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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 02/12/2005
CASE NO: A1101/2004

UNREPORTABLE

In the matter between:

LEON MOKOENA	1ST APPELLANT
DAVID PHALA	2ND APPELLANT

And

THE STATE	RESPONDENT

JUDGMENT

PATEL, J

The two appellants, who were not legally represented, were charged with the crime of robbery with aggravating circumstances. It was alleged that they unlawfully and intentionally assaulted the complainant, William Mokgatle and took from him with force his jeans, takkies, jacket, Nokia cellphone, belt and socks. In doing so they used a firearm.

Both appellants, who are referred to hereinafter as accused 1 and accused 2, were convicted and sentenced to fifteen years imprisonment. They are appealing against both the conviction and sentence.

The central issue in this case is the often perplexing issue of identification of the two accused. The complainant testified that on 4 May 2003 at about 20:00 he was on his way to Saulsville Hostel in Atterridgeville where he stays. When he entered the block of his flat he was blocked by accused 1 and 2. They were not known to him at the time of the incident. Accused 2 produced a firearm and pointed it at him. Then both accused removed his clothes off his body. Accused 1 held his trouser and took his lumber jacket, pair of Nike takkies and cellphone together with R34.50 cash whilst accused 2 took his denim trouser, belt as well as his cap and they then chase him away.

According to the complainant it was dark, but he was able to identify both accused since he was able to see for a distance of 7-8 metres away from him. He had prior knowledge of accused 1, he even knew his name Leon and he often saw him on weekends at the butchery playing snooker for some months. The complainant testified that he clearly identified accused 2 by his dreadlocks.

The following day whilst the complainant was on his way from work he noticed the two accused at the butchery. They were wearing the clothes of which he was robbed. He reported the matter to the police and

two police officers came to the butchery where he pointed out the two accused and they were arrested.

The state also adduced the evidence of Police Officer Calitz and Inspector Mathe. According to Calitz he could not recall or say if either one of the two accused had dreadlocks. Whilst, under cross-examination by accused 2, Mathe testified that accused 2 had dreadlocks.

Accused 1 elected to remain silent. Accused 2 testified that at 17:00 he found his co-accused 1 at a liquor store where he was playing with some other persons. He said he did not have dreadlocks. According to accused 2 the complainant told the police that he knew him, amongst other things by the dreadlocks. He informed the trial court that: "... what would actually assist my testimony, would be the photos which were taken by the police at the police station. The complainant pointed out somebody with dreadlocks, but the police decided to arrest the wrong person, innocent me."

The prosecutor conceded that when the photographs were taken accused 2 did not have dreadlocks (p 49, lines 21-23). But accused 2 insisted that he needed those photographs since he was not the one who was pointed out by the witnesses (p 50, lines 10-12). Eventually, after

remanding the case, the photographs of both accused 1 and 2 were produced. The photograph of accused 2 was handed in as exhibit A and that of accused 1 as exhibit B. The photographs revealed that the hair of both accused was very short (p 52, lines 15-25; pp 73 and 74; p 62 lines 1-13).

In spite of the prosecutor's concession, the court *a quo* did not deal with the evidence pertaining to identification of accused 2 of not having dreadlocks. Counsel for the respondent rightly conceded that any reasonable possibility of error in identifying accused 2 was not eliminated by the end of the trial. Under the circumstances, it can be said that the state did not prove its case beyond reasonable doubt against accused 2.

I now turn to consider whether the state proved its case beyond reasonable doubt against accused 1. WILLIAMSON JA in *S v Mehlape* 1963 2 SA 29 (AD) 32A-F/G, said:

> "It has been stressed more than once that in a case involving the identification of a particular person in relation to a certain happening, a court should be satisfied not only that the identifying witness is honest, but also that his evidence is reliable in the sense that he had a proper opportunity in the

circumstances of the case to carry out such observation as would be reasonably required to ensure a correct identification; see for example the remarks of RAMSBOTTOM, A.J.P., in *R v Mokoena*, 1958 (2) S.A. 212 (T) at p. 215. The nature of the opportunity of observation which may be required to confer on an identification in any particular case the stamp of reliability, depends upon a great variety of factors or combination of factors; for instance the period of observation, or the proximity of the persons, or the visibility, or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bags, etc., connected with the person observed, and so on, may have to be investigated in order to satisfy a court in any particular case that an identification is reliable and trustworthy as distinct from being merely *bona fide* and honest. The necessity for a court to be properly satisfied in a criminal case on both these aspects of identification should now, it may be thought, not really require to be stressed; it appears from such a

> considerable number of prior decisions; see for example the apprehension expressed by VAN DEN HEEVER, J.A., in *Rex v Masemang*, 1950 (2) S.A. 488 (A.D), after reference to the cases of wrongly convicted persons cited in Wills *Principles of Circumstantial Evidence*, 7th ed. p.193. The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence."

Prior to pleading to the charge accused 1 indicated to the court *a quo* that he elected to remain silent and he reaffirmed this later in his brief testimony. However, the court *a quo* in its judgment stated: "Now whilst it is true that he has a constitutional right to remain silent and not to incriminate himself, he did not exercise such right. He said he remained silent because he was perplexed." (p 64, lines 20-23; compare p 34, lines 21-26 and p 35, lines 1-4). It is clear from the record that accused 1 has a fundamental right "to be presumed innocent, to remain silent and not to testify during the proceedings" (section 35(3)(h) of the Constitution). The court *a quo's* assumption that accused 1 was perplexed was not supported by any evidence to that effect from him.

MADALA J in delivering a unanimous judgment of the Constitutional Court in *Osman and Another v Attorney-General, Transvaal* 1998 4 SA 1224 (CC) at para [22] said:

> "The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt."

That is certainly the crux of the matter. That is the critical question regarding identification that is whether any reasonable possibility of error in identifying accused 1 by the end of criminal case. In *S v Mehlape, supra*, at 32H-33A, WILLIAMSON JA said:

> "... what is important is the opportunity he had for recognising that person. In other circumstances such questions may be most pertinent. But what is important in a case in which the witness says he knew the person he saw, is to test both any degree of prior acquaintance or knowledge claimed having regard to the circumstances of the case; see HOLMES JA in this Court in *R v Dladla and Others* 1962 (1) SA 307 (AD) at p 310C."

HOWIE AJA (as he then was) in *S v Zitha* 1993 (1) SACR 718 (A) 721b-j stated:

> "The enquiry, then, is whether the magistrate's treatment of the case constituted compliance with what the leading reported decisions enjoin not only in regard to single witness cases but more particularly as to identification matters.
>
> In *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C it was said that because of human fallibility the reliability of the observation made by the identifying witness must be tested. The trial court must therefore consider, *inter alia*, the opportunity for observation, both as to time and situation; the extent of the witness's prior knowledge of the accused; and the accused's appearance. It goes without saying that where, as here, the accused has no legal representation, the judicial officer has no alternative but to seek, within the constraints of his function as impartial arbiter, to conduct the necessary testing himself. In cases where the identifying witness has known the accused previously, identification marks and facial characteristics are of much less importance than where there has been no previous acquaintance but it is

then necessary to focus upon the degree of prior knowledge and the opportunity for correct identification having regard to the circumstances in which it was made: *R v Dladla and Others* 1962 (1) SA 307 (A) at 310D-E.

It seems to me to follow from these cases that the importance of physical appearance remains but that it is in inverse proportion to the degree of prior knowledge. On the question of prior knowledge the magistrate said the following as to Jordaan's evidence:

> 'hy (het) die beskuldigde betreklik goed geken, want hy het 'n hele ruk by sy firma gewerk waar hy hom gereeld gesien het. Hy was derhalwe in staat om 'n paar dae later na sy firma terug te gaan en 'n foto van die beskuldigde te gaan uithaal.'

In my view this assessment involves an overstatement and also lacks critical analysis. Jordaan claimed to have seen appellant at close quarters as an employee on only one occasion and that was about seven months before the offence. As regards the rest of his time with the firm,

Jordaan apparently saw him merely in passing, as one of 68 drivers. In leading fashion the magistrate asked whether he saw appellant 'gereeld', with which Jordaan simply agreed. The word 'gereeld' is relative. The court's investigation fell short of revealing how regularly, at what distance and in what situations. Jordaan himself said he really did not have contact with the drivers. It is true that in his account of the encounter in Jordaan's office appellant said that Jordaan 'het (daarna) sleg vir my gekyk' but that vague comment was left unexplained. In the result, to say that Jordaan's evidence was that he knew appellant 'betreklik goed' put the position too high. That conclusion could only properly have been reached upon further enquiry. An illustration of the nature and depth of the required investigation was given by Williamson JA in *S v Mehlape* 1963 (2) SA 29 (A) at 33B-C:

> '(H)e said he had often seen the appellant before. The value of this alleged prior knowledge ... remained entirely uninvestigated. The court did not know how often he had seen this man, or when he had last seen him, or whether he had ever seen him close by or had ever spoken to him or anything at all about the

> opportunities of accurate observation of the appellant's face afforded on the prior occasions; he said that he recognized him by his face. The magistrate may of course have seen that the appellant's face was of a type which was easy to remember and later to recognize; but he made no findings in that regard.'"

It is apparent that although the complainant testified that he saw accused 1 for some months, the value of his prior knowledge remained unexplored and untested. There is no evidence as to how often the complainant saw accused 1 or whether there were particular features by which he knew the accused. Further, in the light of the following factors the opportunity for correct identification remained rather tenuous:

(a) There was absolutely no light at all available at the time and therefore no credence can be given to the complainant's evidence to the effect that he was able to see and identify persons, let alone their faces and features at a distance of 7 to 8m.

(b) The suddenness of the attack upon the complainant and the demand made to him, that he should immediately run away without looking back, which he conceded that there was little opportunity for him to observe his attackers in any event.

(c) The admitted shock which the complainant was subjected to and indeed which caused him to remain perplexed until the following day when the two appellants were arrested was to affect his ability to identify his attackers.

Furthermore, the complainant was a single witness regarding the incident and the court *a quo* failed to exercise caution in scrutinizing his evidence.

In the absence of investigation and testing of the evidence of the complainant regarding the identity of accused 1, I am not persuaded that the court *a quo* was justified in drawing any adverse inference from accused 1's silence. I am of the view that the state failed to prove beyond reasonable doubt that accused 1 was the other robber.

In the result, the appeal of both accused 1 and 2 succeeds and their conviction and sentence are set aside.

E M PATEL
JUDGE OF THE HIGH COURT

I agree

F J JOOSTE
ACTING JUDGE OF THE HIGH COURT

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