REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE: 29/10/2014
CASE NO: A202//2010

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

DATE **JUDGE: AC BASSON**

In the matter between:

SIPHO MABUNDA 1st Appellant

ROBERT GUMEDE 2nd Appellant

vs

THE STATE Respondent

JUDGMENT

BASSON, J:

[1] There are two appellants before Court – Mr Mabunda and Mr Gumede. Only Mr Gumede has filed heads of argument. Mr Mabunda's appeal is therefore struck from the roll.

[2] This matter served before this Court on a previous occasion but was adjourned to allow the parties to reconstruct the record. The matter is now before Court to be decided on the reconstructed record. The parties are in agreement that the record as it stands is adequate for a proper consideration of the appeal.[1]

[3] Mr Gumede ("the appellant") was charged with robbery that took place on 7 January 2004. The appellant pleaded not guilty.

[4] It was common cause that the complainant Ms Katrina Nel and her family were attacked and robbed of various items on 7 January 2004. Ms Nel was also assaulted with a firearm and sustained injuries on her head. One of the accused took her bankcard and threatened to kill her if she did not give him the correct pin number. She explained that two of the accused stayed behind to guard them whilst some of the other accused went to withdraw money. She confirmed that the two accused that stayed behind did not have masks on. She testified that she saw the accused loading goods into her son-in-law's car. She testified that she also saw another white car. She was able to identify accused no 1 as the one that fired a shot that almost killed her grandson. She was also able to identify accused no 2 as one of the people that stayed

[1] See *S v Chabedi* 2005 (1) SACR 415 (SCA).

behind to guard them. In fact, accused no 2 admitted that he was on the scene but his version was that he was forced to be there. She was also able to identify accused no 7 (the appellant) as one of the people who stayed behind to guard but conceded that she was unsure about accused no 7.

[5] The complainant's grandson Mr Johan Floor was able to identify accused no 2 but was unable to identify the second person that stayed behind with them.

[6] I have already indicated that it was common cause that accused no 2 was on the scene and that some of the items robbed from the complainant were found at his house upon his arrest.

[7] It was further common cause that the appellant owned a Fort Sierra motor vehicle at the time of the incident. Also common cause was the fact that the appellant never took part in any identification parade.

[8] Mr Richard Floor (the son-in-law of the complainant) was, however, able to make a positive dock identification of accused numbers 1, 2, 3, 4 and 7 (the appellant). He testified that accused no 2 and the appellant guarded them whilst the others went to the bank to withdraw money. He testified that it was the appellant that relaxed the ropes against his wrists when he (Mr Richard Floor) complained. He also testified that it was the appellant that took his mother-in-law's cell phone and gave it to his (Mr Richard Floor) daughter. Mr Floor was adamant that he was able to identify the appellant and explained that they were together in the room. He was adamant that he definitely did not

make a mistake in identifying the appellant. He also testified that it was the appellant who was in possession of a shotgun that belonged to his mother-in-law's brother-in-law and that the appellant was also in possession of his mother-in-law's .22 revolver.

[9] The appellant's testimony amounted to a mere denial and he merely testified that he did not know any of the other accused.

[10] The presiding magistrate summarized the evidence and referred to the evidence of Mr Floor who testified that it was the appellant who detained them and that it was the appellant who threatened to kill them if he did not get money. In stark contrast to the detailed evidence of Mr Floor was the evidence of the appellant who merely denied that he knew any of the other accused.

[11] It is clear from the record that the presiding magistrate was alive to the fact that Ms Nel was not sure whether the appellant was present when they were detained. In respect of the identification of the appellant, the presiding officer took into account that there was other evidence apart from Mr Floor's identification, that the appellant was indeed involved in the robbery: She took into account the confession made by accused number 2 which clearly implicated the appellant and the fact that accused nr 2 was aware of the fact that the appellant had a white Ford Sierra (although the appellant said it was cream-white). The presiding magistrate rejected the version of the appellant on the basis that it was not reasonably possibly true.

[12] In respect of sentencing the presiding magistrate took into account that the appellant had spent two years and two months in prison which amounted to four and a third years. The appellant was given a sentence of 13 years imprisonment.

[13] The appellant was granted leave to appeal against his conviction.

Question before the Court

[14] The cardinal issue to be determined by this Court is whether the identity of the appellant as one of the robbers was proved beyond a reasonable doubt. The second issue is whether the magistrate correctly found that the version of the appellant was not reasonably possible true in light of all the circumstances.

[15] It is accepted that a dock identification has very little probative value. However, this does not mean that a dock identification is *per se* inadmissible. See S v Mdlongwa:[2]

> *"[10] Additionally, merely because Mbatha made a dock identification of the appellant and accused 5 does not make his evidence less credible. Generally, a dock identification carries little weight, unless it is shown to be sourced in an independent preceding identification.1 But there is no rule of law that a dock identification must be discounted altogether, especially where it does not stand alone. Mbatha had ample*

[2] 2010 (2) SACR 419 (SCA).

opportunity at least to observe two of the robbers who participated in the robbery, as is visible from the video footage, and who were later identified as the appellant and accused 5 in the facial comparison made by Inspector Naude, an aspect to which I shall return later, thus supporting his dock identification of them."

See also*: S v Bailey:*[3]

"[25] Furthermore, there is of course ample authority for the proposition that a dock identification by itself, without more, has limited (if any) evidential value (see, for example, S v Daba (supra); S v Moti 1998 (2) SACR 245 (SCA) at 257h; Du Toit et al Commentary on the Criminal Procedure Act at 3-4B (Service 24) and cases referred to therein). It is completely unnecessary, in my respectful view, to go one step further by ruling a dock identification inadmissible 'save in certain special circumstances'. For these reasons I respectfully decline to follow the approach suggested in Marudu's case with regard to a 'dock identification'."

In arriving at this conclusion, the Court in *Bailey* referred with approval to the following academic authority:

"[27] In a useful article by Prof Steph E van der Merwe titled 'Parade-uitkennings, hofuitkennings en die reg op regsverteenwoordiging: Enkele rondwetlike perspektiewe' (1998) 9 Stell LR 129 the learned author deals with this issue (at 137 - 41). His conclusion, after referring to American and Canadian authorities on the topic, is summed up as follows (at 141):

[3] 2007 (2) SACR 1 (C)

'Soos hierbo aangetoon is, is daar goeie redes om op grond van art 35(5) van die Grondwet 'n parade-uitkenning uit te sluit waar 'n beskuldigde sy grondwetlike reg op regsverteenwoordiging by die parade ontsê is. Beteken dit egter dat die daaropvolgende hofuitkenning noodwendig ook uitgesluit behoort te word? Hierdie vraag - so word aan die hand gedoen - sal telkens beantwoord moet word in die lig van die bewese feite van elke saak. As die Staat die hof kan oortuig dat die gewraakte hofuitkenning gebaseer is op waarnemings wat onafhanklik staan van die waarnemingsgeleentheid wat die onreëlmatige parade gebied het, kan die hofuitkenning toegelaat word omdat dit nie nou gaan om getuienis wat bekom is op 'n wyse wat 'n reg in die Handves skend nie. Die hofuitkenning staan los van die parade-uitkenning. In hierdie verband kan aansluiting gevind word by die volgende passasie uit die meerderheidsbeslissing van die Hooggeregshof van die VSA in United States v Wade (388 US 218 (1967)):

> *"We come now to the question whether the denial of Wade's motion to strike the courtroom identification by . . . the witnesses at trial because of the absence of his counsel at the line-up required, as the Court of Appeals held, the grant of a new trial at which such evidence is to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the line-up identification. Where, as here, the evidence of the line-up identification itself is not involved, a per se rule of exclusion of courtroom identification would be unjustified."*

> *"Wat moet egter gebeur as die hof sou bevind dat die hofuitkenning geen "independent origin" het nie en bloot berus op die parade-uitkenning wat ingevolge art 35(5) uitgesluit moet word? In hierdie geval het 'n mens te doen met 'n uitkenningsproses wat - alhoewel dit tegnies steeds uit 'n parade- en hofuitkenning bestaan - nie splytbaar is vir doeleindes van art 35(5) nie: As die parade-uitkenning uitgesluit word, moet die hofuitkenning noodwendig ook ontoelaatbaar wees. Die Staat kan tog nie toegelaat word om die hofuitkenning - wat op die parade-uitkenning berus en dus eintlik maar 'n vermomde parade-uitkenning is - by die agterdeur in te bring in die hoop dat dit nie uitgeken sal word as 'n herhaling van die parade-uitkenning nie. Die hof sal konsekwent moet wees. Die uitsluiting van sowel die parade-uitkenning as die hofuitkenning is 'n ongelukkige resultaat. Maar dit is ook 'n onvermydelike resultaat."*

See finally: *S v Tandwa and Others:*[4]

> *"[129] This brings us to the question whether the accused's conviction can stand in the light of the exclusion of the real evidence against him. The principal remaining evidence against him is Dlamini's dock identification, which - in contrast to the same witness's identification of accused 2 - was not reinforced by any preceding description of traits specific to the accused. Dock identification, as our previous allusions to it in this judgment indicate, may be relevant evidence, but generally, unless it is shown to be sourced in an independent preceding identification, it carries little weight:54 'taken on its own it is suspect'.55 The reason is apparent:*

[4] 2008 (1) SACR 613 (SCA).

> *"(T)here is clearly a danger that a person might make an identification in court because simply by seeing the offender in the dock, he had become convinced that he was the offender."*[56]
>
> *[130] In ordinary circumstances, a witness should be interrogated to ensure that the identification is not in error. Questions include -*
> *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. Bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake.*[57]
> *[131] Where the State relies solely on a dock identification, however, these questions carry little weight. This is because the witness can look at the accused in the court - as happened in the present case, to the indignant objection of the accused and their counsel. Under these circumstances, dock identification is similar to a leading question. As a result, in certain circumstances it could carry no weight at all.*[58]*"*

[16] We are persuaded that, apart from the fact that Mr Floor had ample opportunity to observe the appellant, that there exists other independent evidence that links the appellant to the robbery. It is clear from the evidence of Mr Floor that he was in close proximity with the applicant for some time and that he had ample opportunity to observe the appellant. There were also a number of accused before the Court and not only the appellant. This is not one of those cases where there is only one accused in Court which carries the danger that a witness may become convinced that he was the offender. Mr Floor was adamant in his evidence that it was the appellant who threatened them and that it was the appellant who loosened the ties around his wrists

when he complained that they were too tight. He was also adamant that it was the appellant who took his mother-in-law's cell phone and that it was the appellant who had his mother-in-law's shotgun and revolver. In addition to the dock identification, accused nr 2 clearly implicated the appellant in the robbery. In respect of the evidence of accused nr 2 it should also be borned in mind that he not only implicated the appellant – he also implicated accused nr 5. Accused nr 2 also testified that he and the appellant drove to the crime scene in the white Ford Sierra of the appellant. We have already pointed out that it was common cause that the appellant owed a white Ford Sierra (although the appellant said it was cream-white). There is no explanation before Court as to how accused nr 2 could have known that the appellant had a Ford Sierra if he was not in the company of the appellant. This certainly casts serious doubt on the appellant's version that he did not know accused no 2.

[17] Lastly, we are not persuaded that the presiding magistrate was wrong in rejecting the appellants defence as not being reasonably possibly true.

[18] In the circumstances we are of the view that the State has discharged its onus of proof. In the event the appeal against conviction is dismissed.

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AC BASSON
JUDGE OF THE HIGH COURT

I agree

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A BEATSON
ACTING JUDGE OF THE HIGH COURT