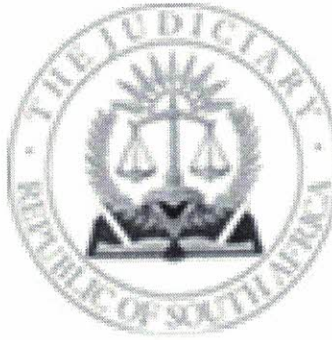


21/9/2017



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

CASE NO:A597/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHERS JUDGES: YES/NO  
(3) REVISED ✓

20/9/2017

DATE

*[Signature]*

SIGNATURE

In the matter between:

**THULANI GIFT LUBISI**

**APPELLANT**

**and**

**THE STATE**

**RESPONDENT**

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**JUDGMENT**

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**RANCHOD J:**

**Introduction**

[1] The appellant was convicted in the regional court, Pretoria, on a charge of robbery with aggravating circumstances and sentenced to a term of imprisonment for 15 years. He was also declared unfit to possess a firearm.

He was legally represented throughout the trial and had tendered a plea explanation in which he raised an alibi defence.

[2] The trial court refused an application for leave to appeal against both conviction and sentence but it was granted on petition to the High Court.

[3] Although leave to appeal was granted against both conviction and sentence in the appellant's counsel's heads of argument as well as oral submissions during the hearing of the appeal the arguments were confined to the issue of conviction only.

[4] The crisp issue to be determined on appeal is whether the appellant was correctly identified as one of the two assailants who robbed the complainant of her motor vehicle.

#### Background facts

[5] The conviction of the appellant stems from an incident on 25 November 2014 at the Westpark Primary School in Pretoria.

[6] The complainant testified that on that day during her lunch hour, she had firstly picked up her daughter from Pretoria High School then proceeded to Westpark Primary School to fetch her two sons who were schooling there. She had parked her Subaru Forrester motor vehicle a few meters from the main entrance gate of the school on her right hand side of the road to await the arrival of her sons. Her daughter was with her in the motor vehicle and seated on the left hand side while she was behind the steering wheel. The complainant noticed two males ("guys") approaching but they were on the left hand side of the road. She assumed they were school children as the matric exams were being written at the time and some students finished early. The next thing she knew was that a person had put a gun to her head and unsuccessfully tried to pull the keys out of the ignition. The assailant then ordered her to get out of the vehicle but just before she did so she looked in her daughter's direction and noticed another person on her daughter's side. The complainant got out of the car but threw herself on the ground. She said

it was when she was getting out of the vehicle that she realised from the clothes the assailants were wearing that they were the persons that she saw a few minutes earlier.

[7] The complainant further testified that she had looked at the assailant on her daughter's side for a few seconds. She said she saw a cap on his forehead and she could see his face. She identified the appellant in court as the one she saw on her daughter's side of the motor vehicle.

[8] According to the complainant the incident happened between 13:20 and just after 13:25. She estimated this time on the basis that the school bell rings at 13:30 and the incident happened a few minutes before that and the assailants had gotten into the vehicle and sped off. She said her husband's cell phone indicated that she had informed him of the incident at 13:40. She used the phone of a passing motorist who stopped to assist her and her daughter to phone him. She also called the police and informed her insurance company as her vehicle had a tracking device.

[9] At about 14:15 her insurance company informed her that her vehicle had been recovered in Tembisa.

[10] She reported the incident at the Pretoria-West police station and asked if she could go and retrieve her handbag and personal belongings from the vehicle. It appears the police consented as she went in the late afternoon to where her vehicle was found but the police officers there refused to allow her to take her belongings until they cleared them. She was advised to come the following day.

[11] The complainant testified further that the next time she saw the appellant was at an identification parade which was held a week later at the Benoni police station where she identified him as one of the two assailants and that he was the one on her daughter's side of the motor vehicle.



[12] Apart from the complainant identifying the appellant as one of the two assailants, the state led the evidence of the two police officers who arrested the appellant, viz., Constable Maila and Constable Manyamalala who had testified that they were on duty on 25 November 2014 patrolling the Tembisa area when, at about 14h00 they received a radio alert, for a white Subaru vehicle which was hijacked in Pretoria and, according to the tracking device in the motor vehicle, it was heading along the R21 highway in the direction of Tembisa. They took up positions at the Olifantsfontein off-ramp leading to Tembisa. The vehicle passed them at high speed and they gave chase. At the Oakmoore railway station the Subaru came to a halt and the two occupants jumped out of the vehicle and ran towards a taxi rank. Constables Maila and Manyalala gave chase on foot but the one person escaped while they managed to arrest the other one, who, they both testified was the appellant. Constable Maila testified that they never lost sight of the appellant until they apprehend him.

[13] The appellant's defence was an alibi. He said he was on duty as a peace officer for the Ekurhuleni municipality. He said on the day of the incident he was always in the company of his co-worker, a Mr Lucky Khumalo. They worked up to 12h00 as foot patrollers, then took a thirty-minute break whereafter they resumed their duties and eventually knocked off at 14h30. They then went to Khumalo's home by taxi and from there went to buy 'bunny chow'. At about 15h40 the appellant went home, changed his clothing and left his home on foot. Whilst he was walking two police officers picked him up and alleged that he and his friend had hijacked a motor vehicle. He showed the police where he was staying and he was then taken to the scene where the complainant's motor vehicle was recovered. He said he was taken out of the police vehicle and made to stand outside it at the same time that the complainant was on the scene.

### Discussion

[14] The appellant argues that on two occasions prior to the identification parade the complainant had the opportunity to observe him. One was when

the police, after arresting him, took him to where the Subaru was abandoned at Oakmoore railway station and the other when he saw the complainant at the identification parade prior to the parade being held, the implication being that she had the opportunity to observe him.

[15] The complainant denied seeing the appellant late in the afternoon where the Subaru had been abandoned. Further, it was never put to the complainant when she testified during cross-examination that she saw the appellant before the identification parade.

[16] The appellant also tendered a time-sheet kept by Mr Mashamula, his supervisor, as proof that he was at work on 25 November 2014. Mr Mashamula is an Ekurhleni Metro police officer. He testified on behalf of the appellant. It is evident from his evidence that the system used to keep attendance records at the time of the arrest of the appellant did not work properly and had since been stopped. There was no real control over the attendance of those who supposedly signed in for duty and then again when going off duty. The list filled out and signed by the attendees was exhibit H. Mr Mashamula conceded that a comparison of two signatures, purportedly of the appellant on exhibit H next to his name clearly showed that they were not the same signature. He said the system was stopped because of the dishonesty involved. He conceded that someone could sign on behalf of another person.

[17] In the end, the evidence of Mr Mashamula was not helpful to the court more especially as he conceded that the mere fact that appellant was recorded as having been there to sign the register did not mean he was in fact there.

[18] The appellant also called his co-worker Mr Khumalo to testify. Mr Khumalo said on 25 November 2014 he was in the company of the appellant, who is his close friend, all day long up to 15h45. However, he never made a statement to the police confirming the *alibi* before the trial knowing well that he could exonerate the appellant. The false or concocted information



tendered by the appellant regarding the attendance records raised serious questions about the credibility of Mr Khumalo, who said he was with the appellant on duty all day on the day of the incident.

[19] Having regard to the evidence, the trial court's conclusion that Mr Khumalo was a poor witness cannot be faulted.

[20] The court *a quo* made strong credibility findings. In my view, it correctly assessed all the evidence and observed the demeanour of the relevant witnesses. The alibi was considered not in isolation but in light of the totality of all the evidence. The court held that the appellant was recalcitrant, reluctant to give straight forward answers and evasive. On the other hand, the trial court found the state witnesses, particularly the complainant and the arresting officers to be impressive witnesses. Maila and Manyamalala corroborated each other in all material aspects.

[21] Finally it is also important to note that the complainant was not a single witness regarding identification. Her identification of the appellant was corroborated by the fact that he was arrested about thirty minutes later by Maila and Manyamalala who arrested him after he fled from the Subaru at Oakmoore station without Maila having lost sight of him as they gave chase. The conviction must stand.

#### The sentence

[22] As I said earlier, the appellant did not proceed to argue the appeal against sentence. In any event, the sentence imposed cannot be faulted.

[23] In the result I would dismiss the appeal against both conviction and sentence.

  
 RANCHOD J. S.  
 JUDGE OF THE HIGH COURT

I AGREE



D MAKHOB A J  
 ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellant	: Adv. P Pistorius
Instructed by	: JJ Van Zyl
Counsel on behalf of Respondent	: Adv. E Leonard (SC)
Instructed by	: Director of Public Prosecutions, Pretoria
Date heard	: 2 March 2017
Date delivered	: 21 September 2017