IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case number: A634/13

Date: 31__/03___/2014

DELETE WHICHEVER IS NOT APPLICABLE

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

....

DATE SIGNATURE

In the matter between:

KATO SHADRACK MFUNDISI **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MOSEAMO AJ

[1] Appellant was charged in the Benoni Regional Court on a charge of Robbery with aggravating circumstances. He was convicted and sentenced to 15 years imprisonment.

[2] Appellant was granted leave to appeal on both conviction and sentence.

[3] The charges arose out of an incident that took place at Barcelona on the 10th February 2012. The appellant together with two friends unlawfully and intentionally assaulted N. T.and J. T. He took from them a cell phone using a knife and a firearm. The appellant was caught by members of the community and assaulted. He was later arrested by the police.

[4] Appellant submits that the state did not prove its case beyond reasonable doubt and as such the court a quo should have given him the benefit of the doubt as his evidence is reasonably possibly true.

[5] Appellant further submits that failure by the state to call further witnesses, particularly one Mthembu who was informed about the robbery weakened the state's case.

[6] The appellant further points to the contradictions between the evidence of complainant and Thusi on the one hand that the cell phone was found in the grass and the evidence of the Police Officer who testified that the cell phone was found in the possession of the appellant.

[7] According to the appellant the court *a quo* erred in finding that: (a) by failing to explain the reason for his possession of the cell phone in his warning statement or in his plea explanantion; (b) The fact that no money was found in this possession when he was searched, presupposes that the evidence by the appellant was false.

[8] The appellant's counsel submits that the appellant did not have to prove his innocence but it was for the state to prove its case beyond reasonable doubt.

[9] The version of the appellant is that T. gave him the phone as security for a loan. According to the accused T. lost money in a game of dice and he borrowed R100.00 (Hundred Rand) from the accused. The appellant took the phone with the understanding that once T. will have raised the R100.00 (Hundred Rand) he will pay

back and the accused would return the phone. When evening was approaching the appellant decided to leave. The complainant became aggressive. Then the appellant ran off with the phone of the complainant.

[10] At the hearing of this appeal, counsel for the respondent conceded that if there is any doubt to the guilt of the appellant then the appellant should be given the benefit of the doubt.

[12] In convicting the appellant, the court *a quo* considered the fact that the appellant did not at any point in time, either during the assault by members of the community or during his arrest make an exculpatory statement to the effect that he did not rob the appellant. The court *a quo* drew a negative inference from his failure to explain how he came to possess the complainant's cell phone.

[13] It is trite that the state has to prove its case beyond reasonable doubt.

In **S v Van Der Meyden 1999(2) SA 79 (W)** it was stated that the corollary to the abovementioned onus of proof is that the accused is entitled to be acquitted if it is reasonably possibly true that he might be innocent.

The court further held that:

"In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward may be true. The two are inseparable, each being the logical corollary of the other"

[14] The version of the state witnesses as to where the cell phone was found was contradictory.

[14.1] According to the complainant, the appellant offered to show them where he had hidden the cell phone and as they were going back they came across the police. The appellant took the police to a place where they initially found him hiding and there the police found two cell phones in the grass.

[14.2] Under cross examination, the complainant denied that the phone was found on the appellant's person. He even said the police would be lying if they were to come and say that the phone was found on the person of the appellant.

[14.3] According to T. he reported the incident to one M. who also chased after the appellant and his friends but turned back after one of the fiends the friend fired a shot.

[14.4] Despite having stated that M. turned back, T. mentions that later when they got to the Appellant's home, M. suggested that they should take the appellant back to where the incident took place and then call the police.

[14.5] T. further testified that the appellant said he was going to show the police where his friends were but they did not find them. He then told them that the cell phone is where he was hiding and the cell phone was recovered there. They recovered two cell phones from the grass.

[15] The evidence of T. contradicts with the evidence of the complainant regarding where they went after the police arrested the appellant.

[16] When confronted with his statement made at the police station, Thusi changed and confirmed that the phone was found in the appellants' possession.

[17] The reason for the postponement was for the state to subpoena V. who allegedly alerted T. about the appellant's whereabouts and for M. who allegedly turned back after a shot was fired.

[18] It appears from the record that on the 18th of September 2012 when the case resumed, an affidavit was produced where the Investigating Officer states that neither V. nor M. could be found despite his attempts to look for them. The affidavit confirmed that the complainant was approached and he indicated that he knew them facially and he does not know where they reside.

[19] It is clear from the evidence of T. that he knew where V. stays; On page 19 of the record T. was asked:

"Do you know V.'s addresss?"

Answer: “No I do not”

“Would you be able to point out the address to the police?”

Answer: “Yes I can”

It is also clear from the evidence of T. that he knew where M. stays. “I took another street; I told Qanisela that I will inform Mr M. about the incident first.”

[20] From the above it can be inferred that M. is someone that the complainant and his brother knew very well.

[21] In my view, the evidence of the two state witnesses is riddled with inconsistencies. Some of the evidence is unreliable and some of the evidence seems to be false.

[21] The court called the arresting officer, Figile Eric Motha. He testified that he arrested the appellant after he found him being assaulted by members of the public who told him, the appellant and his friends had robbed people of their cell phones. He then took him to the Police Station. The complainant’s cell phone was found in his possession.

[22] The version of the Police Officer contradicts the version of the state’s witness that the cell phone was found in the grass.

[23] The contradictions in the state’s case are material and cannot be attributed to mere lapses of memory.

[24] The Appellant’s version is that he took the phone from the complainant as security for the R100.00 (Hundred Rand) that he lent to him during a game of dice. To his credit, the appellant corrected his attorney who had put it to the complainant that the phone was returned to him. The appellant indicated to his attorney that the phone was found in his possession.

[25] In **S v Tshabalala 2003 (1) SACR 134 SCA** it was stated that in determining the guilt of the accused the correct approach is to “weigh up all 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, decide whether balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.

The court cautioned against wrongly latching on to one obvious aspect without assessing it in the context of the full picture presented in evidence.

[26] In my view the court *a quo* erred in finding that because the appellant did not make an exculpatory statement, then the only inference was that he robbed the complainant.

[27] The court *a quo* also found the version of the accused not to be reasonably possibly true because: "there is no indication that any money was found on him. Where are his winnings"

[28] *In* ***S v Kubeka 1982 (1) SA 534 at 537 F-H Slomowitz AJ****, stated that "The accused's evidence did not impress me. It contained various unsatisfactory features. Whether I subjectively disbelieve him is however not the test. I need not even reject the state's case in order to acquit him. It is not enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Evidence ought not to be looked piecemeal and in isolation. All of it should be analysed and weighted together in determining whether the state has proved its case beyond reasonable doubt"*

[29] In considering the totality of the evidence the following deficiencies emerge in the state's:

[29.1] It is questionable why the two state witnesses lied about where the phone was found, when the appellant was adamant that it was found in his possession.

[29.2] Why were there no other witnesses to confirm their version of events, especially M. and V.?

[29.3] Is it probable that complainant and his friend, would chase three suspects suspect armed with a firearm and a knife while they were not armed.

[29.4] There were many people there, but it appears that members of the community apprehended the appellant on the information they obtained from the complainant and T.

[29.5] Despite clear evidence that T. knew where to find V. and M., both of them could not be located by the Investigating Officer when they were required to give evidence.

[30] Considering the totality of the evidence, the evidence of the state witnesses does not in my view establish the guilt of the appellant beyond reasonable doubt. There is a reasonable possibility that an innocent explanation which has been put forward might be true.

[31] In my view, the court *a quo* misdirected itself as it did not consider the totality of the evidence in convicting the appellant. As a result the appeal against conviction should succeed.

The following order is made:

1. The appeal against conviction is upheld.

_____

P D MOSEAMO

ACTING JUDGE OF THE HIGH COURT OF PRETORIA

I agree,

_____

T A MAUMELA

JUDGE OF THE HIGH COURT OF PRETORIA

It is so ordered.