IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR44/19

In the matter between:

MZWANDILE VICTOR MEMELA **APPELLANT**

and

THE STATE **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representative by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 18 June 2020.

ORDER

The following order is issued:

(a) The appeal against the conviction and sentence is upheld.

(b) The conviction and sentence imposed on 27 June 2017 are hereby set aside.

JUDGMENT

Steyn J (Chetty J concurring):

[1] The appellant was indicted on a count of robbery simpliciter in the district court Alfred Nzo, sitting at Ezingolweni. The appellant was sentenced to pay a fine of R3 000 (three thousand rand) or undergo three (3) months imprisonment in default of the fine. Half of the sentence was suspended for six (6) months on condition that he was not convicted of robbery committed during the period of

suspension. The appellant appeals against his conviction and sentence with leave granted by the court a quo.

[2] At the onset it is requisite to deal with the appellant's plea and whether he was granted the opportunity to raise a defence. The record reflects that the presiding officer in the court a quo failed to invoke s 115 of the Criminal Procedure Act 51 of 1977 (the Act). Section 115 of the Act, in my view plays a vital role at the pre-trial stage. In *S v Seleke en 'n ander*[1] at 753 Rumpff CJ stated that the purpose of the section is to eliminate unnecessary evidence by establishing precisely what the accused is placing in dispute.[2] For the sake of completeness, s 115 of the Act reads as follows:

'(1) Where an accused at a summary trial pleads not guilty to the offence charged, the presiding judge, regional magistrate or magistrate, as the case may be, may ask him whether he wishes to make a statement indicating the basis of his defence.

(2)*(a)* Where the accused does not make a statement under subsection (1) or does so and it is not clear from the statement to what extent he denies or admits the issues raised by the plea, the court may question the accused in order to establish which allegations in the charge are in dispute.

(b) The court may in its discretion put any question to the accused in order to clarify any matter raised under subsection (1) or this subsection, and shall enquire from the accused whether an allegation which is not placed in issue by the plea of not guilty, may be recorded as an admission by the accused of that allegation, and if the accused so consents, such admission shall be recorded and shall be deemed to be an admission under section 220.

(3) Where the legal adviser of an accused on behalf of the accused replies, whether in writing or orally, to any question by the court under this section, the accused shall be required by the court to declare whether he confirms such reply or not.'

(My emphasis).

[3] In my view, the presiding officer ought to have clarified the defence in terms of the appellant of s 115(1) of the Act. The appellant should have stated his plea explanation and the State should have been given an opportunity to know what was placed in dispute. The authors Van der Merwe et al in *Plea Procedures in Summary*

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[1] *S v Seleke en 'n ander* 1980 (3) SA 745 (A).
[2] See Ibid at 756G.

Criminal Trials have aptly described the importance of a plea explanation as follows:

'The contents of the explanation of plea – even if they happen to be self-serving – may then be considered in order to determine the bona fides of the accused or, to put it differently, to see whether the explanation of plea can rebut the allegation of recent fabrication. The explanation of plea is in these circumstances relevant with regard to credibility.'[3]

(Footnote omitted, my emphasis).

[4] The appellant in casu was legally represented and his legal representative should have been asked to tender the plea explanation in terms of s 115(3) of the Act.[4] The conduct of the magistrate to not invoke s 115 of the Act, resulted in an irregularity. I am however of the view that the irregularity is not so fundamental that it vitiate the proceedings per se.[5]

[5] When the matter was heard, the State tendered the evidence of the complainant, who was a single witness. His evidence in short was that he went to the KwaNodalane Supermarket to collect money on the day in question. He went home via the shebeen at KwaCele. On his way from the shebeen to his homestead, he was accosted by the appellant who was known to him, and another person. The two of them dragged him into the forest.

[6] According to the complainant, the appellant and his accomplice placed him on the ground and started to search him. The appellant took money amounting to R550 from his pocket. The accomplice took his hat and his wallet. The complainant conceded that he had been drinking at the shebeen and reluctantly admitted that he did not walk with ease when he was going home. The record reflects as follows:

'COURT Now, you don't want to answer the question. We want to know what happened that day. If a person comes and says the witness from the shebeen went on falling, falling, falling all the way to his home, what would be your response to that? --- No, I

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[3] S E van der Merwe, G A Barton and K J Kemp *Plea Procedure in Summary Criminal Trials* (1983) at 140.

[4] See discussion by C F Klopper 'The new Criminal Procedure Act in practice' (1978) XI CILSA 320 at 323 where the author deals with the benefits of s 115. He states it as:
'A further consequence of s 115 is that the accused is forced to choose a defence at the explanation of plea stage which will stand throughout the trial, and that he consequently can no longer, as sometimes happened in the past, trim his sails to suit the wind.' (My emphasis).

[5] See *S v Moodie* 1961 (4) SA 752 (A) at 758F-H.

will not dispute that but a person doesn't sleep on the road or whatever – they get up and walk back home.'[6]
(My emphasis).

[7] The complainant was not consistent in his version before the court. He first said that the robbers were in possession of a knife and that it was the appellant who carried it. In his affidavit to the police, a day after the incident, he stated that the robbers did not have a knife and that he was not assaulted. During his evidence-in-chief he stated that he was slapped in the face and all over his body. Whenever the complainant was confronted with a question regarding the details of the event, he responded by saying that he could not remember.

[8] Later during cross-examination, he said that it was the appellant who also took his hat and wallet and gave it to the accomplice. When he was asked to clarify the material contradiction in his affidavit to the police and his evidence in court, he responded as follows:
'I was by myself when I went to report the matter so I thought it was better for me not to mention this part because if I meet up with them again, they are going to assault me because I was by myself walking along.'[7]
It is clear from the record that his credibility was compromised because the aforesaid explanation does not make sense.

[9] During re-examination his version changed again and he claimed to have a blurry memory of the events.

[10] The State also called Lindokuhle Shude (Shude). His evidence in a nutshell was that when he came from a shop he found the complainant on the ground in the forest in the company of the appellant who was busy relieving himself. He told the appellant that he better not be robbing his uncle. The appellant immediately denied that he was robbing the old man. When he was asked why his uncle, the complainant, was on the ground Shude said '[i]t was as if he has fallen because he was drunk.'[8]

[6] See record at 12 lines 3-8.
[7] See record at 31 lines 21-24.
[8] See record at 37 lines 24-25.

[11] Shude did not see any other person in the company of the appellant. According to him it was not a rainy day and the ground was not muddy as suggested by the complainant. Inasmuch as the complainant told him that he was robbed he did not reveal the identity of the person or persons that had done so.

[12] This concluded all the evidence tendered in support of the State's case. The appellant elected to close his case without tendering evidence. The court a quo surprisingly found that the State had failed to make out a prima facie case against the appellant's co-accused, and found him not guilty.

[13] Mr *Mlotshwa,* on behalf of the appellant submitted that the court a quo was misdirected in its findings regarding the identity of the perpetrator. I agree that the evidence of the complainant has to be approached with caution, since he was a single witness.

[14] Mr *Dunywa,* on behalf of the respondent conceded that there are contradictions in the State's case but maintained that the State had proved its case beyond reasonable doubt. Mr *Dunywa* relied on *S v Oosthuizen*[9] and *S v Mavinini.*[10] The reliance on *Mavinini* is in my view misplaced. A fair reading of the judgment shows that an accused is required to rebut the State's case in the face of evidence that clearly implicates him. I shall return to the State's case and whether it required of the appellant to be placed on his defence.

[15] It is trite that a court of appeal generally does not interfere with the credibility findings of the trial court.[11] Since the complainant is a single witness the court a quo had to apply the cautionary rule and look for safeguards that would reduce the risk of a wrongful conviction.[12]

[16] I shall now turn to the judgment of the court a quo and the evaluation of the evidence before the court. The court a quo summarised the evidence of the complainant in relation to the robbery as follows:

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[9] *S v Oosthuizen* 1982 (3) SA 571 (T).
[10] *S v Mavinini* [2008] ZASCA 166; 2009 (1) SACR 523; [2009] 2 All SA 277 (SCA). Also see *S v Tandwa & others* [2007] ZASCA 34; 2008 (1) SACR 613 (SCA) paras 53-56.
[11] See *S v Francis* [1990] ZASCA 141; 1991 (1) SACR 198; [1991] 2 All SA 9 (A).
[12] See *R v Mpompotshe & another* 1958 (4) SA 471 (A) at 476E-F.

'Accused 1 and the other person searched the witness all over his body and during that search accused 1, holding a knife took away the witness's money, amounting to about R550, his hat and a wallet containing a SASSA card.'[13]

[17] In the summary, the court stated that the witness Shude testified that that the complainant said immediately on the day of the incident that it was the appellant who had robbed him and he repeated it again the next day. However, when the witness was cross-examined about the report that was made to him regarding the identity of the robber by the complainant, he said:

'And who did he say he was robbed by?--- he did not say who was robbing him….'[14]

[18] The learned magistrate was clearly misdirected on a number of the facts. As to whether there was any onus on the appellant to rebut the evidence of the State, the court approached it as follows:

'The State has adduced the complainant's evidence that accused 1 had dragged and robbed the complainant of his property and this is unlawful. The accused has, in my view, to rebut that presumption of unlawfulness. In the absence of evidence of rebutting the State's case, I am of the respectful view that the State has proved its case against accused 1 beyond reasonable doubt.'[15]

[19] It is necessary to consider the court a quo's approach to the evidence of the State in relation to the co-accused:

'The complainant was found to be a poor witness in this case the veracity of whose evidence had to be thoroughly dug up and followed. Even the second witness could not link accused 2 with any wrongdoing in this matter. The second State witness had not seen accused 2, had not seen any role accused 2 played. The onus of proving the case against the accused rests with the State and the accused had no duty to supplement the State's case.'[16]

(My emphasis).

[20] I agree with the learned magistrate that the complainant was an appalling witness and that his evidence could not be relied on. The court ought to have considered whether a prima facie case had been made out against the appellant

[13] See record at 50 lines 18-21.
[14] See record at 42 lines 8-9.
[15] See record at 54 lines 12-17.
[16] See record at 55 lines 19-25.

and his co-accused. In *Osman & another v Attorney-General, Transvaal*[17] the court reaffirmed the consequences for an accused that exercises his right to remain silent at the end of the State's case. The distinction between the *Osman* and this matter is that state failed to make out a prima facie case against the appellant. The appellant did not apply for a discharge, he closed his case which means that the state had to show conclusively at the end of the defence's case that it was the appellant who had robbed the complainant.

[21] In my view, any court acting cautiously, would have rejected the evidence of the complainant. It is evident from the record that there are no safeguards in support of his testimony. The silence of the appellant could never have strengthened the State's case in the given circumstances.

Order

[22] Accordingly the following order is issued:

(a) The appeal against the conviction and sentence is upheld.

(b) The conviction and sentence imposed on 27 June 2017 are hereby set aside.

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Steyn J

I agree

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Chetty J

[17] *Osman & another v Attorney-General, Transvaal* [1998] ZACC 14; 1998 (4) SA 1224; 1998 (11) BCLR 1362 (CC) para 22.

APPEARANCES

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Date of Hearing	:	12 June 2020
Date of Judgment	:	18 June 2020