


REPUBLIC OF SOUTH AFRICA


 IN THE HIGH COURT OF SOUTH AFRICA
 (GAUTENG DIVISION, PRETORIA)

 A861/2013
 CASE NUMBER: ~~64196/2011~~ T.S

(1)	REPORTABLE: YES <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO
(3)	REVISED.
	<div style="display: flex; justify-content: space-between;"> <div> 2014.04.29 DATE </div> <div>  SIGNATURE </div> </div>

24/4/2014

In the matter between:

ERNEST MABUZA

Appellant

and

STATE

Respondent

J U D G M E N T

THE COURT

[1] This is an appeal against conviction and sentence. The appellant was convicted of robbery with aggravated circumstances in the regional court, Benoni, and sentenced to 15 years' imprisonment. The appeal is with leave of this court.

[2] Only the complainant, Mr Edward Fagute testified. A witness statement of Mr Joshua Mahlangu (Mahlangu) was admitted into evidence by agreement. The appellant testified in his defense and closed his case without calling any witnesses.

[3] The complainant testified that he and the appellant were neighbours, and well-known to each other. On 22 November 2009 at approximately 02h00 in the morning, he and Mahlangu were asleep in his shack when the appellant and two unknown men stormed the shack. The appellant produced a firearm and pointed it at him. The appellant also assaulted him repeatedly on his knees with a hammer that was in the shack. One of the assailants was wielding a golf stick. The appellant took two cell phones and a wallet with R680 inside, which were on the table, and fled with the other assailants. Due to the injuries he had sustained as a result of the assault on him by the appellant, he was unable to walk and Mahlangu had to assist him to his brother's home, from where he was carried to hospital. During cross-examination it emerged that the previous day he was involved in a fight with his business partner, a brother to one Bheki, who was referred during the trial as Mbeki.

[4] In his statement, Mahlangu stated that he and the complainant were asleep when they were woken up by the door being forced open. The appellant and Bheki entered the shack. The appellant was having a firearm, which he pointed at him. Bheki was having a hammer, which he used to assault the complainant on his knees. The appellant instructed them to put their cell phones and money on the table. When he realized that Bheki's assault on the complainant was unrelenting, he took out R680 from his wallet and gave it to them. The appellant also took three cell phones which were on the table. The appellant and Bheki dragged the complainant outside, still demanding money. Outside the shack he observed a third assailant, armed with a golf stick, whom he pushed aside and fled. The complainant also managed to flee. They reported the matter to the police the following day.

[5] The appellant testified that, the day prior to the incident, he witnessed a fight between the complainant and his business partner, who is Bheki's brother. He intervened in the fight and separated them as the complainant was hurting his business partner. He later accompanied Bheki to the complainant's place after he, Bheki, heard about the assault on his brother. A fight broke out between complainant and Bheki and he, the appellant intervened trying to separate them. The complainant hit him and he retaliated. The following morning the complainant and his brothers approached him, wielding pangas and he ran away. He knows the complainant well as he is a neighbour to his brother. He denied any knowledge of, or participation in, the robbery.

[6] The appellant attacks the conviction on the sufficiency of the evidence. In particular, it is contended that there were material contradictions between the evidence of the complainant and the statement of Mahlangu. The State supports the conviction.

[7] The appeal court's powers to interfere with the factual findings of a trial court are limited to instances where there has been a material misdirection on the part of the trial court. See *R v Dhlumayo and Another* 1948 (2) SA 677 (A).

[8] In our view, there were a number of internal inconsistencies in the evidence of the complainant, as well as contradictions between his evidence and the statement of Mahlangu. We deal first with the inconsistencies. First, in his statement he stated that the incident took place at 04h00 while at the trial he testified that the incident took place at 02h00; Second, he testified that he did not know the people who were accompanying the appellant while later he identified one of the assailants as Bheki. Third, he testified that he was taken to a hospital and when asked of the name of the hospital he changed and said he was taken to a clinic.

[9] As to the contradictions between the complainant's evidence and the statement of Mahlangu, they are the following: First, the complainant testified that the appellant took his wallet that had R680 in it; in his statement Mahlangu mentioned that he took R680 out of his wallet and gave it to the assailants, seeing that they were hurting the complainant. Second, the complainant testified that the assailants took two cellphones; while Mahlangu mentioned three cellphones. Third, the complainant testified that the assailants left after taking the money and the cell phones; while Mahlangu stated that after taking the items they took the complainant outside and demanded more money.

[10] Fourth, Mahlangu stated that he and the complainant fled the scene after the robbery, while the complainant testified that their assailants left them in the shack and that he, the complainant, was so badly injured, and could not walk, that he had to be carried and helped to his brother's house. Fifth, according to complainant the man with the golf stick was inside the shack, while Mahlangu stated that he only observed his presence when he went outside.

[11] In its evaluation of the evidence, the trial court dealt only with one of the contradictions referred to above, namely one relating to the wallet. It concluded that the contradiction was immaterial, and speculated that there might have been two wallets containing the same amount of R680. A court is required to base its findings and conclusions on the facts before it, and not to engage in conjecture or speculative hypotheses. In our view, to the extent the trial court did so, it misdirected itself materially. The further misdirection is its failure to consider the other contradictions pointed out above, either severally or cumulatively.

[12] On behalf of the state, reliance was placed on *S v Mkhle* 1990 (1) SACR 95 (A) to explain away these inconsistencies and contradictions. The submission is that they are not material, and could merely be indicative of an error. We do not agree. We conclude that the nature of the contradictions, their number, importance and their overall bearing on the totality of the

evidence, cast doubt on the cogency of the state's case. They are simply too coincidental to be ascribed to mere error.

[13] It is clear, on close examination of all the evidence, that there was bad blood between the complainant and the appellant emanating from the fight they engaged in the previous day. This provided the motive for the complainant to falsely implicate the appellant. The trial court did not investigate this aspect in any manner. It is clear that the complainant and Mahlangu's versions were contrived. What they failed to do was to consider the finer details of their story, which could not bear scrutiny of cross-examination. In the result we are of the view that the state had not established the guilt of the appellant beyond a reasonable doubt. In the circumstances the appeal has to succeed.

[14] In the result we make the following order:

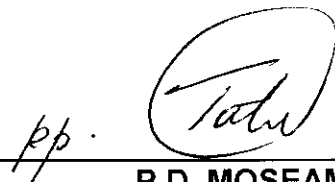
1. The appeal against conviction is upheld;
2. The order of the regional court is set aside and the following is substituted for it:

'The accused is acquitted'

3. The sentence imposed on the appellant is set aside.



T.M. MAKGOKA
JUDGE OF THE HIGH COURT



P.D. MOSEAMO
ACTING JUDGE OF THE HIGH COURT