

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**CASE NO.: CAF 6/2014**

In the matter between:

**A R MODUTWANE**

**APPELLANT**

**and**

**THE STATE**

**RESPONDENT**

**FULL BENCH CRIMINAL APPEAL**

**HENDRICKS J, LANDMAN J AND GUTTA J**

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**JUDGMENT**

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**LANDMAN J:**

[1] The appellant, Abel Rapula Modutwane, was indicted in the circuit Court before Gura J on the following counts: murder, robbery with aggravating circumstances, unlawful possession of a firearm and unlawful possession of ammunition. He pleaded not guilty, but was convicted on all counts and sentenced as follows:

count 1 - life imprisonment;

count 2 - 15 years imprisonment;

count 3 - 3 years imprisonment; and

count 4- 2 years imprisonment.

[2] The appellant appeals against both his convictions and sentences with leave granted by the Supreme Court of Appeal.

[3] Mr Skibi, who appeared on behalf of the appellant, did not dispute that at least two men, Mr Mohamed and Mr Abdi, were robbed of goods which included airtime vouchers, at 20:00 on 1 May 2011 at a tuckshop situated on the corner of Lebone and Mokoena Roads in Thlabane. He also did not dispute that in the course of the robbery their brother, Omari Ali Ismael, was shot by the robbers at the tuckshop and died within hours of a gunshot wound to the abdomen. Mr Skibi submitted that the only issue to be determined is whether the appellant was one of the perpetrators who took part in the robbery.

[4] The identification of the appellant rests on the evidence of a single witness Mr Molebatsi, who was at a car wash on Lebone Street. The carwash is on the opposite side of the road from the tuckshop and about 50 to 80 metres away.

[5] The evidence of a single witness must be satisfactory in all material respects. The identification must be reliable.

Evidence of identification must be approached with caution. See **S v Mthetwa** 1972 (3) SA 766 (A) at 768A. As pointed out in **Matwa v S** [2002] 3 All SA 715 (E) the confidence and sincerity of the witness is not sufficient (**S v Mehlape** 1963 (2) SA 29 (A) at 32F); neither is the honesty of the witness in identifying a person by itself a guarantee of correctness. See **S v Ndika and Others** 2002 (1) SACR 250 (SCA) at 256f–g). In evaluating the evidence of such a witness:

“...factors such as the length of time the witness had the offender under observation, the distance at which the observation was made, the conditions of visibility at the time, whether the observation was impeded in any way, whether the witness had seen the accused before (and, if so, how often), the period that

elapsed between the original observation and the subsequent identification, whether there exists any material discrepancy between the description of the accused given by the witness to the police when first seen by them and the accused's actual appearance (this list is not intended to be exclusive) are of crucial importance. All these factors go to the quality of the identification evidence and should be borne in mind in considering whether the identification can be regarded as sufficiently reliable." See *Matwa v S* (*supra*).

[6] Captain Moloane arrived on the scene shortly after the murder and robbery. He found people outside the shop. He observed a cartridge lying in the shop about four paces away from the door. The captain said that there is a scrapyard opposite the tuckshop. Its lights extended the tuckshop. These were square lights. There were also lights in the tuckshop and lights on the stoep of the tuckshop. The illumination extended to the street. These were fluorescent lights. He also said that about 200m from the tuckshop, at a place called Yizo Yizo, there are Apollo lights that illuminate the whole area. He confirmed that there was a car wash on the Lebone Street facing Adam Street. The car wash is 50 to 80 m away from the tuckshop. He said that David Street is 10 to 15 m away from the tuckshop.

[7] Warrant Officer Dingiso attended at the scene, together with the captain. He took photographs and drew up a sketch plan. The colour photographs show that the front of a neat tuckshop. It is well lit. He also took a photograph of the interior of the shop and of the cartridge. He took the cartridge and sent it for testing by a ballistic expert. It is common cause that it is a 9 mm Parabellum calibre that had been fired. He also testified about the illumination and pointed out that there was a light on the left-hand side of the shop. The streetlight was about 30 m to the right of the shop. The Apollo light is about 150 m from the shop. There is a road separating the shop from a place called Phillips. The premises of Phillips are lit by four lights which illuminate the area. He says he remembers that when he arrived the shop's lights were on and that it was bright on the street.

[8] I return to the evidence of Mr Molebatsi . He says he was at the car wash on 1 May 2011 at 20:00 hours together with the owner of the car wash. He knows the

tuckshop. It is owned by Somali citizens. He says he observed, as he put it, “three boys” who went to the tuckshop. Two Somalis were seated outside the shop. Two the boys went into the shop. One remained with the Somalis outside. After five minutes one of the Somalis screamed and went across the tarred road. It was one of the persons who was outside. The boy who was outside the shop then went into the shop. For a brief period all three of them were in the shop. When they exited the shop they were in possession of a black refuse bag. The last one to exit the shop was Chester. Chester is the appellant.

[9] Mr Molebatsi said he recognised Chester because at the corner of the street there is a streetlight and there were shop lights. He also identified one other person who he said was “Karabo Tema (sic)”. When Chester exited the shop he was in possession of a firearm.

[10] He was still at the car wash when his girlfriend phoned him. She lives on David Street. He met her at a shebeen belonging to one Ruth. He went into Ruth’s yard and into the house in order to buy beer. He handed over his money. He saw the appellant and others there. They had placed air time (vouchers), cigarettes and coins on top of the deep freezer. There were six of them. He knew three of them, namely Stompie, Chester and Thring who is also known as Karabo Tema. They were busy sharing these articles. A black plastic refuse bag was on top of the freezer.

[11] He heard the scream but he did not hear the gunshot. He later heard that someone had been killed and he went and informed the police what he knew of the robbery. He was cross-examined at length. He confirmed that the person who was outside the shop with the Somalis was Karabo Thema. He said that he had known the appellant for some 29 years. He confirmed that he did not hear the gunshot. He did not see Mr Abdi come out of the shop to see his brother. He also confirmed that he attended an identification parade and pointed out the appellant as one of the persons who took part in the attack.

[12] The State led the evidence of Ms Sophie Molelekwa. She testified that she rented a room at Ruth's shebeen. She testified of an incident which took place on a weeknight. The appellant and some others arrived at the shebeen at night, after all the customers had left. They tried to persuade Ruth to open up for them, but she declined to do so. Thereafter, they knocked on her door and her boyfriend let them in. They came in carrying a box. They were five of them, including the appellant. They were talking about airtime. She was cross-examined and said that Ruth does not have a deepfreeze. She keeps the liquor in her bedroom in a freezer, but it is not a deep freezer. She was not cross-examined about assertion that this took place on a weekday. She says she had never seen Mr Molebatsi at Ruth's shebeen. She confirmed that Ruth kitchen lights were in working order. Significantly it was not put to her that the appellant and his companions did not arrive and do what she says they did.

[13] The appellant's evidence is that he did not commit the crime. He was not at the tuckshop on 1 May 2011. On 1 May he was at his girlfriend's place at Sunrise Park. He went to Sunrise Park on 29 April 2011 and he came back on 2 May to ask his mother for money. His mother gave him R1000. He went back to Sunrise Park. He confirmed that he knows Mr Molebatsi. At one stage he said that he was at Sunrise Park from 29 April until 3 May. He celebrated his child's birthday on 4 May in Sunrise Park. He later confirmed that he went back to his mother's place on 2 May to ask for money. He returned the same day to Sunrise Park. He also said that he keeps a diary but he made no entry for the dates of the 29 April and 2 and 4 May 2011. He did not remember what took place at the identity parade. He could not remember the events that Ms Sophie Molelekwa described. He said he did not know whether there were lights at the tuck shop. He admitted that he would sometimes go to Ruth's shebeen.

[14] The appellant's girlfriend at the time, Ms Tekela, was called to corroborate his evidence. She says she had not had contact for him for about two years prior to her testifying. She says the appellant was with her on 1 May 2011. He had arrived on 29 April 2011. She said the appellant came to her place late on the Saturday, 29 April. He

slept at her place. He went away and returned with money for the child's birthday. She said he came back on 2 May. The child's birthday was on 4 May.

[15] Under cross-examination it was pointed out to her that 29 April was not a Saturday. It was a Friday. She said she did not remember the date. But it was a Saturday. He arrived on the Saturday and they were together on the Sunday. On the Monday he went home to collect money. She could not remember the date because this happened so long ago. However, she insisted that on 1 May he the appellant was with her. When he left Sunrise Park for the money he left at about 19:00 hours.

[16] Mr Skibi submitted that Mr Molebatsi's evidence was in sharp contrast to that of Ms Sophie Molelekwa. He submitted that their versions were mutually destructive.

[17] The versions are not mutually destructive. They do not relate to the same occasion. It is clear that the incident which Ms Molelekwa testified about was on a week night and after hours. The shebeen was closed. The appellant did not challenge her evidence that he was there. But he challenged Mr Molebatsi's evidence that he saw him and his companions at Ruth's shebeen.

[18] Mr Molebatsi was a single witness. Was his evidence satisfactory in every material respect and was his identification reliable? The fact that he did not hear the gunshot could be attributed to the fact that when the shot was fired, it was fired from within the shop. This would not contradict the evidence of Mr Abdi. Mr Abdi said that the shot was fired when they left the shop. An examination of the sketch plan and the photographs shows that Mr Abdi, who was standing behind the counter, could not see the actual doorway because the shop's door opened inwards and it would have obstructed his view. In addition, the cartridge which was found inside the shop, indicates that the shot was probably fired by the gunman while he was inside the shop, firing at the deceased, who was being forced into the shop, and who may therefore have been in the doorway when he was shot.

[19] The illumination was good. Mr Molebatsi's saw the men approach the tuckshop. He could not identify them at that stage. However, when they reached the tuckshop, the scene was well illuminated. He was looking at the activity at the tuckshop. He saw the appellant leave the tuckshop in possession of a firearm. It cannot be said that this was the firearm that was used to kill the deceased. He had known the appellant for 29 years. He was also able to identify at least one other attacker.

[20] The fact that the appellant and his companions may have not placed the airtime and other items on the flat surface of the deep freezer, but some other flat surface in Ruth's kitchen is not material.

[21] None of the other submissions made by Mr Skibi persuades me that Mr Molebatsi's evidence is to be doubted. That he may not have seen the events precisely as Mr Mohammed saw them, does not detract from his reliability.

[22] Ms Tekela was not a good witness. She was unsure of dates. The accused did not remain at Sunrise Park from 29 April to 4 May. He came back home he says on 2 May and, according to his girlfriend left at 19:00 and he returned there the same evening. Ms Tekela's testimony is one day out of line with the calendar and the days of the week.

[23] Neither the appellant nor Ms Tekela were believed by the court *a quo*. There is no reason to doubt the credibility finding of the court *a quo*.

[24] In the result the appeal against conviction should fail and be dismissed.

## **Sentence**

[25] No submissions were directed to appropriateness of the sentences imposed on the appellant. Rightly so, because the facts adduced at the trial concerning the relevant circumstances show that the sentences are appropriate.

[26] In the result the appeal is dismissed.

A A LANDMAN  
JUDGE OF THE HIGH COURT

I agree

R D HENDRICKS  
JUDGE OF THE HIGH COURT

I agree

N GUTTA  
JUDGE OF THE HIGH COURT

**APPEARANCES:**

DATE OF HEARING : 27 JUNE 2014

DATE OF JUDGMENT : 21 AUGUST 2014

COUNSEL FOR APPELLANT : ADV SKIBI

COUNSEL FOR RESPONDENT : ADV RASAKANYE