

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG, PRETORIA

Case no: A663/2017

DELETE WHICHEVER IS NOT APPLICABLE

1) REPORTABLE ~~YES~~/NO

2) OF INTEREST TO OTHER JUDGES YES/NO

3) REVISED

4/12/2020
DATE


SIGNATURE

In the matter between

HAPPY SEDIBANE

and

THE STATE

APPELLANT

RESPONDENT

JUDGEMENT

KHWINANA AJ

1. The appellant was arraigned in the Benoni Regional Court on a charge of robbery with aggravating circumstances read with section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997 on the 03rd February 2017 wherein he was convicted and sentenced to 15 years imprisonment. Appellant appeals both the conviction and sentence.

AD SALIENT FACTS

2. The complainant testified that on the 08th December 2015 at around 13h00 she was walking along Mabaso street in Daveyton and she saw a car behind her. She looked back to see if it was coming towards her direction and saw that it was indeed coming her way. She then moved away from the road onto the pavement so that it could pass by. She says it did not pass but instead it decreased speed and then went on to drive the curb and then crossed over the other side. She says she has a friend who drives a similar car thus she wanted to see if it was him or not. She says the vehicle was a Jetta bottle green in colour. She saw the driver who was

Commented [KM1]:

unknown to her. There were three occupants in the cart. Whilst she was walking the car pulled off to her side and the one passenger on the rear alighted. He had a firearm in his possession and before she could flee, he threw her to the ground and searched her bag and proceeded to search her trousers pockets.

3. She says she managed to see the person and that she could point him out. She points out a gentleman wearing a T-Shirt that has got blue inscriptions on the front the one with a black T-shirt it is accused 1. Whilst she was being searched a lady came out of the yard. She screamed and the driver said let's go someone is seeing us. He then went into the car and they left. She testified that a phone and money were taken from her. She identifies the phone as a Lumia 430 Matt black bought on contract by her aunt and does not know its value. The amount of money taken amount to R 500.00. She says the driver is the man in a checked shirt who is before court later identified as accused 2.
4. They then left and she got up and ran to the lady that witnessed the robbery who comforted her. She left and went towards Khumalo's shop seeking help so that she could inform her family as to what happened. She found a friend of hers Txolile who borrowed her a phone. She telephoned her mother and informed her ordeal. Her friend also lent money to board a taxi to go home. She saw the motor vehicle again at railway houses. It still had three occupants inside and it was in motion going towards Daveyton. She asked to be dropped off at an Engen Garage in order

to take down the number plates. She was merely able to take the letters only without the numbers being WML....GP.

5. She says gentlemen saw that she was shocked and questioned her of what was happening. The car pulled off at the stop sign and the occupants appeared to conversing with a young man there. The stop sign was between 15-20 metres from where she was. All three people were still in the car. She hid herself behind those gentlemen. She informed the gentlemen that the occupants of the car has just robbed her in Daveyton, The car left and it stopped at the Indians' store. Accused number 1 who pointed her with a firearm alighted and went into the store. She moved with the gentlemen to the entrance of the garage and those gentlemen screamed at them asking them why have they done what they had done?
6. She testified that accused one just glanced and went back into the car and she asked the gentleman to accompany her to the police station. At the stop sign the young man asked what happened. One of the gentleman explained and he offered to accompany them as he knows very well where those people reside. She did not take down his name. She left with the young man until they met up with her uncle who wanted to find out what happened. The young man explained what happened and further told that he has an idea as to the owner of the car was whom does the car belong and where the occupants stay.

7. She headed for the police station in Etwatwa where she was asked where the incident took place. She told them it was at Daveyton and she was turned away to Daveyton police station.
8. She proceeded to the Daveyton police station. She says they went back to Etwatwa police station. She was with her mother, uncle, younger brother, cousin and the gentleman who had offered to assist at the stop sign. They went to look for the assailants from different angles. The police were the first to arrive whereas she was in the company of her uncle and upon arrival the alleged robbers had been arrested. They were in the police vehicle and it was three individuals. She was asked to alight from the vehicle by the police officer Mr Magwaza in order to identify them. She pointed out the driver and the one that pointed her with a firearm.
9. She testified that she had not seen the third person properly and accused number one is pointed as the driver and accused two as the person who pointed her with a firearm. She says accused one was cold, without expression, he looked at her and just smiled. Accused two asked to speak to her uncle he said they can negotiate this matter and bring back the phone and money he had taken. Accused two seemed desperate to settle the matter outside court. The third person was shocked. The vehicle was searched, and the police Mr Magwaza found a firearm under the front passenger seat and a cell phone. She said he had seen a firearm

and it was silver in colour with faded black. She was not asked to identify the cellphone it was black, and it did not belong to her. She never recovered her cell phone. She says she saw the face of accused 1 and did not know the accused 2 before the incident. She looked at accused two twice when she wanted to see the driver and at railway houses. She had ample time to see the accused. Visibility was clear as it was 13h00 in the afternoon. She says Magwaza recovered the firearm from the car. It was lifted with a pair of scissors in the presence of the mother, uncle, cousin, younger brother and the complainant. She does not know what happened to it thereafter. She says police officer told them that accused two admitted and had undertaken to bring back or pay back everything, that is the phone and the money. She says they told the police officer they want the matter to proceed.

10. Under cross examination it was put to her that it happened quick as the person came out of the car demanded money and a cell phone. In evidence in chief is that she was thrown to the ground by a guy who came out with the firearm who searched her and found a phone in her pocket. She further said she had a good look at his face when this was happening. It was put to her she made a mistake and in her statement the version is "He demanded me to give him my cell phone and money, and I gave him". And he went back to the car and the car drove off. The complainant says he had a firearm there was nothing she could have done.

She was thrown to the ground and he asked for the phone and money. She had a skinny jean everything was visible. Accused one took the phone out of her pocket.

11. She says she was scared but she saw her attacker and accused number two. In her statement the complainant said, "I can only be able to point an African male who pointed me with a firearm and took my belongings". She was asked "You do not mention that you point number 2 out, why not?" she says that is what was asked at the police station, if I could be able to identify the person who pointed a firearm at me. It was again put to her that this happened too fast and the arrest was as a result of the green Jetta and to this she said no. When confronted about her statement she says she was scared however there was enough time for her to see them and recognize them.
12. She was asked how long, and she said long enough for her to be able to identify them again. She had support of a young man she met at the stop sign, her mother, uncle, brother, cousin and the police. The story about her being scared does not make sense, except that she actually did not have ample time to see her assailants neither could she identify them.

13. It was put to her that she screamed at them and she said the men she was with at the garage screamed at them. She said accused one did not run he merely went to the car and drove off. He did not run away from there. Accused number one's version is that he sold the car to accused two prior the incident. He was there to fetch the balance when the police arrived and arrested them. He denies commission of the offence and says it is mistaken identity. She denied this. The statement was handed in as an exhibit and the end of cross examination by Mr Wills.

14. Mr Maruha the attorney for accused two cross exams the complainant and puts to her that at what stage did she see accused two. She says when she shifted the car, moved the car they were driving so the car could pass and at Engen garage. She was also questioned that she saw the driver from behind and she says from the right side of his face. She says she saw them at the garage but because she was hiding and could not see who spoke to this gentleman as she was hiding behind the flowers could not see properly. She says she saw accused two first time when accused one alighted from the car and at the garage. She then says she saw them properly despite that she was hiding.

15. She was asked why she did not tell the police officer accused two was the driver and her answer is she was scared. She was never pointed with a firearm before and did not know what to do. Accused two's version was put to the complainant that accused two was at his car wash business at Kopi Motibang Street when he was approached by accused one about a sale of a car. Accused one came driving the said motor vehicle a Jetta 3 sedan, bottle green in colour which he intended to sell to him. It did not have papers. Mr Maruha made a mistake by saying accused one instead of two which was rectified. Accused two required motor vehicle papers prior to the sale being finalised which then led to accused one borrowing money from accused 2 in order to enable him to get the said papers. Accused one was told to wait until accused two finishes washing cars and the money would be lent to him.
16. The police then arrived, pointed them with firearms and asked to search them. Nothing was found on them. The police alleged the car was stolen however accused two told the police the car belonged to accused one. Accused two says no firearm was found which fact is denied by the complainant and she reiterates that Mr Makgwaza found the firearm and everyone saw. Accused two further would say he was at his place of business and he never left. The complainant is still adamant about her version of events. Complainant says accused two is the person who drove the car and she was at the car wash after the accused were arrested

and her uncle was present. She further says they were inside the police van when she pointed them out. That was the cross examination from accused two's attorney.

17. In re-exam the complainant says she was not asked questions by the officer who took down her statement like the prosecutor and the attorneys for the accused. She was asked by the court the time which she stated as 13h00 in the afternoon. She could not tell the court the time of arrest of the accused. The police and her did not check the Indian shop for her phone. She further says the car had number plates in front.
18. The mother to the complainant told the court that she was present when the firearm was recovered with a cell phone. Mr Magwaza recovered it using a pair of scissors given to him by another police officer. He took it with him to the police station. Mr Magwaza told her that accused number two wanted to negotiate however Robert Ngidi being the uncle had a conversation with accused two wherein he asked why they did that to her?
19. Accused two was outside the police van when he offered to pay back the money and cellular phone in the presence of Robert Ngidi the uncle. The complainant however said the uncle never replied to this whereas the mother says accused two tendered an apology. Mr Magwaza testified that he was escorted to the accused by the complainant wherein she pointed them out. The three were found next to

the motor vehicle, searched but nothing was found on them. He denied that there was a car wash or cars there. He further denied that there were negotiations by the accused. He denies that he said the car was stolen and that accused two said it belonged to accused one. He says someone else came saying he is the brother to accused and the owner. Mr Magwaza denied under oath that he found a firearm and a cell phone inside the motor vehicle in which appellant was arrested.

20. Ms Mashaba testified that she was from her neighbour who was sick when she saw the green car coming driving slowly. There was a lady walking along that car. There were three occupants of the said car, one of the passengers seated at the back alighted grabbed her by her neck from the back. He tripped her and she fell to the ground. He came on top of her, put his knee on her back and took out a firearm. He pointed her with a firearm whilst on the ground. She prevented them from seeing her but did not run away. The car was moving slowly. The person robbed the complainant and ran into the slow-moving car. She hugged her as she was asking for help. She was nervous and could not speak properly. She did not see the faces of the people that robbed the complainant.
21. The appellant testified that he sold a motor vehicle with registration numbers and letters YML 224 GP for R 22 000.00 (twenty-two thousand) to accused two and he received R 9000.00, the sum of R 13 000.00 remained outstanding. On the 13th December 2015 he did not rob the complainant. He says he is residing with his

girlfriend Constance Radingwane at Isalalento Myami. His girlfriend received a call from accused two who was trying to locate him as he wanted him to collect his outstanding money. This happened around past 13h00 in the afternoon. He says he left his place of residence around (two) 2pm. He went to accused two's residence wherein he found the car parked there and accused two was inside it. He says he was in possession of the papers of the car. Whilst talking the police emerged and he says he did not run as he knew nothing. The police informed him that they were being arrested for robbery and they searched him but did not find anything on him save for the papers of the car. The car was searched but nothing was found.

22. Mr Magwaza testified that a person who came to the scene claimed that the car was a family car and he brought car papers at the scene. Accused one testified that he bought the car in 2015 June but did not change it to his name.
23. Accused two never returned to court on the 5th April 2017 and his bail was finally forfeited to the state. A warrant of arrest was issued for execution forthwith against him. The court ruled that the matter be proceeded with in his absence in terms of section 159(3) of the CPA 51/1977 as amended. Accused one called his girlfriend to testify as a witness wherein she stated that she knew about the sale of the Jetta at R 22 000.00 to Sifiso in September 2015. She said a sum of R 9000.00 was paid and the difference of R 13 000.00 remained outstanding payable in December

2015. She confirmed that Sifiso called on the day in question for accused one to collect the money. She was unable to go with him as she had a newborn baby. She later received a call from the accused that he was arrested. Defence case was closed.

24. The crisp issue in this appeal is whether the learned magistrate was correct in convicting and sentencing the appellant.

In *S v Mafaladiso en Andere*¹, in cases where there are material differences between the witness's evidence and his prior statement, the court held that the final task of the judge is to weigh up the previous statement against viva voce evidence, to consider all the evidence and to decide whether it was reliable or not and whether the truth has been told, despite any shortcomings. This means that the court is enjoined to consider the totality of the evidence to ascertain if the truth has been told. It is submitted by counsel for the appellants that the evidence of the complainant is riddled with contradictions and inconsistencies on a number of material issues. The following contradictions have been brought to the attention of this court:

25. The complainant was robbed at gunpoint of her cell phone and cash by a person who alighted from the back seat of a bottle green Jetta 3. The complainant's evidence is that there were three occupants in this vehicle. An independent witness

¹ *Mafaladiso en Andere* 2003(1) SACR 583 (HHA)

one Mrs Mashaba observed the robbery from across the street but in respect of the robber and occupants of the car she could not take the matter further.

26. The complainant alleges that she was shocked and had sufficient opportunity to observe the perpetrator. It is clear that the incident did not take a while and the complainant's ability to see her attacker on the day in question was compromised. The complainant in this matter fails to talk to the time that lapsed when the event took place. The defence has put it to the complainant that the incident happened fast. She did not deny this however she alluded to the fact that she was able to see her attacker. The complainant says that she saw a car that looked like the one her friend drove, and she looked at the driver to see if it was her friend driving the motor vehicle. She was able to see that the driver was not a friend however she also noticed that the occupants of the motor vehicle were three. That is how far she was able to take this matter in relation to the scene.

27. The complainant does not say she clearly observed the passengers especially the one seated at the back seat whom it is said is her attacker. The person came out with a firearm in his hand attacked the complainant and made her lie down facing down robbed her of her items and left her. It is clear that the incident happened unexpectedly, and it is evident from her testimony that it did not last long enough to enable her to clearly observe her attacker. The learned Magistrate therefore erred in finding that the appellant had an ample time to observe her attacker to an

extent that she was able to identify them. The complainant did not take the number plates of that car when she was attacked, not whilst she was in a taxi driving along until at the Engen garage. She tells how she was only able to borrow a phone and taxi fare from a friend who stays nearby the place. She was comforted by the independent witness who could not assist her with identification nor the number plates of the said motor vehicle.

28. When confronted about features of the attacker or the driver she was unable to give description except that she saw them. The question to be asked is whether that is sufficient.

The case to consider is that *S v Mthethwa*² which is authority on identity. It is not canvassed with her after how long she then travels and when did she see the appellant. Again according to her she saw the assailants but does not tell how does she identify them save for the green motor vehicle which already it is evident is not the only one as the complainant herself says there is a friend of hers that drives a similar motor vehicle. How many other cars exist of the same colour? In well-known case of *S v Mthethwa* the test for identification was enunciated at 768 a-c of the judgment as follows:

"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

² 1972 (3) 766 (AD)

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, if any; 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; see cases as *R. v. Masemang*,³; *R. v. Dladla and Others*⁴; *S v Mehlahe*,⁵"

29. Again, the complainant says she saw the motor vehicle driving in the same direction as the taxi, she was in however she does not see the number plates. She says she was in a taxi but does not alert the taxi driver to the fact that this is the motor vehicle that just attacked her neither does she get the number plates neither does she observe these assailants in order to be able to identify them properly with anything be it structure, colour of the skin or clothes . The trial court accepted the identification of the appellant and his co-accused by the complainant.

³ **1950 (2) S.A. 488** (A.D.)

⁴ **1962 (1) S.A. 307** (A.D.) at p. 310C

⁵ **1963 (2) S.A. 29** (A.D.)

30. In the matter S v Tanatu ⁶ Plasket J "My conclusion from the above is that the identification parade conducted by the street committee is so tainted by the irregularities that I have detailed that no reliance can safely be placed on the identifications that were made there. That being so, the only other evidence of the identity of the complainant's assailant is the dock identifications made by the complainant and the complainant's friend. No weight can be placed on that evidence because it follows upon the irregular identification of the appellant in the identification parade and because there was no-one apart from the appellant in court when the dock identification was made that had a defective eye: all of the well-known dangers of placing reliance on a dock identification are present in stark form in this case".

31. In casu the identification was also done in the street in the presence of a police officer this clearly was wrong as it is also tainted by irregularities and who else was the complainant to point out other than those that were arrested and in the police van.

⁶ S v Tanatu (ECJ 2004/036) [2004] ZAECHC 35 (15 October 2004)

32. In Sekhele⁷ the court said 'A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplained, untested and un investigated, leaves the door wide open for probabilities of mistake.'
33. In Phetla and ano⁸ "It is generally accepted that evidence of identification based upon witness' recollections of person's appearance is dangerously unreliable unless approached with due caution. The average witness's ability to recognise faces is poor, although few people are prepared to admit that they have made a mistake. On a question of identification, the confidence and sincerity of the witness is not enough. The often patent honesty, sincerity and confidence of an identifying witness remain, however, a snare to a judicial officer who does not constantly remind himself of the necessity of disputing any danger of error in such evidence. The witness should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to height, build, complexion, what clothing he was wearing and so on should be put".

In this matter that was never canvassed with the witness which fact was imperative in so far as identification of the assailants was concerned as it had been disputed from the onset, to this end the magistrate erred.

⁷ R v Shekele **1953 (1) SA 636** (T) at 638.

⁸ Phetla and Another v S (A632/2015) [2016] ZAGPPHC 555 (24 June 2016)

35. The complainant proceeds to get help from a guy who was not called as a witness whom it is said spoke to the assailant and knew where the people and the car could be located. He according to the complainant took them to the police station and ultimately to where the accused were arrested. He was at the police station when the complainant opened the case and when the accused were arrested. No statement was taken from him.
36. When the complainant arrives the said people were already arrested. This made it easy for the complainant to point out the so-called assailants, as they were inside the van. No identification parade was held as it has been alluded to by the appellant in his heads of argument.
37. The complainant says there were items recovered in the car being a firearm and a cellular phone. This is denied by the police officer. The appellant says he had papers of the motor vehicle which the police officer denies safe to say they were brought by someone else who said he was a brother to accused two. The magistrate erred in finding that the police officer was not being truthful whereas she fails to explain how. This is the same officer who despite being stationed at Puttfontein he attended to the complainant without hesitation. He did not hesitate to arrest the two gentlemen standing next to the car despite that no items were recovered as alluded to by the complainant and her mother.

38. The complainant testified that a phone was discovered but she does not demand to see it, this is surprising for a person was robbed of a phone. She was in company of her mother, uncle, younger brother and cousin. None of them insist on seeing this phone. They proceed to the police station and again even there she does not demand to see the phone. One can infer that it is indeed true that that no items were recovered.
39. The complainant testified that an offer was made that the items would be replaced which fact was told to the complainant and her family particularly her uncle. The complainant testified that the uncle merely said if you had killed her and we are told there was no reaction save for the fact that they said they want to proceed with the case. The incident occurred on that day why does the complainant or her family members insist on the items being recovered it is beyond comprehension.
40. The police officer found the accused without items despite that he arrested within a short space of time and the complainant was on their tail. An argument is put forward that the incident took place in another area and they were arrested in a different area. It was put to the accused that they thought they were far from where the incident took place however if that is the case where is the phone, firearm and the money. This aspect the magistrate ought to have taken into account.

41. The appellant testified that he was there to meet accused two with the motor registration papers and outstanding payment. He called his girlfriend as a witness who testified that he was to collect payment from accused two and indeed he had sold the car for R 22 000.00 (Twenty Thousand Rands) to Sifiso being accused two. And the balance was R 13 000.00. The girlfriend to the appellant corroborated him on material facts which included the time she received a telephone call and the time he left his home. The issue regarding that the pair was using one cellphone, appellant did not know the address where they were residing and that they were separated until 2014 is neither here nor there. The learned Magistrate erred in finding that those contradictions were material as same were not canvassed with the appellant when he testified.

42. It is trite that the judgment of a court of law must be justified by adequate evaluation of evidence⁹. The learned regional magistrate applied the incorrect standard of proof. In a full bench decision of the SCA¹⁰ held that a perusal of the Magistrate's analysis of the evidence revealed that he had applied the incorrect standard of proof. In appearing to have rejected the Appellant's version on the basis that it was improbable, the Magistrate committed a fatal misdirection. In criminal matters, the State must prove its case beyond reasonable doubt. An accused's version can only be rejected if the Court is satisfied that it is false beyond reasonable doubt. An accused is entitled to an acquittal if there is a reasonable possibility that his or her version may be true. A court is entitled to test an

⁹ see *S v Teixeira* 1980 (3) SA 755 (A) *Robinson and Others v S* (AR18/2017) [2018] ZAKZPHC 22 (25 May 2018)

¹⁰ *Shusha* (2011) JOL 27877 (SCA)

accused's version against the improbabilities. However, an accused's version cannot be rejected merely because it is improbable.

43. In the case of **Shackell v S**¹¹ Brand AJA (as then he was) stated the following:

"A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

44. It has been further submitted on behalf of the appellants that the regional magistrate erred in law by simply considering the version given by the State witnesses and axiomatically rejecting the appellants versions. The court a quo considered the evidence of the State witnesses in isolation. It did not follow the test in *S v Van der Meyden*¹², where Nugent J, stated as follows:

'These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to

¹¹ 2001 (4) ALL SA 279 (SCA) `

¹² Shabalala v S (A3146/2017) [2019] ZAGPJHC 70 (7 February 2019)

convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true.

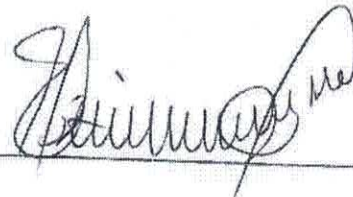
The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

45. It was incumbent on the trial court to have properly evaluated the evidence of the State witnesses in the light of all the discrepancies, improbabilities and contradictions thereto to determine if it came up to the required standard acceptable by our courts. In this case, it has not been established that the state proved its case beyond a reasonable doubt.

In the result the following order is made:-

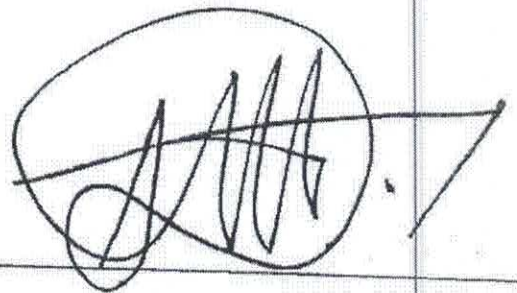
1. The appeal against conviction and sentence succeeds.
2. The conviction and sentence are set aside.



KHWINANA ENB

ACTING JUDGE OF THE GAUTENG
DIVISION PRETORIA

I agree, and it is so ordered.



MAKHOBHA D.

JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA