IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A114/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

In the Appeal of:

SPHAMANDLA KHUMALO APPELLANT

And

THE STATE RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties legal representatives by email. The judgment is further uploaded to the electronic file on Caselines by the Judges secretary.

JUDGMENT

LESO AJ

INTRODUCTION

[1] On the 6th of March 2019 the appellant leave to appeal against the conviction and sentence which was dismissed by the *court a quo*. The appellant has now filed an appeal against his conviction and sentence.

BACKGROUND

[2] On 14 December 2018 the appellant was convicted on a count of robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977 read with Section 51(2) of Criminal Law Amendment Act 105 of 1997 by Magistrate Du Plessis at Tsakane Regional Court. On 22 February 2019 the appellant was sentenced to fifteen (15) years imprisonment and declared unfit to possess a firearm in terms of section 103 (1) of the Firearms Control Act 60 of 2000.

[3] I wish to state that record of the and reconstructed evidence was difficult to follow, specifically the evidence of M [....] who was the first witness where the magistrate even commented that are no notes on the morning of 6 February 2018 and he had to replace the record with his electronic notes.

GROUND OF APPEAL

[3] The appellant's grounds of appeal are summarised as follows:

3.1 It is submitted that the trial court erred in ruling that the appellant had properly identified by M [....];

3.2 that court *a quo* did not treat M [....]'s evidence with the necessary caution;

3.3 that the court *a quo* did not place sufficient weight on the above contradictions in the evidence of M [....] and M [....] 1;

3.4 The magistrate erred in ignoring the material contradictions between accused 2 and T [....] M [....] 1;

3.5 that there is doubt in the state's case because the state witnesses were not coherent.

THE STATE CASE

[5] The evidence of B [....] M [....], F [....] N [....], T [....] M [....] 1, T [....] 1 M [....] 2, T [....] 1 N [....] 1 as far as it relates to the appellant as summarised below.

The evidence of M [....]

[6] This witness testified that while he was driving at section 6 Vlakfontein he was hijacked by the appellant and accused no.3 according to him he could identify them firstly because the appellant sat in the front seat and he turned around to open for accused no.3 to sit at the back because the passanger door was not opening from the outside. Secondly, while he was driving on a gravel road the appellant turned as if he was looking for something which he thought was money but it was a knife, when he looked at the back and he saw accused no.3 pointing a firearm at him. I wish to remark instantly that the fact that the witness identifies the two assailants who he had picked from the street and he was seeing for the first time as accused no.1 and accused no.3 caught my attention. Unfortunately, the appellant's representative did not follow up on that evidence nor did the court raise any concerns.

[7] The witness said that the owner, N [....] told him to go to Duduza Taxi rank then from there he went to the house of N [....] who later joined him and they both went to the place where the vehicle was spotted by the tracker officials. There they found accused no.1 and no.2 inside the police van he then identified the appellant identified as accused no.1.

The evidence of F [....] N [....]

[8] Th e witness confirms receiving a call about the hijack of his vehicle from his driver, M [....] and from the tracker officers. He disputes the evidence of M [....] that he went with him to the place where the vehicle was recovered. He version is that he followed a lead from tracker officers with his colleagues from the taxi association. When they arrived at the place where his vehicle was spotted by the tracker accused no.1, the appellant was in the front passenger's seat, accused no.2 was outside the hijacked vehicle and accused no.3 was reversing. He said they only apprehended the appellant and accused no.2 because accused no.3 ran away, Metro police came and they handed them to the police. He disputed M [....]s evidence that the appellant and accused no.2 were already in the police van by insisting that his colleagues and himself apprehended the appellant and accused no.2.

[9] The prosecutor asked him whether he went to the scene with his driver and his answer is captured as follows: "*I was never on the scene*"(my emphasis). This inscription in the record is obviously incottect because It is clear from the above summary that N [....] was at the scene where his vehicle was recovered. If one were to follow the rule that says the court takes the record as is, then this part of the evidence on record wipes the whole evidence of N [....] at the scene. I will however not follow this rule because of it is not in the interest of justice to ignore the shortcomings and the visible mistakes in the record as I have already commented about the state of the record in paragraph 4.

Evidence of T [....] 1 M [....] 1

[10] The witness testified that he could identify the appellant because he, the appellant, accused no.2 and no. 3 slept at accused no.2 house and the appellant and accused no.3 came in the morning with the stolen vehicle. This evidence was denied by accused no.2 and both the accused. The witness testified that accused no.2 give him R20 to buy a cigarette he described the cigarette as a pill called "mandrax" when he was home from accused no. 2 house heard the sound of a chopper. He admits that the hijacked vehicle was found in his yard but he said it was reversed into his yard by accused no. 2 who got out of the vehicle and ran together with the appellant into his shack. He said the officers from tracker found the appellant with a toy gun and when police came with accused no.1 looking for a gun He said later and told the police he did not see any firearm but there was a toy gun laying somewhere and he was beaten. He denied involvement in the hijacking and he disputed the evidence of accused number 1 that accused 2 sells dagga.

Evidence of T [....] 1 Matikinta

[11] The witness testified that the appellant and accused no. 2 were handed to him by N [....] who told him one of the suspects ran away. He confirms that N [....] told him that he found Accused no. 1 and no.2 in the car.

Evidence of T [....] 1 N [....] 1

[12] This witness confirmed the M [....] 1 and appellant s testimony on the search of a gun at M [....] 1s home where M [....] 1 told them that accused no.3 was Lowanbo Nasareth and they went to look for accused no.3. This evidence is relevant because throughout his testimony T [....] 1 M [....] 1 claimed that he did not know the 3rd accused.

THE APPELLANT'S EVIDENCE

[13] Sphamandla Khumalo testified in his defence as follows: that on his way to work he stopped at accused no.2's house to buy dagga then he went to the shop to buy two cigarettes and gave accused no.2 R8 for dagga because accused no.2 did not have a change. when accused no.2 went to fetch dagga, he heard a sound of a helicopter then accused no. 2 told T [....] M [....] 1 who was in the house not to run but T [....] ran out of the house. He heard a gunshot and when he went to investigate he was apprehended by tracker officials and he was taken to the Metro Police officer by the name of Justice who took him and accused no.2 in the police van.

[14] The appellant denied any involvement in the robbery, he denied sleeping at accused no.2's house, he denied being in the company of accused no. 3, he denied that he was in the hijacked vehicle, he said that he cannot drive a car and he insisted that he told the police that he went to accused no.2 to buy dagga. He does not dispute the arrest but denied that he was positively identified by the complainant because according to him the complainant looked at him and he said "*it could be him*". According to the appellant, he saw N [....] at Tsakane Court the first time and he saw T [....] M [....] 1 and accused no. 2 when he was buying dagga. He said the Tracker officer found dagga at the accused no.2 house but he does not know what happened to it because they were put in the police Van. He denied that there was a third person at accused no.2's house.

ANALYSIS OF EVIDENCE

[15] The court a quo relied on circumstantial evidence in its finding that the appellant is guilty of the offense of robbery with aggravating circumstances. This

court will interfere with the factual finding of a trial court if the magistrate committed a misdirection on facts.

[16] The magistrate incorrectly relied on the above evidence that Mandela had identifiedd the appellant. There are factors which the magistrate is compelled to observe when testing the reliability of identification and those are listed in *S v Mthethwa*[1] where it was held that "*because of the fallibility of the human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest, the reliability of his observation must also be tested, this depends on the various factors such as* lighting; the proximity of the witness; opportunity of observation and the extent of prior knowledge of the accused and corroboration of witnesses.

[19] The observation of the appellant by M [....] must not pass the test of positive identification if not all factors as held in *Mthethwa* are not present. Similarly, the identification of the appellant does not pass the test and should not be considered. This witness could have been close to the assailant (s) but the fact is that he was seeing them for the first time when he picked them up from the side of the street should create a doubt on positive identification. I doubt that he had an opportunity to observe the asailiant taking into account all the activities that demand one's attention while driving. The appellant's attorney and the respondent's counsel are correct in their submission when they argued that the observance of the appellant occurred in a moving scene. The evidence of the second identification lacks validation because N [....] denies that M [....] was at the scene at which he claims to have pointed the appellant. Even if we were to accept that M [....] was at the scene he does not describe how he identifies the appellant as the person who robbed him. Makinita contradicts the evidence of M [....] whio says the appellant and accused no.2 were already in the police van when they arrived.

[20] section 208 provides that a conviction may follow on the evidence of a single competent witness however the principle our law is that the evidence of a single witness must be approached with caution and M [....]'s evidence on the identification

[1] *S v Mthethwa* 1[1]972(3) SA 766 (AD)

of the appellant should have been treated with caution as it was found in *S v Stevens* [2] *that an accused may be convicted of any offence on the single evidence of any competent witness. However, it is trite that …the evidence of a single witness should be approached with caution, and his or her merits being weighed against factors which militate against his or her credibility*".

[21] During cross-examination by accused no.1 attorney and re-examination by the prosecutor N [....] could not remember whether he went with M [....] to the scene. I do not doubt that the magistrate was aware of this contradictions in the evidence of the two witnesses because in his judgment he states the following " *I got the impression that N [....] wants to be the hero in this case and even tried to make it better by stating that accused no.2, he also forgets that his driver mandela was at the scene*". Despite the above observation the magistrate does not make any credibility finding on this witness but he instead justify the witness's sudden amnesia. On the issue of arrest of the appellant and accused no.2 N [....] insisted that the appellant was found inside the hijacked vehicle while accused no. 2 was outside the vehicle when M [....] insisted that he went with N [....] to the scene and they found the appellant and accused no. 2 already arrested in the police van. M [....] 1 also give a different testimony in this regard, he testified that the appellant was arrested by Metro police officials in the shack however N [....] denied that the appellant and accused no. 2 were arrested by Metro police officials and insisted that he and his colleagues handed the accused to Metro.

[22] It is clear that the finding was based on the incoherent evidence of N [....] and M [....] the magistrate also found that M [....] was taken from N [....]'s house to where the car was found and they found accused 1 and two and identified accused 1 as a knife-wielding robber but stated that he did not know accused 2. It was incorrect for the court a quo to put any reliance or weight on the evidence of M [....] 1 because of the challenges in Mokena's who also admitted that he was a suspect who was beaten by the police when the police were looking for a gun at his place.

[2] S v Stevens 2005 1 All SA 1 (SCA) para 17 See also S v Sauls 1981 3 SA 172

[22] When he was asked about the issue of the gun M [....] 1 started mumbling to the extent that the court officials could not hear what he was saying. The magistrate also could not follow his mandrax story as he made the following comment "*just find out what he is trying to say*". During cross-examination when he was asked to describe the toy gun which he alleged to have been in possession of the appellant he answered that he did not see the gun clearly because the appellant had hidden it in the t-shirt. When the inquiry about the toy gun intensified the witness could not answer the questions until the interpreter comments as follows: ''*your worship I do not know if this man is frightened or afraid to answer but I cannot hear*, *I do nor understand what he is saying, even the stenographer with the headphones cannot hear him*". During cross-examination, he said he made the statement and said he will take the police to where the appellant and 2 put the gun. This evidence does not make sense because this witness had said the tracker officials found the appellant with the gun which he could not describe.

[24] It I clear from the above dicusion that the testimony and M [....] 1 and N [....] differ on the issue of the arrest of the appellant and accused 2 while accused no.2 evidence coincides with the evidence of M [....]. N [....],s evidence does not make sense because he denies that Metro police and tracker officials were already at the scene when he arrived with his colleagues even though he was called by them and he heard gun shot when he got to the scene. On the other hand M [....] did not say anything about N [....]'s colleagues being at the scene. I do not doubt that the magistrate was alive to the fact that the state case was larking and that were material contradictions in the state's case that are irreconcilable because in his judgment he said the following "*the state can be criticised for not calling the officers probably from tracker who fired shots and clearly assisted in the arrest as it might have cleared up a lot of issues that arose at the later stage*".

[25] The magistrate made a finding against the testimony of N [....] that M [....] arrived at the scene and over an hour he identified the accused at the address where the vehicle was found and he continues by stating the following: "*I got the impression that Mr N [....] wants to be the hero in this case and even tried to make it better by stating accused to make the case even stronger. This is highly unlikely in the presented scenario o a helicopter hovering over and authorities closing inn. He also*

forgets that the driver M [....] was at the scene of the arrest where he pointed accused 1 as one of the robbers". He summarised N [....]'s evidence as follows: "*colleagues and tracker personnel pounced on the premises where the car was and noted that the vehicle was driven by someone whom they assumed it was accused 3 and accused 1 was in the front passenger seat and accused 2 was standing outside next to the vehicle*". The magistrate does not commend on the contradictions with M [....] who said the accused were already in the police van nor was there any comment made to the fact that N [....] who actually denied the involvement of tracker officials in the arrest of the appellant and accused no.2.

[26] The magistrate incorrectly rejected the evidence of the appellant on the basis that the appellant said dagga cost R9 while he gave accused no.2 R8. He then made the following commend, ..*it is strange that accused 2 will risk losing business by not having change available for his merchandise to be sold, if accused 2 was a drug dealer I think he would rather admit it as it might be a less serious offense*. I do not what to make of this comment save to state that this inference is misplaced and has no basis. On the flip side, accused no.2 would not have admitted to dealing with drugs because that evidence would not have assisted his case in any way. The appellants pleaded not guilty and he denied having committed the offence of robbery.

[27] Having said the above I found no basis for the rejection of the appellants version. In *S v Shackell*[3] *where the court remarked that "In view of the standard of proof, the court does not have to be convinced that every detail of the accused version are true. If the accused version is reasonably possibly true in substance, the court had to decide the matter on the acceptance of that version. The accused version can only be rejected on the basis of inherent improbabilities, not because it was merely improbable but because it was so improbable that it could not reasonably possibly true. In the criminal the trial the accused does not have to prove his innocence. What is expected of him is to give the court the version that is reasonably possibly true. The court does not have to believe that his version is truthful court a quo erred in ruling that the appellants' version is not reasonably*

[3] See *S v Shackell*[3] *2001 (4) SA 1 (SCA)*

possibly true'. It is not for the appellant to prove that he is innocent but it is for the state to prove that the appellant is guilty beyond a reasonable doubt.

[28] On the issue of evidence on the arrest of the accused the respondent argued that circumstantial evidence indicates that the appellant was at the scene and he is person who robbed the complainant because there is no part of the complainant's evidence that can be criticised to a point that it failed the test in terms of section 208 of the Criminal Procedure Act of 1977. This argument is misplaced because section 208 applies to the admission of evidence of a single witness. The evidence relating to the fact that the appellant was found at the scene was not disputed as tendered by several state witnesses and the appellant who had tendered a version where he explained his presence at accused 2's house. The respondent avers that the magistrate had managed to put all pieces from the circumstantial evidence to convict the appellant. From the analysis of the whole evidence there is no evidence either by the state or appellants that anyone could piece together save to indicate that the state evidence is at its worse state. The magistrate made a mistake by solely relying on the timelines between the time of the robbery and the arrest of the appellant and accused no.2 and not considering the totality of the evidence. The magistrate does not make a credible finding nor does he attempt to balance or test the veracity of the state's evidence especially the evidence of T [....] 1 M [....] 1 and N [....].

[29] In *S v Monyane and Others 2008(1) SACR 543(SCA)* the court said the following: "bearing in mind the advantage that the 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 the trial court's evaluation of oral testimony". The court has to analyse all the evidence to determine the probabilities and improbabilities of the witnesses' versions the inconsistencies and corroborating testimonies and the credibility of the witnesses which the court found in this matter. When I test the version of the appellant that he went to by dagga accused 2 house against the version Mokena that accused 1 slept at accused 1 and came back in the morning with the stolen car and the version of accused 2 who denied that accused 2 slept at his house. I find the appellant's version probable. It is trite law that the guilt of the accused must be established beyond a reasonable doubt. From the totality of the evidence on record, it is clear that M [....] 1 and N [....] were not good witnesses nor

was their evidence impressive and I say this from what I gathered from the totality of their evidence and the comments of the magistrate himself. The state evidence lacks credibility, coherence and logic as such the court a quo should not have relied on their evidence to convict the appellant.

CONCLUSION

[37] The court had to interfere with the findings because the magistrate erred in relying on state witness's evidence when it found that the appellant was positively identified as a person who robbed the complainant. The magistrate had incorrectly found that the appellant is guilty because he ignored material contradictions in the evidence of N [....] and M [....].

[40] The onus is on the state to prove the accused is guilty and the test is beyond a reasonable doubt. When dealing with a criminal trial the correct approach is to weigh up all the evidence and consider the probabilities and improbabilities of all the versions. I have no doubt that the state failed to prove its case beyond a reasonable doubt. There is no evidence that the appellant committed an offense of robbery aggravating consequently, the conviction of the appellant was incorrect and the conviction ought to be set aside.

AS A RESULT, I PROPOSE THAT THE FOLLOWING ORDER BE MADE:

ORDER

1] Appeal against conviction is upheld.

2] The sentence imposed by the court *a quo* is set aside.

J T LESO
ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

M P N MBONGWE

JUDGE OF THE HIGH COURT

DATE OF THE HEARING: 9 November 2022

DATE OF JUDGEMENT: 17 February 2023

APPEARANCES

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