger seat and the door of the Audi where it collided with a stationery vehicle as described later herein.

[6] Constable Ngobeni testified he was with Constable Ngwenya on patrol in Troyville in a marked police vehicle on the day that the robbery occurred. Constable Ngobeni drove the vehicle. They turned into Gous Street and saw the VW Caddy and Audi stationery and the Audi's open doors. He saw the three men running back to the Audi vehicle. One of the men running back to the Audi was wearing a grey shirt, blue jeans and brown shoes. It is common cause the appellant was similarly dressed when he was arrested later on that day. The man so dressed was armed with a handgun, which he carried in his right hand. He held a bag in his left, as he ran towards the Audi. Constable Ngobeni saw this man enter the front, left passenger seat of the Audi vehicle, where the silver revolver in issue, was later recovered. Only two robbers managed to get into the getaway vehicle, when it sped off. The robber who was left behind, ran away on foot and played no further role in the events that unfolded.

[7] Constable Ngobeni gave chase and called for backup assistance. He was driving a Nissan light delivery vehicle. The Audi sped towards the city centre. During the Audi's attempt to escape, it collided with a bus, but continued on its way. At some stage another marked police vehicle, a Volkswagen Jetta joined the pursuit of the Audi vehicle in the chase, and a metro police vehicle joined as well. The Volkswagen Jetta, was driven by Constable Phahlane, accompanied by Warrant-Officer Hlatshwayo. They responded to the call for assistance and followed the Audi when they saw it. The metro police officer, Inspector Rampete, saw the chase by Constable Ngobeni and joined therein. He also was driving a marked, official vehicle. It was a car chase on a normal Tuesday morning in the city centre, as usual, filled with traffic and pedestrians.

[8] The exact route that the Audi took is not relevant. The Audi at some stage drove down Commissioner Street with vehicles in pursuit. During the pursuit, Constable Ngobeni at some stage moved into a side street, Maritzburg Street, parallel to the street in which the Audi was being driven. He knew the area and which the probable routes were. He lost sight of the Audi briefly during this

period, but was able to catch up with the Audi a few streets later. Constable Ngobeni did not enter Kruger Street when the Audi turned into oncoming traffic into a one-way street. A short while later he came upon the scene of the collision involving the Audi and a Mazda 323 and found that the occupants of the Audi had fled. The second police vehicle was already on the scene. Constable Phahlane and Warrant-Officer Hlatshwayo saw the Audi being driven into the oncoming traffic in the one-way street in Kruger Street. It collided with the Mazda 323. The metro police officer, Inspector Rampete, stopped in Commissioner Street, ran forward, and saw the collision that had occurred between the Audi and the Mazda 323. He thought this was in Main Street.

[9] Immediately after the collision, Constable Phahlane and Warrant-Officer Hlatshwayo saw the passenger in the left front passenger seat of the Audi vehicle getting out and running towards them, then taking the corner into Marshall Street. Both Constable Phalahlane and Warrant-Officer Hlatshwayo saw the front passenger get out of the vehicle, whom they identified as the appellant, dressed as previously described in a grey shirt, blue jeans and brown shoes. They chased after him. They were close to the scene of the collision. Constable Phahlane arrested the appellant in Marshall Street, assisted by Warrant-Officer Hlatshwayo. Constable Phalahlane saw the passenger in close proximity and, save for a brief interval when he turned into Kruger Street, kept him under observation until he arrested him. Even before Constable Phahlane exited his vehicle, a metro police officer had stopped as well. According to Constable Phahlane, he led the chase (not the metro police officer). The metro police officer, Inspector Rampete, recalled seeing Constable Phahlane on the scene. After the arrest of the appellant, the police officers returned him to the scene of the collision. Constable Ngobeni saw that it was the man he had seen earlier in Troyville robbing the two complainants. He testified that he could see him clearly at the scene of the robbery. He identified that person as the appellant in the dock as well.

[10] Several of the police witnesses testified that two firearms were found in the Audi, including the silver revolver, Magnum .375 which was loaded with six

cartridges. The revolver was found where the appellant sat in the Audi, between the left front passenger's seat and the door. The complainants' two bags were also found in the Audi.

[11] The only criticisms in the evidence for the state are not material having regard to the pursuit and are that:

[11.1] Various witnesses estimated the distances differently;

[11.2] There were differences about who passed whom in the foot chase after the appellant. The evidence by the metro police officer suggested that he commenced the chase; and

[11.3] There were differences about where the metro police vehicle was parked.

[12] There is little merit in these criticisms. These events played out where witnesses were pursuing first a vehicle and thereafter an offender, and events were happening very quickly, the situation was a stressful event, and the police reacted with speed to a dangerous situation. They were chasing after criminals and would have focussed on the dangerous chase, not on peripheral details. Differences in recollection further may be explained by the relative observation positions the witnesses had, or the lapse of time, as opposed to being untruthful on an aspect. Tailored evidence would have been easy to achieve, but the slight contradictions under these circumstances point to honest, recalled observations about events that took place a reasonable time before the trial. I agree with the remarks by Nicholas J in *S v Oosthuizen*:[1]

> "… *Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence.*"

[13] The evidence must be evaluated as a whole.

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[1] *S v Oosthuizen* 1982 (3) SA 571 (T) at 576H. This judgment inter alia was referred to in *S v Nair* and Another [1993] ZASCA 5 with approval by the learned judge, then acting in the SCA.

[14] The appellant was at all times legally represented. The appellant's case was that on the day in question, 26 February 2013, he was apprehended based on a mistaken identification:

[14.1] In his plea explanation on 25 February 2014, the appellant stated that he was walking under a bridge towards "Comaimai" to buy traditional food when he was accosted. A year-and-a-half later, on 29 July 2015, he testified that he was his way to "Cwamaimai" to "make" a quotation for traditional clothing. In cross-examination he avoided answering the question why he was in the area and explained the contradiction in his versions by stating that traditional (Zulu) clothes are sold at that place, and that both traditional food and clothing are sold there. This does not indicate why he was in the area;

[14.2] In his plea explanation he stated that a group of Nigerians followed him, and shouted that he should stop. They informed him that he was wearing similar clothes to the person (singular) who had crashed into their vehicle at a panel beating business. In cross-examination he testified that the group did not approach him from behind as stated at the outset, but from the front. He was wearing a grey shirt, blue jeans and brown shoes. He could not state how far he was from the scene of the collision when he was stopped, but was out of sight of the scene;

[14.3] In his plea explanation the appellant stated that he was asked to go with the group of Nigerians to the scene of the collision, which he did. In evidence he testified that they dragged him along;

[14.4] In cross-examination he testified that they immediately started assaulting him. He was assaulted by being hit with open hands and fists, and by being kicked. Despite the assault by the group surprisingly, he testified that he suffered no visible injuries.

[14.5] In his plea explanation, the appellant stated that whilst they were on their way back to the scene of the collision, the group encountered police officers. The group informed the police that the appellant wore

similar clothes to one of the people who had got out of the vehicle that had crashed into their vehicle. In evidence he testified to this effect and added an observation that it seemed to him that the police were merely driving around in their van. He was loaded into the van;

[14.6] In his plea explanation, the appellant further stated that before they encountered the police, this group assaulted him. He was handed to the police officers, who also assaulted him. In evidence he testified that only the group that apprehended him and the police at the scene of the collision assaulted him. I have referred to his lack of injuries; and

[14.7] The appellant was cross-examined on where he was arrested. His lawyer had put a version that he was arrested in Main Street, and not in Marshall. As already reflected, the appellant was unable to state where he was detained.

[15] It is trite that a court must exercise some caution in evaluating evidence on identification.[2] Similarly, it is trite that if there is a reasonable probability that the appellant's version may be true, he should have been found not guilty.[3]

[16] Before interfering with a finding of fact by the learned magistrate on appeal, it is instructive to consider the guidelines set out in *R v Dhlumayo and Another,*[4] guidelines that restrict interference in findings of fact on appeal. At the same time, those guidelines, should be seen in context. That context was re-affirmed by the Supreme Court of Appeal ("the SCA") in *Attorney-General, Transvaal v Kader*[5] when it quoted the following extract from *Dhlumayo supra* (referring to the judgment by Davis AJA):"*Later, he said, more specifically (at 695-6):*

> *'The principle which has been adopted that an appellate Court will not ordinarily interfere with a finding of fact by a trial Judge - with which I shall deal in a moment - is certainly not a rule of law. It probably may be called a "rule of practice", though I can find no authority which goes so far as to call it such. ... It is no more than a common-sense*

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[2] *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C.
[3] *R v Biya* 1952 (4) SA 514 (A) at 520H-521A.
[4] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 695.
[5] *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A) at 739J-740B.

recognition of the essential advantages which the trial Judge has had, as a consequence of which the right of the appellate Court to come to its own conclusions on matters of fact, free and unrestricted on legal theory, is necessarily in practice limited.'"

[17] In the *Monyane and Others v The State* the SCA held:[6]

> *"[15] This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (S v Francis 1991 (1) SACR 198 (A) at 204e)."*

[18] Still, when an incorrect factual finding has been made by the learned magistrate, this court must rectify it.[7]

[19] Counsel for the defence submitted that "... if *one steps back a pace the conclusion is inexorable that that the appellant was not involved in the commission of the crimes of 26 February 2013.*" I disagree, upon a complete conspectus of the evidence, the evidence of the appellant does not raise reasonable doubt about the state's case.

[20] The case for the prosecution, if false, would have required a contrived conspiracy to lie about a chain of events that played out in public view. That evidence is a complete chain of events linking the appellant to the crimes in issue as the only reasonable conclusion. Cross-examination did not disturb

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[6] *Monyane and Others v The State* [2006] SCA 141 (RSA) para 15.

[7] *S v Mafaladiso en Andere* [2002] ZASCA 92:

> *"Dit is natuurlik so dat 'n hof van appèl nie ligtelike met 'n feite-bevinding, selfs 'n afleiding uit bewese feite, van 'n verhoorhof sal inmeng nie. Maar hierdie stelling is niks meer as 'n riglyn nie en is nie 'n regsreël nie (R v Dhlumayo and Another 1948 (2) SA 617 (A) op 695 in fine e v) en waar 'n hof van appèl oortuig is dat die verhoorhof 'n verkeerde feitebeslissing gemaak het, moet hy dit regstel. (Sien S v Mkohle, supra, op 100 e - f; President of the RSA and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) op 42, [78] – [81].)"*

that conclusion, and neither did the evidence of the appellant. There is no suggestion that the court erred in not accepting the appellant's evidence:

[20.1] His version was internally inconsistent and not consistent with his plea explanation, as set out already;

[20.2] The appellant had no visible injuries despite the alleged assault;

[20.3] If one accepts that the collision had taken place ending a police chase, how likely is it that bystanders would have gone looking for the suspects running away from the scene?

[21] As suggested in in *Modiga v The State*[8] I am mindful of falling into the trap of failing to see the wood for trees, hence I take an overview of the evidence and consider the entire body of evidence balancing the strengths and the weaknesses and merits and demerits and the probabilities in determining whether the magistrate erred in deciding that the appellant was guilty on the three counts.[9] In doing so I am alive to the fact that the State bore the onus to prove the appellants guilt beyond a reasonable doubt.[10] The appellant bears no onus to prove his innocence and any doubt must benefit the appellant.[11]

[22] The learned magistrate delivered a comprehensive, reasoned judgment. As would be clear from the above, I can see no reason to interfere in his judgment. The judgment reflected in detail the evidence on the chain of events from robbery to arrest to recovery of the stolen goods and the firearm in issue, as well as the appellant's version. The judgment also reflected the caution that the learned magistrate applied, by setting out the legal principles he had to apply, and at the same time he considered the evidence as a whole, including the small contradictions in the evidence. The state witnesses impressed the magistrate, and he found that the appellant's version was false. I am satisfied that he correctly accepted the version of the state witnesses, and noted that minor contradiction were not indicative of lies but were due to error per

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[8] *Modiga v The State* [2015] ZASCA 94 para 28.
[9] *S v Trainor* [2002] ZASCA 125 para 8 and 9; *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.
[10] See *S v Ntsele 1998 (2) SACR 178 at 182A-G.*
[11] *S v Jochems* [1990] ZASCA 146; *S v V* 2000 (1) SACR 453 (SCA).

Oosthuisen.[12] The trial court has had the advantage of hearing and observing the witnesses as they testify and under cross-examination. I am satisfied that the Magistrate has correctly found that the State proved its case beyond reasonable doubt.

[23] For the reasons above, I propose that the following order be made:

1. The appeal is dismissed

DP de Villiers AJ

I agree and it is so ordered

SC Mia J

Heard on:	28 April 2020 (matter determined on written submission oral submission at counsel request due to Covid-19 restrictions)
Delivered on:	21 May 2020 electronically, by e-mail
On behalf of the Appellant:	Mr LM Tshabalala
On behalf of the Respondents:	Adv MPD Mothibe

[12] *S v Oosthuisen* (supra) 1982 (3) SA 571 (T) at 576H-577C.