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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: AR297/2021P

In the matter between:

ZAKHELE OXFORD ZWANE

APPELLANT

and

THE STATE

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 24 January 2023.

ORDER

On appeal from the Regional Court, Eshowe Magistrate ME Xolo presiding, it is ordered:

The appeal against conviction is dismissed. The conviction of the court *a quo* is confirmed.

JUDGMENT

Henriques J (Mlaba J concurring)

Introduction

[1] On 30 June 2015, the appellant was convicted on a charge of attempted murder and sentenced to ten years' imprisonment on the same day.

The matter serves before us as an appeal against conviction only, which leave was granted on 9 October 2017.

[2] In the court *a quo* the appellant was convicted on the evidence of the complainant, a single witness who also identified the appellant at an identification parade subsequent to the date of the incident. The sole issue for determination in the court *a quo* revolved around the issue of the complainant's identity of the appellant and whether same was sufficiently reliable to secure a conviction against the appellant.

Grounds of appeal

[3] In his grounds of appeal the appellant submits that the court *a quo* misdirected itself in relying on the evidence of a single witness and in finding that the identification by the complainant was satisfactory and reliable in all material respects. He submits that the identification is not reliable and alludes to the fact that he and the complainant did not know each other prior to the alleged commission of the offence.

[4] Mr *Pillay*, who appeared for the appellant, submits that the evidence of the complainant in the court *a quo* ought to have been viewed with circumspection in light of the fact that this was a moving scene and the complainant's life was under attack. The complainant was unable to provide the police with either a detailed physical description of the assailant nor a proper description of the clothing which the assailant wore. Most notably, his statement omitted the description of the facial scars which he subsequently testified about in court which served as the basis for his identification of the appellant.

[5] The respondent submits that on a conspectus of the evidence the identification of the appellant by the complainant is reliable and that the court *a quo* correctly rejected the version of the appellant as false.

[6] It is common cause that the complainant, a security guard, sustained

three gunshot wounds to the lower part of his body on 24 October 2014, whilst performing his duties at M[...] High School. The injuries which he sustained were confirmed in a J88 completed on 15 November 2014 pursuant to the examination conducted by Dr Daniel Thulani Khoza on 24 October 2014 at 11h45. I may add that the J88 as well as the s 212(4) affidavit were handed in by consent. He subsequently identified the appellant at an identification parade held on 19 December 2014.

[7] The complainant, W[...] Q[...] M[...] (M[...]) testified that on 24 October 2014 at approximately 08h00, he observed a person entering through the side gate. He observed a person entering through the side gate of the premises without permission. He exited the guard room and approached the person greeting him. He subsequently identified the person as being the appellant.

[8] The appellant informed him that he wanted to see an educator, a Mr M[...] who was inside the school premises and shortly after saying this, the appellant drew a firearm, pointed it at his face and said 'we are done I am going to finish you off you must not move.' That is when he tried to take evasive action to avoid being shot and moved around and the appellant directed shots at him, three of which struck him.

[9] There were many people around the area who shouted that someone was shooting a security guard and when the appellant heard these people shouting, he fled the scene. M[...] was subsequently taken to Nkonjeni Hospital where he was treated and discharged. He confirmed that he had not seen the appellant before this incident. The incident lasted approximately ten minutes. Throughout the incident he was able to keep the appellant under observation at all times as the appellant was approximately an arm's length away from him.

[10] The appellant's face was not covered and he observed him being dark in complexion and had notable scars, one of which was on one of his eyes. The

appellant also appeared to be cross-eyed. He observed the appellant's face clearly. It was broad daylight and nothing obscured his view of the appellant at the time. The appellant was facing him when he threatened him and pointed the firearm at him.

[11] He also observed that the appellant was wearing a grey two-piece dust coat and a small hat which only covered the top of his head and was wearing takkies which were dirty. His clothing was dirty, marked with grease stains as if he was a mechanic. The complainant was also able to describe the firearm which the appellant carried as being a 9mm firearm used by police officers which had scratches on it and was brown-like or black in colour.

[12] Subsequently, he provided a statement to the police which did not contain a physical description of the appellant. His explanation for this was that he was traumatised after the incident but indicated to the policemen who took his statement that he would be able to identify his assailant. He thereafter identified the appellant at an identification parade.

[13] During cross-examination he confirmed that whilst the shooting incident was taking place, he and the appellant were looking at each other. At that time, he observed that the left eye of the appellant was somehow deformed and had a scar that crossed down the left eye. The appellant also had another scar on the left side of his face and nose.

[14] Constable Andries Sondelani Dlamini (Dlamini) testified that he assisted in the arrest of the appellant. He confirmed that he had received information from an informant regarding the appellant's alleged involvement in the offence. At the time, he interviewed the complainant who provided him with the physical description of the appellant, him being dark in complexion and describing his bodily features, more specifically the scars on the appellant's face. He confirmed that he had arrested the appellant and handed him over to the investigating officer. He was not present when the identification parade was conducted.

[15] The appellant testified in his defence and did not call any witnesses. His defence centred around the fact that he was not at the scene of the crime; had not been properly identified by the complainant and was not the person who shot the complainant on 24 October 2014.

[16] During cross-examination however he conceded that the complainant had an unobstructed view of him and adequate opportunity to observe him on the day in question and agreed with the description provided by the complainant to the court regarding his body structure and facial features. He agreed with the suggestion during cross-examination, that it was a clear day and the complainant would have been able to identify the person who shot him.

[17] The appellant did not dispute the identity parade. The only challenge to the identification parade by the appellant appeared to be centred around the fact that the identification parade was held subsequent to the appellant making his first appearance in court. However, nothing much turns on this aspect as, during the course of the evidence, it became clear that although the appellant had made a first appearance in court, the complainant had not seen him at court on the day he made his first appearance.

[18] During the course of his evidence it became apparent that he was arrested on 18 December 2014 for another offence and made his first court appearance on the same day. The identification parade was held on 19 December 2014. His first court appearance in relation to the current offence was on 20 December 2014. During cross-examination he conceded that he assumed the complainant had seen him in court. Consequently, the complainant did not have an opportunity to observe him in court before his arrest and the complainant did not observe him in court prior to him providing a description to Dlamini.

Judgment of the court *a quo*

[19] The court *a quo*, relying on the evidence of a single witness as well as the evidence of his identification of the appellant, was satisfied that the complainant correctly identified the appellant as being the person who shot him on the day in question. In addition, it was of the view that the evidence of the complainant was satisfactory in all material respects and that the evidence of the appellant fell to be rejected.

Analysis

[20] It is correct that a court of appeal would not readily interfere with the factual findings of a trial court unless there is evidence of a clear misdirection. See in this regard *S v Monyane and others*¹ where the court held the following:

The 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... 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...'

[21] In assessing the evidence, one must have regard to the evidence as a whole. In my view, the court *a quo* correctly considered the evidence before it and I can find no misdirection in its acceptance of the evidence. The court *a quo* correctly rejected the version of the appellant that he was not present and did not remember where he was on the date of the commission of the offence. The appellant never disputed his unique facial features and other bodily

¹ *S v Monyane and others* 2008 (1) SACR 543 SCA.

features during the course of cross-examination as testified to by the complainant.

[22] It is trite that in terms of s 208 of the Criminal Procedure Act 51 of 1977, an accused may be convicted on the evidence of a single witness provided same is satisfactory in all material respects. In *S v Sauls and others* 1981 (3) SA 172 (A), the following *ratio decidendi* was set out:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"

It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[23] In essence, at the appeal hearing Mr *Pillay* submitted that the complainant's identification of the appellant was not reliable. He submitted that the complainant, at the time of the incident and whilst being interviewed on the scene by the police, was not able to provide a detailed description of his attacker. He did not, at that point in time nor when his statement was subsequently taken by the investigating officer, describe any of the identifying features of the appellant like for example the scars on his face. He submitted that on 24 October 2014 whilst lying on a stretcher at hospital, the police took his statement but he did not provide them with a physical description of his attacker.

[24] He submitted that for these reasons the complainant's identification of the appellant shortly after the incident and at the identity parade was unreliable and consequently being a single witness, based on the cautionary rule, his evidence was unreliable and the appellant ought to have been acquitted.

[25] The fallacy in these submissions lies in the evidence presented in the court a *quo*. It is correct that the complainant did not provide a detailed description of the appellant to the police at the scene of the incident. This could be due to a number of reasons least of all that the complainant was injured and in shock. However, he had ample opportunity to see the complainant at the time of the incident and kept him under observation for at least five minutes as he was an arm's length away from him.

[26] In addition, the arresting officer, AS Dlamini, testified that he had received information from an informant concerning the appellant's alleged involvement in the offence. Before he effected the arrest, he contacted the complainant and interviewed him. The complainant indicated that he did not know who had committed the offence but had observed his attacker as it was broad daylight and he had seen who had shot him. When he interviewed him, the complainant provided a description of his attacker namely that the attacker's complexion was similar to his, being dark, he was taller than him and that '...there was one eye which was some sort of disfigured from the perpetrator, it is only that he did not know whether it was a left or a right eye.' He further said '...the perpetrator had a small scar somewhere around his face...'.² He indicated that it was only after he had verified the appellant's description with the complainant that he then arrested the appellant.

[27] In my view, the criticism of the complainant's failure to inform the police at the time of the shooting incident the exact description of the

² Transcript of the proceedings, page 35, lines 18 to 22.

appellant is without merit. The complainant had been through a traumatic ordeal; had been shot and was laying on a stretcher in the hospital when the police interviewed him. He could hardly be expected at that point in time to provide a detailed description. There was no evidence from any of the police present at the scene nor the investigating officer that at the time the complainant was asked for a description of the perpetrator and he failed to provide one.

[28] His failure to provide a description of the appellant at that point in time cannot detract from the weight of his identification of the appellant. In any event, there is no suggestion from the evidence or by the appellant that his description was provided to the complainant prior to the identification parade. Consequently, I am of the view that the submission by Mr *Pillay* falls to be rejected.

[29] Turning now to the reliability of the complainant's identification of the appellant as the perpetrator, the seminal judgment on identification is the decision in *S v Mthetwa*³ where the court held the following:

'Because of the fallibility of 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 various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities...'

³ *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-D.

[30] The following in my view constituted important features emanating from the evidence of the complainant justifying the court *a quo* correctly rejecting the appellant's defence but more importantly, accepting the evidence of the complainant, a single eyewitness' identification of the appellant. The incident occurred in broad daylight and took approximately five minutes; the complainant at all times had an unobstructed view of the appellant who was approximately an arm's length away from him. At the time of the altercation, the appellant was face to face with him and when he pointed the firearm he was facing M[...].

[31] The complainant not only identified the appellant by his structure, his dark complexion but also indicated that at the time of the incident the appellant had not covered his face. He identified peculiar facial features of the appellant, being the scars which made him easily identifiable. The complainant's description of these identifying features was pertinently noted by the court *a quo*. It is clear that these identifying features were not something which the complainant could have manufactured and it is evident from the appellant's evidence, most particularly that the scratch under his nose was not one which was easily identifiable but only identifiable if one was very close to the appellant.

[32] This is indicative that M[...] had sufficient opportunity to observe this. At no stage during the course of his evidence did the appellant dispute any of this evidence. In addition, the complainant testified that he observed the clothing of the appellant as being a grey two-piece dust coat. The appellant was wearing a small hat which covered the top of his head and wearing takkies. This was not disputed by the appellant at all.

[33] I agree with the findings of the court *a quo* that there were no material shortcomings or criticisms which may be levelled against the evidence of the complainant. He was a credible witness who testified in an honest and forthright manner. There was no reason for him to falsely implicate the

appellant as he was not known to him. Consequently, we can find no misdirection by the court. In the result, the court *a quo* correctly rejected the version of the appellant as being false beyond a reasonable doubt and correctly found that the respondent had discharged the onus beyond reasonable doubt.

[34] It is evident that the complainant had sufficient opportunity for a reliable observation of the appellant. The arresting officer, Constable Dlamini, also testified in an honest and forthright manner and he too testified that the complainant provided him with a description of the appellant that he verified before arresting the appellant.

Order

[35] In the result the following order will issue:

The appeal against conviction is dismissed. The conviction of the court *a quo* is confirmed

Henriques J
MLABA J

Case Information

Date of Argument: 28 October 2022

Date of Judgment: 24 January 2023

Appearances

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