THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A194/2015

DATE OF HEARING: 3 DECEMBER 2015

DATE OF JUDGMENT: 11 DECEMBER 2015

In the matter between:

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

GAMA, MZWAKHE CALVIN Appellant

And

THE STATE Respondent

CORAM: Avvakoumides AJ and Hundermark AJ

J U D G M E N T

AVVAKOUMIDES, AJ

[1] This appeal is brought against the conviction and sentence of the Appellant with the leave of the trial court. The Appellant was convicted of robbery with aggravating circumstances and sentenced to 15 years' imprisonment.

[2] The grounds of appeal against the conviction are that the trial court erred in that it:

[2.1] did not permit cross examination on an unsigned statement of the complainant, *alternatively* in not insisting that the original statement allegedly signed by the Appellant should be made available to the Appellant's legal representative;

[2.2] accepted the credibility of the complainant and rejecting the credibility of the Appellant;

[2.3] accepted the evidence of the two state witnesses that the Appellant participated in the robbery and rejecting the evidence of the Appellant to the contrary; and

[2.4] accepting the uncorroborated evidence of the complainant that a knife was used at the end of the robbery.

[3] The grounds of appeal against the sentence are that the trial court erred in that it:

[3.1] failed to consider in relation to the question of exceptional circumstances whether it had been proved that the *mens rea* of the Appellant extended to the use of the knife in the offence;

[3.2] failed to consider in relation to the question of exceptional circumstances, to give adequate weight to:

[3.2.1] the relative youth of the Appellant;

[3.2.2] that fact that he was a first offender; and

[3.3.3] the conduct of the Appellant on the scale of conduct that constitutes the offence of robbery with aggravating circumstances.

[4] The Appellant pleaded not guilty to the charge and was legally represented throughout the trial.

[5] According to the complainant, on 23 August 2013 at approximately 06h50 she was on her way to school. She had gone to fetch a friend but upon not finding her friend at home, she carried on walking to school. She walked by a huge field whilst playing on her phone. She noticed three men running towards her but paid no attention to them. They approached her and told her to hand over her phone. She refused and wrestled with them. They were pulling and grabbing to get the phone away from her and she resisted. She screamed for help. Someone jumped out from his house and started running to help her. The three ran away but the one used a knife to “prick” her hand to let go of the cell phone. Two of them managed to get way but the Appellant was apprehended by the man who ran to her assistance. The police van was also in the vicinity and the Appellant was arrested. The Appellant was apprehended by the person who had run to her assistance, one Twala. The

complainant identified the Appellant when he was brought to the police van by his yellow Bafana Bafana jacket and his facial features. The phone was not recovered. The complainant described the conduct of the Appellant's role in the robbery as him saying to her: "Give me your phone; give me your phone" whilst the others were fighting and wrestling with her.

[6] Under cross examination the complainant stated that she had made a statement that was prepared for her by a police officer. The statement was read back to her and she confirmed the contents. This statement was unsigned. The complainant conceded that she made a further statement, which she had signed. Similarly, the second one was also written by a police officer and read back to her. The complainant testified that the second signed statement was taken at her home where she was visited by the police officer involved, one Hlongwane. According to the complainant the police officer wanted her to confirm whether she could identify the Appellant.

[7] The prosecutor objected to the cross examination of the unsigned statement on the basis that it was unsigned and that it was not her statement, as a result. The Appellant submitted that the trial court prevented the cross examination on the unsigned statement because it was unknown whether it was her statement or not. When the defence attorney wanted to proceed with cross examination on this statement, the trial court stated that "…We do not know whether that is her statement…." No further cross examination ensued on the statements.

[8] The purpose of the second statement, according to the complainant, was to confirm that she would be able to identify the Appellant because he was denying that he partook in the robbery. The complainant testified that the first time she identified the Appellant was when he was apprehended by the community and this presumably relates to her first statement. The second time is when the police officer visited her at home when she was advised that she would have to identify the Appellant in an identification parade. The identification parade never took place.

[9] Why the Appellant's representatives failed to pursue further the two statements in order to illustrate whether there were material differences, and to insist on cross examination in this regard, remains a mystery. One must conclude that the trial court's utterance to the effect that" "We do not know that this is her statement" was a clear indication to the Appellant's legal representative that the court would not allow further cross examination on this aspect. In doing so, the trial court permitted an irregularity in the proceedings. What the effect of this irregularity has on the trial is the real question.

[10] Whether the statement was signed by the complainant or not, it was a statement purporting to be a statement in the name of the complainant and was made available to the Appellant by the prosecutor from the SAPS docket in response to his attorney's request for "her original statement". There was no explanation from the SAPS officer who took down the statement as to why it did not reflect what the complainant had told him. However, it was a relevant

document and ought to have been admitted as evidence and to have been available for the Appellant's legal representative to cross-examine on.

[11] The Appellant's counsel submitted that even if it was shown that this statement was not the original statement made by the complainant, it is clear from the complainant's evidence that there was an original statement that she made to the police, and the failure of the State to make such a statement available to the Appellant and his legal representative prior to the trial violated the Appellants right to a fair trial.

[12] The failure to allow the cross-examination of what purported to be the original statement of the complainant, alternatively the failure to make available the original statement of the complainant to the Appellant so that the complainant could be cross-examined on that statement, constituted an irregularity in the proceedings. This being the case, such failure to deliver the statement and the ruling to disallow the cross examination on the two statements, vitiated the proceedings, unless it is clear that no prejudice was caused to the Appellant by the irregular exclusion of the previous statement made by the complainant. See: R v Ntshangela 1961 (4) SA 592 (A) at 599 E-H.

[13] The complainant was the primary witness on whose testimony the Appellant was convicted. She was the only witness who testified to the aggravating circumstances alleged in the charge sheet – namely the alleged use of a knife in the robbery. Cross-examination on her original statement may have assisted the Appellant to challenge her credibility and in the absence of such

cross-examination being allowed, it is not possible to assess where that cross-examination would have led.

[14] The Appellant submitted that the evidence of the complainant was consistent evidence and provided a reasonable explanation of how the Appellant came to be wrongly apprehended for a robbery that had been perpetrated by two other persons with whom he plays football, namely Mpho and Fana. The trial court made an adverse credibility finding against the Appellant but nothing in the judgment supports this finding by way of any reasoning and does not support this conclusion.

[15] The Appellant submitted that it is not inherently improbable that if he was innocent he would have done nothing and failed to intervene when the struggle between his two jogging partners and the complainant broke out. The Appellant's counsel submitted further that it requires particular bravery to intervene in such a situation and the failure of the Appellant to do so may have been attributable to passivity, fear or even shock. The failure of the Appellant to intervene is consistent with a range of possibilities other than an intention to make common cause with the assailants.

[17] There is nothing inherently improbable that the Appellant would have failed to question his jogging partners as to why they had increased their speed as they ran away from him in the direction of the complainant. Similarly, the difference between the Appellant's initial evidence that he was scared and his subsequent evidence that he was shocked, was hardly a material

contradiction. Accordingly, it was submitted that there is nothing in the reasoning of the trial court to support the conclusion that the credibility of the Appellant was to be rejected, and in the absence of anything in the record to support such a conclusion independently. The Appellant thus submitted that this Court should accept the credibility of the evidence of the Appellant as it is reflected in the record before this Court.

[18] On the credibility of the complainant the Appellant submitted that there is inherent implausibility in her evidence on various aspects:

- the complainant's testimony in court about the involvement of the Appellant in the robbery is difficult to reconcile with her admitted statement to the police and the community members on the day that the Appellant "did not take my cell phone but he was with the people who took my cell phone".
- She testified that the robbery took 20 to 30 minutes. This was utterly implausible that a tussle over a cell phone between a single woman and three men, one of whom was armed with a knife, would take 20 to 30 minutes.
- Her evidence in relation to the flight of her assailants in response to the intervention of the community was contradictory.
- Her evidence-in-chief was clear that the assailants fled when "a guy jumped out from his house trying to help me" and then when the assailants fled "the guy chased the three guys and then everybody came out and started chasing them too".

- She then gave evidence which made clear that the “guy” to whom she referred was Mr Twala.

[19] Her testimony in chief made clear that the sequence of events was that:

- the assailants were tussling with her over her cell phone for 20 to 30 minutes,
- she screamed,
- Mr Twala came out of his house,
- one of the assailants produced a knife and pricked her hand,
- she released the cell phone and the assailants ran away with it,
- the rest of the community emerged and started chasing the assailants.

[20] In her evidence under cross-examination, she claimed that the community members came out to chase the assailants before the knife was allegedly used, and that the use of the knife was apparently a response to the advance of the community members. This contradiction under cross-examination must also be viewed in the light of the evidence of Twala that the community came towards the Appellant only after he had apprehended the Appellant.

[21] The Appellant testified that he was not involved in the robbery but was merely standing two metres away from the scene after the men with whom he had been jogging attempted to rob the complainant of her cell phone. The state’s case in relation to the alleged involvement of the Appellant in the robbery was contradictory in the following respects:

- The complainant testified that the Appellant participated actively in the robbery by demanding that she hands over her phone but did not suggest that the Appellant himself was involved in any physical contact with her.
- The state witness, Twala, did not confirm the complainant's testimony that the Appellant had demanded the phone from her, and contrary to the complainant, testified that the Appellant had been physically involved in the robbery.
- From the address of the Prosecutor, it is clear that the State relied on the version of the complainant to contend that the Appellant was a participant in the robbery.

[22] It was submitted on behalf of the Appellant that the complainant's testimony as to the Appellant's active participation in the robbery is difficult to reconcile with her statement to the police and the community members on the day that the Appellant "did not take my cell phone but he was with the people who took my cell phone". It is also difficult to reconcile with the complainant's version that she needed to take a second statement to identify the Appellant. If she saw what she said she saw, her first statement would surely have identified the Appellant as a participant in the robbery. More importantly, however, the only evidence of the complainant as to the Appellant's involvement in the robbery was her allegation that the Appellant demanded that she hand over her phone. That version was specifically denied by the Appellant in his evidence in chief. The Appellant's evidence in this regard was never

challenged in cross examination and it can accordingly not be rejected. Accordingly, it was submitted that the State's case against the Appellant is unsustainable.

[23] The only other evidence against the Appellant was that of the witness, Twala but his evidence is of little value. Twala claimed to have seen the Appellant participating in the robbery but, on his own version, visibility was poor because of mist and he could not see clearly. He could also not give details of anything that the Appellant did beyond the bald assertion that the Appellant had participated in the robbery and his evidence of the physical involvement of the Appellant in the robbery was inconsistent with the complainant's evidence that the Appellant's only involvement was to demand that she hand over the cell phone.

[24] An indication of the limited view that the witness Twala had of the event was that he testified repeatedly that the tussle was over the complainant's bag, whereas it is clear that on the version of the Complainant, the tussle was over her cell phone. Accordingly, it was submitted that in the circumstances there is at least a reasonable possibility that the version of the Appellant was not false and that he was, in fact, standing two metres back from the robbery in a shocked or scared state and not participating in it.

[25] It would seem to me that the State did not prove beyond reasonable doubt that the Appellant was party to the robbery of the complainant and the conviction of the Appellant accordingly should be set aside. Firstly, in regard

to the failure to permit cross examination of the two statements I have had regard to the decision in President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98), reported as 2000 (1) SA 1, at paragraphs 61 to 63 wherein the following appears:

"61 *The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts*.

62 *The rule in Browne v Dunn is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions*.

63 *The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the*

imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed."

[26] Moreover, the trial court in not permitting cross examination of the two statements failed in its duty in this regard. In S v Dlamini 1999 (2) SACR CC 51 the following was held with regard to the duty of trial courts and courts hearing bail applications: "*Provided trial courts remain alert to their duty to exclude evidence that would impair the fairness of the proceedings before them, there can be no risk that evidence unfairly elicited at bail hearings could be used to undermine accused persons' rights to be tried fairly. It follows that there is no inevitable conflict between s 60(11B)(c) of the CPA and any provision of the Constitution. Subsection (11B)(c) must, of course, be used subject to the accused's right to a fair trial and the corresponding obligation on the judicial officer presiding at the trial to exclude evidence, the admission of which would render the trial unfair. But it is not only trial courts that are under a statutory and constitutional duty to ensure that fairness prevails in judicial proceedings*." Justice Kriegler, as he then was, held that the message in R v Hepworth 1928 (AD) 265 remains as valid today as it ever was. In that case at 277, Curlewis JA stated: "*A criminal trial is not a game where the one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to*

see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to the recognised rules of procedure but to see that justice is done."

[27] On the question whether the Appellant acted in common purpose with the other two perpetrators, it was submitted that the Appellant would have had to actively do something in order to be guilty on the principle of common purpose. I have had regard to the decisions of S v Thebus 2003 (2) SACR 319 CC at par 34 wherein the following was held:

'*If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite mens rea concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue*.'

[28] In S v Le Roux & others 2010 (2) SACR 11 (SCA) at paragraph 17 the court stated as follows: '*In S v Mgedezi & others 1989 (1) SA 687 (A) this court dealt with a situation where there was no prior plan to commit the offence of public violence. It was stated there that a general and all-embracing approach regarding all those charged is not permissible. It was stated further that the conduct of the individual accused should be individually considered, with a view to determining whether there is a sufficient basis for holding that a*

particular accused person is liable, on the ground of active participation in the achievement of a common purpose that developed at the scene. In Mgedezi the following was stated: "*A view of the totality of the defence cases cannot legitimately be used as a brush with which to tar each accused individually, nor as a means of rejecting the defence versions en masse*." And further: '*The trial Court was obliged to consider, in relation to each individual accused whose evidence could properly be rejected as false, the facts found proved by the State evidence against that accused, in order to assess whether there was a sufficient basis for holding that accused liable on the ground of active participation in the achievement of a common purpose. The trial Court's failure to undertake this task again constituted a serious misdirection*.'

[29] With regard to Section 51(2) of the Criminal Law Amendment Act 105 of 1997: The use of the knife, the Appellant's counsel submitted that the complainant's version in relation to the knife was inherently improbable. She testified that the knife was produced by one of the assailants only towards the end of a 20 to 30-minute robbery after Mr Twala jumped over his fence to apprehend the assailants. It was submitted that it is highly unlikely that a robber who intends to use a knife in a robbery would wait 20 – 30 minutes before using it and it would also be stretching the limits of plausibility to suggest that three men tussling with a small woman over a cell phone would be unable to remove it from her grasp within 20 minutes without finally producing a knife.

[30] Furthermore, if the knife was used after Mr Twala jumped over his fence to apprehend the assailants, it is unlikely that he would have failed to see the

knife. Yet he did not corroborate the complainant's evidence of a knife being used in the robbery. Because the evidence in relation to the use of knife is the uncorroborated evidence of the complainant, it must be treated with circumspection and it can be accepted only if it is found to be satisfactory "*in all material respects*". This was after all pointed out in the judgment of the trial court is well established law. The evidence of the complainant cannot be stated to be satisfactory "*in every important respect*".

[31] On the contrary her version that the robbery took 20 – 30 minutes is utterly implausible, her evidence in relation to the use of the knife is suspect on its own terms, and there was no satisfactory explanation for her statement in the immediate aftermath of the crime that the Appellant "*did not take my cell phone but he was with the people who took my cell phone*". There is the added curiosity that the SAPS needed to take a second statement from her, sometime after the robbery to be able to identify the Appellant as allegedly having participated in the robbery.

[32] The trial court relied on the evidence of the complainant on the basis that it was corroborated by Twala. But for the most part, any corroboration from Twala concerned issues that were already common cause and related to the robbery being effected by the two robbers who escaped. In particular, the corroboration did not extend to the two material issues that were in dispute between the Appellant and the complainant, namely that Twala did not confirm the Complainant's testimony about the alleged use of a knife, and Twala did not confirm the complainant's testimony about the Appellant's

alleged demand for the cell phone. Indeed, far from corroborating the Appellant, Twala contradicted her on two issues which were common cause between her and the Appellant and thus give reason to doubt the reliability of his testimony:

- while it was common cause between the Appellant and the complainant that the tussle between the robbers and the complainant was a tussle over the complainant's cell phone, Twala testified that it was a tussle over her bag; and
- while it was common cause between the Appellant and the complainant that the Appellant did not take part in any physical tussle with the complainant, Twala testified that he did.

[33] Consequently, the corroboration provided by Twala is of little value and the inherently implausible and uncorroborated evidence of the complainant in relation to the alleged use of the knife cannot be found to have been proven beyond reasonable doubt. The Appellant finally submitted in relation to the conviction, that, if the conviction is not set aside for reasons submitted, the State did not prove the presence of aggravating circumstances in relation to that robbery.

[34] For reasons that appear above, I am of the view that the failure of the court to allow cross examination on the two statements vitiated the proceedings. There was clear prejudice to the Appellant in this regard. This aside and for reason which also appear above, the trial court erred in convicting the

Appellant on the principle of common purpose. There was no evidence to support such finding. Furthermore, the many contradictions in the evidence of the complainant and that of Mr Twala cannot sustain the conviction against the Appellant.

[34] In the premises the following order is made:

[34.1] The appeal succeeds.

[34.2] The conviction and sentence are set aside.

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G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:

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P. R. HUNDERMARK

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

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Instructed by:	Lawley Shein Attorneys

Representation for the Respondent:

Counsel:	T. P. Mpekana
Instructed by:	Director of Public Prosecutions