

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A60/17

(1)	REPORTABLE: <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED. <u>✓</u>
	<u>10/06/2020</u> DATE
	<u>[Signature]</u> SIGNATURE

In the matter between:

MAMADI THABO THOMPSON

Appellant

and

THE STATE

Respondent

CORAM: MABESELE J, MONAMA J, MDALANA-MAYISELA J

J U D G M E N T

MABESELE, J:

[1] This appeal is against convictions and sentences. The appellant was convicted of murder and robbery with aggravating circumstances and

sentenced to 25 years imprisonment and 15 years imprisonment, respectively. The *court a quo* ordered that the sentence imposed in respect of count 1 be served concurrently with the sentence imposed in respect of count 2.

[2] Before this appeal was heard, the parties confirmed to us via e-mails that this appeal may be disposed off on heads of argument. Since we were also satisfied that heads of argument addressed issues in dispute we proceeded with this appeal.

[3] The respondent argued *in limine* that this appeal is not properly before us in that the appellant failed to file heads of argument on 25 March 2020 and did not file any application for condonation for late filing of heads of argument. Although this argument has merit we were of the view that this appeal be entertained, in the interest of justice.

[4] At the centre of this appeal is the question whether the respondent made out a case for conviction of the appellant on evidence of a single witness and in particular, whether the appellant was properly identified at the crime scene.

[5] In terms of section 208 of Act 51 of 1977 the court may convict the accused on the evidence of a single competent witness. In *R v Mokoena* 1932 OPD 79 the court held as follows:

'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be enough for a

conviction, by [the section], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus, the section ought not to be invoked where, for instance, the witness.... has made previous inconsistent statement, where he contradicts himself in the witness box, where he has not had proper opportunities for observation, etc.'

[6] It is not in dispute that on 9 January 2008, around 09h00 and at the entrance into Kyalami Hills Estate, Midrand, Mrs Zimbini Makuleni and her deceased husband were robbed of their belongings and the deceased shot and killed in the process. Mrs Makuleni and the deceased had just arrived home from the O.R Tambo Airport. Mrs Makuleni was the driver of their range rover and the deceased occupied the front passenger seat.

[7] The evidence of Mrs Makuleni is that at the controlled gates into the estate, they found a white 1400 Nissan bakkie stationery at the entrance in front of them, and whilst they were waiting for this bakkie to drive through a man appeared with a gun pointed at her. As the man opened the driver's door and shouted at her, demanding money, she noticed at the same time that another man was on the right side and also opened the front passenger door. Both she and the deceased alighted from the vehicle. She testified that the man with the firearm dropped something like a cartridge and was trying to pick it up. She

then saw the deceased walk towards the guardroom to seek assistance from the security guards and he thereafter walked towards her and the man with the gun. The security guards had run away into the estate. She then noticed a red stationery vehicle behind their range rover. The occupant of the vehicle, who she identified as the appellant, alighted from the vehicle. She then moved to the direction of this man. They both met halfway, more or less to the rear of the range rover. As they met, the man slapped her on the face and ordered her to get into the range rover. She became dizzy as a result of that blow. When she was asked for how long she observed this man before she was assaulted she responded that she observed him for about one to two minutes, which time included searching of the boot of the range rover by this man. Soon after she was slapped on the face she heard a gunshot. When she looked up she heard the deceased shout and saw him holding his left upper arm and subsequently fell on the ground. Thereafter the man she identify as the appellant offloaded two bags from the boot and was joined by his two co-perpetrators when he left the scene in a red vehicle.

[8] On 19 April 2008 Mrs Makuleni attended an identification parade at the Johannesburg Police Station. At the police station she was informed by the police officer about the procedure to be followed when she identifies the suspects who were on the parade. When she entered the parade room she observed male persons through the glass-window standing on the line-up. When she was supposed to point at the

suspects she became frightened and told the officer in charge the following: "*I could not identify anyone, I do not see anyone, please let me go*". When she was asked by the court why she was frightened she responded: "*because the people were looking at me or rather it seemed as though these people on the line-up were looking at me*"

[9] On 27 May 2008 Mrs Makuleni attended the second identification parade at the Johannesburg Police Station. She was again informed about the procedure to be followed when she identifies the suspects on the parade. After the procedure was explained to her she entered the identification room and notice persons through the glass-window standing on the line-up. She then pointed out four persons, saying that although she noticed three persons at the crime scene she deliberately pointed out four persons at the parade because two of them looked alike and she did not want to make a '*mistake of omitting anyone*'. She said that one of the four persons she pointed out '*looks the same as the appellant*'. It is common cause that the appellant was not present at the line-up as the identification was arranged for possible pointing out of other suspects who could have taken part in the robbery and murder of the deceased on 9 January 2008.

[10] The appellant was arrested in the Limpopo Province whilst driving a red vehicle which was suspected to be used in the commission of "airport robberies". After he was arrested the police took him to Johannesburg. On their way to Johannesburg the appellant, according

to the police officers who fetched him from the Limpopo Province, volunteered to provide them with the name of the person who killed the deceased.

[11] On arrival at the Johannesburg police station the appellant again volunteered to provide the police with the information which implicated him to the robbery and murder of the deceased. Arrangements were then made for the written statement of the appellant to be taken which amounted to a confession. During the hearing of this matter in the *court a quo* the appellant formally objected to the state counsel's proposal to hand in the statement. The appellant argued that the statement was not made freely and voluntarily. This dispute resulted in the trial-within-trial. After evidence was presented by both parties and argument concluded, the *court a quo* ruled in favour of the appellant. As a result the statement was inadmissible.

[12] The appellant denied that he was involved in the robbery and murder of the deceased. He could not remember where he was the day of the crime. He said he could have been in Limpopo. He denied that he informed the police that Sibusiso shot and killed the deceased.

[13] The *court a quo* correctly stated in his judgement that evidence of identification requires to be approached with caution. His view was that Mrs Makuleni was remarkable and impressive witness in that she stood up well to cross-examination and her powers of observation was

impressive. The court said: "*She remembers the position, movements, appearance and conduct of each of the three robbers as well as the movements of her husband, and that before the shooting the only man with a gun dropped something like a bullet. She missed nothing even that the security guard ran into the state and that the Nissan LDV drove into estate. Her testimony cannot be faulted or criticised in any material respect, save for the first Identity Parade for which she gives an acceptable explanation*". The trial judge regarded sound argument of the defence counsel that the dock identification by Mrs Makuleni should carry less weight since she failed to identify the appellant at the first identity parade and pointed out a wrong person as the appellant in the second parade, as being without merit. We do not agree.

[14] The *court a quo*'s view on the risk of a wrong conviction of the appellant was that a wrong conviction is obliterated by the following factors which he regarded as independent corroborative evidence:

(a) *Mrs Makuleni's explanation why she could not make a pointing out at the identity parade is reasonable, understandable and acceptable;*

(b) *In the second identity parade she positively pointed out two assailants who were in the line-up and who were identified to the police by the appellant, together with her insistence*

that if the appellant was in the line-up she would definitely have pointed him out.

- (c) *The appellant gave information to the police which led to the arrest and successful prosecution of his co-assailants (in a separate trial).*
- (d) *The red car which led to the arrest of the appellant and the other two is a strong piece of independent evidence that implicates the appellant;*
- (e) *The attempt by the appellant to rely on a late disclosed alibi that he was probably in Limpopo at the time of the crime could not withstand cross-examination and lacks credibility.'*

[15] In all cases of identity the court should bear in mind inherent possibility that even honest witnesses may be mistaken about identification. There must be certainty beyond reasonable doubt as to reliability of such evidence. (*S v Charzen and Another* 2006(2) SACR 143 (SCA). In *S v Mthetwa* 1972(3) 766(A) at 768-C, Holmes JA made the following observations:

'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.....'

[16] The court will seek certain guarantees before accepting the evidence of an identifying witness. The guarantees, among others, will take the form of corroboration (*S v Ketani and Another 2002(3) All SA 15 (c)*).

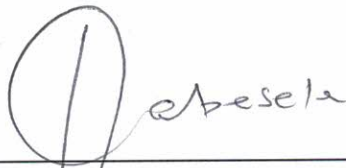
[17] The evidence of Mrs Makuleni that she and deceased were robbed of their belongings and the deceased murdered is beyond criticism. Her evidence is reliable in that regard. Although she was emphatic that her identification of the appellant was accurate, we are not persuaded that she had sufficient opportunity to observe their assailants. Her evidence is that whilst she and the man who carried a firearm were 'fighting' over the object that had fell on the ground, she saw the appellant alight from the red car which she suddenly saw close behind her range rover. She walked to the appellant who, without prior warning, slapped her on the face to the extent that she felt dizzy. It is apparent from her evidence that the incident of walking to her assailant and subsequent assault on her happened very fast, whilst at the same time she did not totally lose concentration on the man who carried a firearm since she was frightened. Logic dictates that after she was slapped on the face and became dizzy she was no longer in a position to clearly see what was happening around her until the perpetrators left the scene shortly after the incident.(emphasis added). Under those circumstances it cannot be

said that Mrs Makuleni had sufficient opportunity to observe her assailant who she alleges was the appellant. This is obvious from her failure to identify the appellant at the first identification parade and pointing out a wrong person at the subsequent identification parade who she said resemble the appellant, thus demonstrates possibility of error of identity. Her version that she could not point out anyone at the first identification parade because she was frightened is without merit because she was under protection of the police and the appellant was behind the glass-window and did not pose any danger to her, as he was already in police custody. She did not even bring to the attention of the police that she was frightened as she alleged. In our view the only reason why she did not point out the appellant (and pointed out the wrong person at the second identification parade) is that she did not see the appellant at the scene on 9 January 2008. Her evidence is not corroborated by any independent evidence as incorrectly concluded by the *court a quo* that there is corroboration. Moreover, it is incorrect for the *court a quo* to state that the appellant identified to the police the other two suspects who were subsequently convicted as there is no such evidence. The fact that the appellant was driving a red vehicle when he was arrested in march 2008 does not advance the case for the state since there is no evidence suggesting that the same vehicle was used when the crimes were committed. The evidence is that the police were in search of a red vehicle which was used in the commission of "airport robbers". Again, the possible information that the appellant could have provided to the police and which could have possibly linked

him to the crimes in question was declared inadmissible by the *court a quo*. The evidence of the appellant that he was not involved in the commission of the offences and did not give the police any information about these offences is reasonably possibly true. For these reasons these convictions cannot stand. Accordingly, the appeal against convictions and sentences must be upheld.

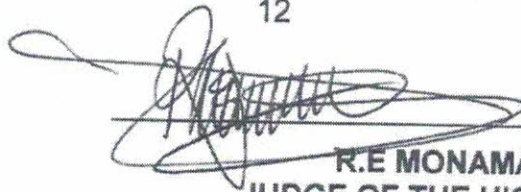
[18] In the result, the following order is made:

1. The appeal against convictions and sentences is upheld.
2. The convictions and sentences are set aside.
3. The order declaring the appellant unfit to hold a firearm is set aside.



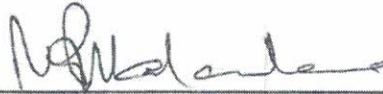
M. M MABESELE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



R.E MONAMA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree



M.M.P MDALANA-MAYISELA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing	:	25 May 2020
Date of judgment	:	^{10 of 2020} 17 June 2020
For the appellant	:	Adv. Robertse
Instructed by	:	Legal Aids S.A
For the respondent	:	Adv. Mothibe
Instructed by	:	DPP