IN THE NORTH WEST HIGH COURT

MAFIKENG

CA NO.: 18/12

In the matter between:

TABANE GEORGE MATLAPENG **Appellant**

and

THE STATE **Respondent**

CRIMINAL APPEAL

GURA J, KGOELE J

DATE OF HEARING	**:**	**30 November 2012**
DATE OF JUDGMENT	**:**	**01 February 2013**
FOR THE APPELLANT	**:**	**Advocate Kuapane**
FOR THE RESPONDENT	**:**	**Advocate Van Niekerk**

REASONS FOR JUDGMENT

KGOELE J:

[1] On 30/11/2012 this matter came on appeal and was adjudicated upon by Gura J and myself. The following order was granted:-

- The Appeal against conviction and sentence is upheld;
- The conviction and sentence are set aside;
- The reasons for judgment are reserved;
- The appellant should be released immediately.

[2] The reasons for judgment that were reserved now follow hereunder.

[3] As a background, the appellant appealed against both conviction and sentence on a charge of Arson by the Regional Court at Mankwe. The Trial Court only granted leave to appeal against the sentence, leave to appeal against conviction is by this Court.

[4] The appellant submitted as his ground of Appeal that the Trial Court erred in finding that the state proved its case beyond reasonable doubt based on the following reasons:-

4.1 That the two state witnesses who allegedly identified the appellant were not credible and contradicted each other on material aspects;

4.2 That the evidence of the shoe-prints is not sufficient to draw the inference that the prints found at the scene can only have come from the shoes of the appellant;

4.3 That the appellant's *alibi* defence is reasonably possibly true.

[5] The outcome of this judgment that was already handed down makes it unnecessary for this Court to deal with the appeal against sentence.

[6] There were quite a number of witnesses called to testify in this matter both on behalf of the respondent and the appellant. Four witnesses including the complainant testified on behalf of the respondent. Three witnesses and the appellant himself testified on behalf of the appellant. For the sake of brevity, I do not intend to summarise the evidence of each and every witness in full. The other reasons are that, the Trial Court did so extensively in its judgment and the evidence is not worthy of being repeated. Furthermore, the evidence of the only two eye witnesses, namely, the second witness and the fourth witness who testified on behalf of the respondent is the one most relevant in the outcome of this matter.

[7] The evidence which is common cause between the respondent and the appellant is that on the 21st November 2009 complainant was at Itlole Resting Place at about 21h00. The appellant is the owner of this Resting Place. She (complainant) received a report about her house being on fire. She proceeded to the scene as a result and met with Tlhalefang, the second respondent's witness, who made further reports to her as well as to the police.

[8] As a result of the report the police confronted the appellant who was later arrested and charged at Mogwase Police Station. Before the detention of the appellant he was searched. Items such as shoes, cellular phones, belts and a black pantyhose were taken from him. As part of their investigations, the police retrieved a shoe-print with a plaster cast from the yard of the complainant, which was compared with some shoes of the appellant and comparison made. There were

three points of similarities found. No distinctive marks and or dissimilarities were found.

[9] The evidence that was in dispute concerns the identity of the appellant as the appellant raised as his defence the fact that he never left the premises of his business nor did he commit the offence alleged.

[10] Analysis of the evidence before the Trial Court reveals that the complainant did not have any direct evidence as regard what might have transpired at her house on the night in question. Save to say that she alleged that when she was at the Resting Place, she saw the appellant driving away in his white Mazda towards Moruleng. The other circumstancial evidence relied on by the respondents is the shoe-prints which were seen at her yard.

[11] The second witness for the respondent Solomon Tlhalefang Maphosa testified as follows:-

He was from Speenman's Tavern with Thato. After parting with Thato he saw the appellant jumping out of the yard of the complainant. Appellant was +- 30 metres away from him. His face was covered with a black cloth. He was wearing dark clothes. He had known appellant prior to that time. He said he did not specifically see the face of the appellant but could recognise him because of his height as there were some lights which illuminated the area. The appellant was driving a Mazda Mitch with a letter "L" at the back which depicts that he was a learner driver.

The appellant then drove away. At the time he was watching the appellant's car driving away in a high speed he then saw a fire in the house of the complainant. He then drove back to Speenman's Tavern and informed one Kgamanyane about the fire. They together returned back to the complainant's house and extinguished the fire. They had to kick the doors as the house was locked. He later made a report to the police and the complainant upon their arrival.

[12] The fourth witness called by the respondent Tshepiso Motlhake testified that on the 21st November 2009 she proceeded from Zondi's Tavern to the complainant's place in order to fetch some money there. She was in the company of Lesego a lady friend. On arrival the gates were locked but she could see some kind of illumination inside the house. She then proceeded to a passage where a white Mazda motor-vehicle with a letter "L" was parked. At the passage she met with appellant jumping out of the yard of the complainant while in possession of a black plastic which he threw over the fence. The appellant drove away telling her that she must not say anything about what she saw. She went to Speenman's place to ask for a cellular phone number of the complainant but with no success. After thirtly minutes she then went back to hitchhike but the place was close to the vicinity of the complainant. Whilst there the same motor vehicle came back. She saw a person alighting from the motor vehicle. That person threw something towards complainant's house and the house caught fire. She did not know who it was. She went back to Speenman's place to make a report. When asked how this person was clad, she said he was clad in a khakhi clothing on his upper torso, and the trouser was brown. She there and then changed her earlier version that that person whom she saw throwing something that made the

house to catch fire was the appellant as she recognised him by his height and build. She could identify him although there were no lights lit there. She also knew the appellant prior this incident.

[13] On the other hand the appellant testified to the effect that he was not at the scene of incident and had never left his business premises on that day. He called three witness who also testified to that effect. Their credibility was not challenged except that the Trial Court rejected their version together with that of the appellant.

[14] The respondent's counsel, correctly so in my view, supported the submissions made by the appellant's counsel that the conviction must be set aside. Those submissions can be succinctly summarised as follows:-

14.1 Two witnesses for the respondent testified that they saw the appellant at the scene of the Arson shortly before the fire started. They are Solomon Tlhalefang Maphosa (hereinafter "the second witness") and Tshepiso Motlhake ("the fourth witness");

14.2 They both say that they were at the scene when the fire started but each gives a totally different account of what happened at that time;

14.3 The second witness testified that on the night in question he was passing the vicinity of the complainant's yard when he saw the appellant leaving the yard by jumping over the fence and ran to a car parked on the street. While he was watching the car speeding off he realised that the complainant's house had caught fire;

14.4 The fourth witness on the other hand testified that the appellant jumped over the fence and drove off. After thirty minutes the appellant drove back and parked at the gate of the complainant's premises. The appellant alighted and from the street, threw an object towards the house thereby causing fire to it;

14.5 In the judgment of the Trial Court this contradiction is explained away to be the result of the different locations of the street the witnesses were at when the fire started and thus the contradiction was not regarded as material.

14.6 It was submitted that this explanation is illogical. The witnesses testified to two materially different and irreconcilable things. The two versions cannot be both correct. Either one of them or both are lying;

14.7 It was further submitted that both versions should be rejected because the two witnesses were also unsatisfactory in other areas as well;

14.8 Their versions differ materially on what transpired at the time the appellant allegedly jumped over the fence.

14.8.1 The fourth witness says the appellant had two refuse bags with him, threw the bags over before he jumped and had talked to her, imploring her to say nothing about the incident for a reward to be satisfied later;

14.8.2 The second witness only says that the appellant just jumped over and proceeded to the car and drove off. No mention of the two huge bags or the presence of

the fourth witness and her conversation with the appellant. He could not see all this despite his claim that he could see well that night.

14.8.3 This material contradiction is not addressed in the judgment of the Trial Court.

14.9 A shoe print was lifted at the scene. The pattern of the sole is similar to that of the shoes worn by the appellant. It was submitted however that that Trial Court erred when it attached too much weight to this evidence in the present circumstances in that:-

- Besides the similarities in the pattern, there was no correspondence of any unique or distinguishing marks observed;

14.10 *In casu*, the circumstances do not justify the finding that the only reasonable inference to be drawn from the facts is that the prints were from the appellant's shoes and no one else. See **R v Blom 1939 AD 188 at 202-3;**

14.11 The facts support a finding that the appellant's version is reasonably possibly true. Three defence witnesses corroborated the appellant's testimony that he had been at their place of work at the time of the start of the fire. No criticism of the three's testimonies is apparent from the record. The Trial Court only noted his disbelief that the "Cook / Chef" could have observed the appellant at all times that evening.

[15] It is generally recognised that evidence of identification based upon a witness's recollections of a person's appearance is dangerously unreliable unless approached with caution. The Appellate Division in **S v Mthethwa 1972(3) SA 766 (A)** laid down 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, 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".

[16] **In S v Shackell 2001 (4) SA 1 (SCA) paragraph 30, Brand AJA** said the following:-

> "It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, 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. On my reading of the judgment of the Court *a quo* its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remain that the substance thereof may be true" (See also S v V 2000 (1) SACR 453 (SCA) paragraph 3)."

[17] When evaluating evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. As **Nuget J (as he then was)** in **S v Van der Meyden 1999 (1) SACR 447 (W) at 450**, stated:

> "What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored".

[18] In **S v Bailey 2007 (2) SACR 1 (C) par [16] at 8b–e,** the Court held that the powers of a court are strictly limited. If there had been no

misdirection on the facts, there was a presumption that the Trial Court's evaluation of the factual evidence was correct. Bearing in mind the advantage the Trial Court had in seeing, hearing and appraising a witness, it was only in exceptional cases that the Court of Appeal would be entitled to interfere with the Trial Court's evaluation of oral testimony. In order to succeed on appeal, the appellant would have to convince the court of Appeal that the Trial Court had been wrong in accepting the evidence of the State witnesses; a reasonable doubt would not suffice to justify interference with the Trial Court's findings. Also see **R v Dlumayo & Another 1948 (2) SA 677 (A).**

[19] **In S v Chabalala 2003 (1) SACR 134 (SCA) paragraph 15** the Court described the approach to be adopted as follows:-

> "15. The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."

[20] After a critical analysis of the evidence on record, I undoubtedly agree with the submissions made by both counsel that the appellant's guilt

was not proven beyond a reasonable doubt and that the appeal should succeed. The basis of my view is based on the following factors:

[21] The respondent tendered the evidence of the two eye witnesses. They are Solomon Thalefang Maphosa (second witness) and Tshepiso Motlhake (fourth state witness) It is important at this juncture to keep in mind that both witnesses testified that they were there at the time the fire started, yet they have a totally different account on how it started and what happened at the scene during that time.

[22] The second witness testified that he at a distance of about 30 metres had seen the appellant leaving the yard of the complainant by jumping over the fence, and ran to a car parked on the street. While he was watching the car sped off, he realised that the complainant's house had caught fire.

[23] The fourth state witness on the other hand saw the accused leaving the yard of the complainant with two plastic bags and he even spoke to her. He then drove off and came back about thirty minutes later, where he alighted from the car and threw something at the house that made it catch fire.

[24] I agree with the submission made by both counsel that the Trial Court's attempt to explain away the contradiction is illogical. The time the fire started is centre to the debate, and if that is taken into account the different versions cannot be accepted.

[25] The following contradictions are glaring from their evidence and unfortunately goes to the root of the crucial issue that was before the

Trial Court, that of identity. They are therefore regarded as material contradictions.

- The second state witness did not mention the two plastic bags the fourth witness saw the appellant carrying;
- She also did not see when the appellant threw something in the yard as alleged by the fourth witness;
- The time they saw the fire does not tally at all. According to the second witness the appellant jumped over the fence, sped off, and the fire was then seen by him. According to the fourth witness, when the house caught fire, the appellant was not in the yard, but outside, as he threw something into the yard that made the house to burn;
- The second witness testified that appellant was wearing dark clothes, whereas the fourth witness said, the clothes were a khakhi in the upper torso, and trounser was brown. A khakhi colour is not classified as a dark colour at all;
- The second witness said the place was well illuminated, the light coming from the outside lamp of the complainant's house, whereas the fourth witness on the other hand said there were no lights on there.

[26] As one tries to make sense of the contradictions and shortcomings in the respondent's case, the shoe-print appears to provide the cure that can mend the respondent's case. The hope is however short lived, because after careful scrutiny more questions surface. The most important questions in relation to the shoe-print are the following:-

It is common cause that many people had jumped the fence of the complainant's yard to help extinguish the fire. This was not disputed by the appellant. It must be borne in mind that there would have been

many prints throughout the yard of the complainant. Why then did the complainant only cover the print of the appellant? What made that print so special?

[27] There was no evidence that this kind of shoe was so scares so as to be unique to the appellant. Futhermore, these people arrived before the complainant and the police arrived. The Trial Court overlooked this fact.

[28] On the issue of shoe-print there is also another contradiction that is found. Complainant said the print was found the following day, whilst the fifth witness for the respondent, the police officer that made the plaster cast, was very positive that it was pointed out to him on the night of the incident.

[29] I am of the view that the circumstances in this matter do not justify the finding that the only reasonable inference to be drawn from the facts is that the prints were from the appellant's shoes and no one else.

[30] The Trial Court considered the evidence of the two eye witnesses, that of the shoe print and a report that a car similar to the one driven by the appellant was at the scene to conclude that this evidence cumulatively pointed beyond reasonable doubt to the guilt of the appellant. This brings me to deal with the latter, "the car" as I had already pronounced on the first two.

[31] The registration number of the car that was alleged to have been driven by the appellant could not be identified nor recalled by the two eye witnesses including the complainant who saw appellant driving

away with his car despite the fact that all knew him very well before. We again did not have the benefit of any evidence that the appellant was the only one in that village having or driving a Mazda Mitch. The registration number is crucial to distinguish one car from other similar cars that can be available especially when identity is at stake and, when the evidence by the state is so questionable.

[32] It is not clear at all from the evidence what moved the Trial Court to accept the respondent's version above that of the appellant. It is trite that a Court in the absence of convincing evidence is not supposed to reject the version of an accused simply because it favours the version of the state above that of the accused. If the version of the accused is reasonably possibly true, then he should get the benefit of the doubt.

[33] It cannot be said that the version of the appellant is farfetched. It is corroborated by three witnesses. The state at no point succeeded to unveil the testimony of the appellant's witnesses as rehearsed fabrications. Their evidence stands uncontested and the credibility thereof unaffected.

[34] I am of the view that this Court cannot safely conclude that the appellant's version is so improbable that it cannot be regarded as reasonably possibly true. On the other hand, the respondent's evidence cannot in the circumstances of this matter be said to be of such a high degree of probability that a conclusion can be reached that there exists no reasonable doubt that the appellant is the one that burned the complainant's house.

[35] I fully agree with both counsel that the Trial Court misdirected itself on the facts of this matter by finding that the two respondent's eye witnesses were credible and further, by rejecting the version of the appellant.

[36] The above are the reasons why this court came to a conclusion it reached on the 30/11/2012.

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A M KGOELE
JUDGE OF THE HIGH COURT

I agree

_____
SAMKELO GURA
JUDGE OF THE HIGH COURT

ATTORNEYS:

FOR THE APPELLANT : MAFIKENG JUSTICE CENTRE

FOR THE RESPONDENT : STATE ATTORNEY