IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)
CASE NO: A234/2013

In the matter:

SITHOLE, NKOSINATHI **APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

THOBANE AJ:

[1] This appeal is directed against both conviction and sentence handed down in the Regional Court sitting in Johannesburg, on the 12th October 2011.

[2] The appellant, who enjoyed legal representation throughout the trial, was facing a charge of Robbery with Aggravating Circumstances as intended in section 1 of Act 51 of 1977, in that:

> *"On or about the 21s' April 2011 at or near Johannesburg in the Regional Division of Gauteng, the accused did unlawfully and intentionally assault Nelson Zefanias and did then and there and with force take the following item, to wit 1 Nokia N73 Cellphone and a wallet with contents, his property or property in his lawful possession, aggravating circumstances being the wielding of a knife and or the threat of inflicting of grievous bodily harm,'.'*

The provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997 were applicable in the matter.

[3] The appellant pleaded not guilty to the charge but was found guilty as charged and sentenced to 15 years imprisonment.

[4] The appeal to this Court is with leave of the Court below.

[5] The evidence of the complainant is briefly as follows. That he was accosted at about 19h00, while walking carrying a bag and speaking on the cellphone, by three men one of whom had a knife in his hand. He was surrounded and robbed of his cellphone as well as his wallet. The robbery lasted for about 10 to 30 seconds. After the robbery the three robbers ran into a dark building and the complainant returned to where he

had left his bag. He requested them to accompany him to the building, which they did. They could not find the assailants and he then decided to hang around the building because he "had a gut feeling" that the perpetrators were still inside that dark flat. He staked the place out and in about five minutes he noticed the three assailants coming out of the building. He noticed two policemen nearby and he went to them to ask for their help. He then grabbed the appellant who had a knife but threw it away. The appellant was then arrested by the police. They all left for the police station where a docket was opened.

On returning from the police station the complainant saw the person whom he had arrested and had escorted in the company of the police to the police station, standing on the street. He went back to the police station and returned to the place where the appellant had been sighted with the police. But he was nowhere to be seen. He went back to the police station with the police.

He once again saw the appellant whereupon he ran after a police motor vehicle to seek their help. The appellant was once again arrested and taken to Hilbrow Police Station.

[6] Bonga Jackson Mathe testified that he was on patrol with a colleague when they were approached by the complainant who indicated that he had earlier been involved in a robbery which resulted in an arrest. But that he had seen the person who had been arrested back on the street. The person was pointed out and was arrested and taken to Hilbrow Police Station. He also testified as to his efforts aimed at finding out how it came about that the appellant be released.

[7] Zebulon Nchabileng was the last of the three state witnesses and testified that he

remembered the appellant. That the complainant came to the Park Station police station to complain about the fact that the appellant had been freed by them. He indicated that he remembers the appellant. He also indicated that he remembered that there is a police Captain who came to conduct investigations the same evening of the arrest at their police station.

[8] After the state had closed its case the appellant was called to enter the witness box and testify. He denied that he was involved in the robbery. He testified that he was fetched from work, being the taxi rank and arrested by the police. During cross-examination he appeared to be contradicting himself as to the number of times he was arrested. He denied having paid police officers for his release. He explained that his first time to the police station was for purposes of questioning. That the complainant indicated to the police that he wasn't sure if the appellant was the person who had robbed him, thereafter he was allowed to leave.

[9] The defense did not call any witnesses.

[10] In my view, the magistrate correctly identified the issue in dispute as identity of the assailants.

[11] The magistrate does deal, to some extent, with issues that he was confronted with and that he took into consideration before arriving at a guilty finding. Firstly, with regard to the cautionary rule the magistrate indicated that the rule was applicable for two reasons. That the complainant was a single witness and also that he was the identifying witness. That prompted the magistrate to further indicate that:

"the court will have to find some or other guarantee that he is honest and that his identification is reliable and not perhaps the result of an honest mistake'.'

He also considered the fact that the witness identified the perpetrator by clothing and by face without mentioning any specifics. The fact that the appellant when approached threw away the knife, was indicative of the fact that the right man had been identified. The fact that the complainant had sufficient opportunity to make an identification. The fact that the accused lied did not indicate his guilt but was not to be ignored. The magistrate was satisfied with the totality of evidence and that it could be relied on despite the fact that it was evidence if a single witness. That is the sum total of the magistrate's considerations.

[12] The question is whether there is proof beyond a reasonable doubt that the appellant committed the robbery on the 21st April 2011, in the company of two other persons. Our law requires that evidence of identity of the offender be treated with caution. See **S v Shekelele 1953 (1) SA 636 (T)** where it was held per Dowling, J that:

"An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. "

[13] It therefore becomes relevant to keep the following in mind when making that determination, **R v Dladla 1962 (1) SA 307 (A):**

> *"In a case where the witness has known the person previously, questions of identifying marks, of facial characteristics, and of clothing are in our view of much less importance than in cases where there was no previous acquaintance with the person sought to be identified. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, having regard to the circumstances in which it was made."*

It is common cause that the complainant did not have prior knowledge of the appellant. Therefore what is relevant is to test the opportunity for a correct identification, having regard to the circumstances in which it was made.

[14] The identification by a witness may be unreliable even if the witness is found to be a good witness, patently honest, intelligent, confident, coherent, and verbally expressive **[see: S v Charzen and Another 2006 (2) SACR 143 (SCA).]**

[15] The complainant testified that the incident took place at night. He indicated also that it was "a bit dark .....only the lights from the shops were on". That the robbery lasted for

about 10 to 30 seconds. Later in his testimony he says that it was "a little bit darkish". The common factor one can gather is that it was a bit dark. Of importance however is that the complainant testified that he observed the appellant/assailant for only two seconds, at the time when the complainant was surrounded by three assailants one of whom was behind him. It is doubtful if that presented him with sufficient time to observe. There is a further contradiction with regard to the position of the appellant at

the time of the robbery. At first the complainant indicated that the appellant was on his left, he later indicated that the appellant was on his right and had a knife.

[16] "A Court should approach the evidence of a single witness with caution and should not easily convict upon such evidence unless it is substantially satisfactory in all material respects or unless it is corroborated." Leon J, **S v Ganiel967 (4) SA 203 (N)**.

[17] The magistrate is expected to apply such caution to the facts before him. He is not to merely pay lip service thereto. It was held in the matter of **S v Avon Bottle Store (PTY) Ltd 1963 (2) SA 289 (A)**, by the Honourable Botha JA, that-:

> *"But a mere pronouncement that it is taking a cautious approach to the evidence is insufficient and is the equivalent of non-compliance. It must be apparent that the court has indeed treated the evidence cautiously: "What is necessary is that the judicial officer, who is the trier of fact, should demonstrate by his treatment of the evidence...that he has in fact heeded the warning'.' At the commencement of his judgment the magistrate does say that he is aware of the applicability of the cautionary rules. It appears though as if mere lip service was simply being paid, in that he does not demonstrate, through the analysis of evidence, that he is indeed doing more than just paying lip service"*

[18] One must therefore analyse the evidence of the complainant, in an attempt to establish if it meets the standard set in **S v Ganie** supra, by viewing it through the prism of "substantially satisfactory in all material respects". If it does not meet that standard, to then try to establish if there is corroboration, in line with the Ganie matter. Of importance being corroboration as to the identification of the appellant.

[19] One is confronted with the following evidence:

[19.1] The complainant observed the appellant for only two seconds,

[19.2] It was a bit dark at the scene the only source of light being from the shops,

[19.3] The complainant was surrounded by three men and was frightened,

[19.4] The complainant lost sight of the assailants for a considerable time,

[19.5] The complainant did not refer to any facial or physical features of the appellant,

[19.6] The complainant did not have any prior knowledge of the appellant.

The magistrate did not deal with these issues in his judgment. He accepted that the description given was inadequate, but still maintained that in his view it was not fatal and he referred to the judgment of **S v Majame and others 1991 (1) SACR 2040**. His finding that the complainant "gave a description of the accused", is not supported by evidence. Equally his finding that the complainant "....did have sufficient opportunity to make an identification", is not supported by evidence.

[20] One is therefore reminded of the matter of S v Mthethwa 1972 (3) SA 766 (A), where it was held that:

> *"Because of the fallibility of human observation, evidence of identification is approached 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 witnesses; the 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, built, gait and rest; the result of identification parades, if any;*

and, of course the evidence by or on behalf of the accused. The list is not exhaustive, 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 and must be weighed one against the other, in the light of the totality of the evidence, and the probabilities."

[21] On the whole therefore and based on the above, I cannot find that the evidence of the single witness, the complainant, was satisfactory in all material respects.

[22] I now turn to the issue of corroboration, to determine whether the evidence can be relied upon on this second leg.

[23] The magistrate refers to evidence by the complainant to the effect that the appellant had a knife which when he saw the police he threw away.

[23.1] The knife was not described save for the evidence of the complainant who said it was a jack knife,

[23.2] The knife was not entered into evidence,

[24] The magistrate was of the view that the act of throwing the knife away, was corroboration of the fact that the person was the same person who had wielded a knife at the complainant during the robbery. This is rather farfetched, and can hardly be said to be corroboration as to identity. Especially viewed against the backdrop that no specific identification had been achieved and also that none of the robbed items were found in the possession of the appellant. In short, there was no other eye witness to the whole incident.

[25] In my view, it cannot be said that the evidence of the complainant, being a single witness, was satisfactory in all material respects. Nor can it be said that it was corroborated.

[26] Much weight has been attached to the fact that the appellant lied when he testified. I agree with the summation that the appellant was not a good witness. That however does not lessen the onus on the part of the State to prove his guilt beyond a reasonable doubt.

[27] It is trite that lies in themselves or improbabilities in an accused version do not establish the guilt of an accused.

S v Steynberg 1993 (3) SA 140 (A)

S v Mtsweni 1985 (1) SA 590 (A)

S v Shackel 2001 (2) SACR 185 SCA

[28] I do not plan to deal with the appeal against sentence due to the order I plan to make below.

[29] I cannot find that the guilt of the appellant has been proved beyond reasonable doubt.

[30] In the premise I make the following order:

1. The appeal is upheld,
2. The appellant's conviction and sentence is set aside

SA THOBANE

Acting Judge of the High Court

I AGREE.

B MASHILE

JUDGE OF THE HIGH COURT

Date of Hearing: 14/10/2013

Date of Judgment: 22/10/2013

Counsel For Appellant: Adv. E Tlake

Instructed by: Legal Aid Board South Africa

Counsel For Respondent: Adv. R. Ndou

Instructed by: National Prosecuting Authority