IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

21/11/16

CASE NO: A715/2015

1. Reportable: ~~Yes~~/No
2. Of interest to other judges: ~~Yes~~/No
3. Revised: Yes/~~No~~

21 November 2016

(Signature)

In the matter between:

MPHO GIVEN SOJANE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

DE VILLIERS, AJ:

1 This is an appeal against the conviction of the appellant. He was charged in the Regional Court, Pretoria with robbery.

2 The appellant was legally represented at the trial. He pleaded not guilty.

3 The trial commenced on 3 April 2014, the appellant was convicted on 22 January 2015 and he was sentenced to eight years imprisonment.

4 The appellant obtained leave to appeal against his conviction on 16 July 2015.

5 The appellant's case was in its heads of argument was based on:

5.1 In the main, on an attack on the alleged identification of the appellant;

5.2 An attack on the admissibility of hearsay evidence about the ownership of cellular phones found in the possession of the appellant (and a purported confession by the appellant).

6 According to the heads of argument, the State is of the view that the only issue in question is if there are reasonable doubt if the identity of the appellant were proven beyond reasonable doubt.

7 In making this submission, the state did not rely on a purported confession by the appellant in its submissions, but did rely on the hearsay evidence about the ownership of cellular phones found in the possession of the appellant. This aspect was not pursued in argument. It did not take the matter further as no evidence was led as to which cellular phones were allegedly robbed.

8 I intend dealing with the matter on the identification ground too.

9 However, there was another matter that troubled me. It was common cause that the appellant played no active role in the robbery. The robbery was carried out outside a spaza shop whilst the appellant was inside the shop. The robber took at gunpoint a Mr Pashoka's keys to a delivery truck, money (the amount was not alleged) and cellular phones (the quantity and makes

were not clarified). Mr Pashoka, testified that the appellant played no role in the robbery, save that he left with the robber afterwards in the truck-

"Then what was accused 2 (i.e. the appellant) doing while the other one was busy with you? --- He was inside the tuck shop.

Doing what? --- They did not do anything. The only person that came is the only one that come and took the cell phones and the money from me.

Then you also explain to this court that after they took the vehicle or the truck to you, who was the driver? --- The short one, the one that took the keys (i.e. not the appellant)

What happened to accused 2 (i.e. the appellant)? Where was accused 2? They both were inside the truck when they put us inside the store".

10 The matter remained as unclear as this evidence, save for in cross-examination the witness was adamant that he saw the appellant in the truck with the robber when it drove away.

11 The State properly conceded during argument, without being pressured to do so, that it had failed to prove common purpose as set out in **S v Mgedezi and Others** 1989 (1) SA 687 (A) at 705I to 706C (underlining added):

> "*In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in S* ***v Safatsa and Others*** *1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea ; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. (As to the first four requirements, see* ***Whiting*** *1986 SALJ 38 at 39.) In order to secure a conviction against accused No 6, in*

respect of the counts on which he was charged, the State had to prove all of these prerequisites beyond reasonable doubt. It failed so to prove a single one of them."

12 The state did not seek a conviction on a less serious offence. In my view the matter ends here. I do not make such a finding, as these matters have not been fully ventilated in argument.

13 That brings me back to the identification issue. The facts are uncomplicated:

13.1 The state led the evidence of the victim, referred to above, who saw two people leave in the truck, one of whom he identified as the appellant in the dock;

13.2 The state led the evidence of several police officers who were at the scene where the truck had collided with a wall and two people ran away;

13.3 Two police officers chased after the passenger and after a while arrested the appellant.

14 What had been fully ventilated in argument was the aspect of identification. Different versions arose:

14.1 Mr Pashoka described the appellant as wearing "*a jean, a kaki jean and also takkies also and a hat on his head*". He only made a dock identification but had seen the appellant in custody.

14.2 The one police officer who chased the driver from the scene of the collision, constable Nkosi, saw that the passenger wore "*something like a grey top and a blue jean*", and "*... he was having a green hat and also, a grey hat and also a grey jacket and a blue jean*".

14.3 Constable Masindi who chased the passenger from the scene of the collision and arrested the appellant said he was wearing "*a jean, tekkies, and a lumber jacket, brown in colour and a beanie*".

14.4 Constable Khoza who followed Constable Masindi from the scene of the collision described the passenger's clothes as "*a green jacket and a blue jean*". The appellant averred that he wore a yellow jacket, a blue jean and did not wear a hat.

15 There are material differences between these descriptions.

16 No proper evidence was led to explain the chase by the police officers and what they observed as they were running. One does not know how far behind the running person they were, if they gained or lost ground, how far they ran, if the route was straight, what the distance between Constable Khoza and Constable Masindi was, if Constable Khoza gained ground or lost ground on Constable Masindi, how tired they became. The only evidence of some value was by Constable Masindi. According to him, he was that at one stage the person running away stumbled, but got up before he started running again. Yet before the fall he was "*17 metres*" from the person and thereafter "*20 metres*" with no attempt made to see how accurately he can judge distance. In addition, he testified that the chase took less than "*5 minutes*" which could reflect a chase over a few hundred metres to a much longer distance.

17 I also need to reflect Constable Masindi's description of the arrest of the appellant. He did not mention a tired person, someone sweating, or fearful. Instead he said;

> "*I ordered him, I called and ordered him to stop and that suspect was co-operative and he managed to stop. At the same time when the suspect stop my colleague who was following me was already there too. I asked to search the suspect, in the presence of my colleague, he was humble and co-operative as if was not a person who have just committed a hi-jacking.*"

18 The statement in **S v Mthetwa** 1972 (3) SA 766 (A) at 768A to C is, with respect, appropriate (underlining added):

> "*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. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as* ***R. v Masemang****, 1950 (2) SA 488 (AD);* ***R. v Dladla and Others****, 1962 (1) SA 307 (AD) at p. 310C;* ***S. v Mehlape****, 1963 (2) SA 29 (AD).*"

19 The appellant's version is that he was walking in the area, he ran away when shots were fired, he was seated in the tavern and he was arrested inside the establishment. Although once could raise difficulty with the probability of an aspect of his version (why did he chose to go into the tavern and not his brother's adjacent store), this aspect was not pursued in cross-examination. In addition, there are doubts as to whether or not shots were fired that allegedly caused him to run, and why he did not give a version to his attorney that two of the cellular phones were not found in his possession, but near him as he later testified.

20 But, taken into totality and against the onus that rests on the state, it is my view the appellant's guilt has not been proven beyond reasonable doubt. His identity is in doubt. Also on this ground, the appeal must succeed.

Consequently, I make the following order:

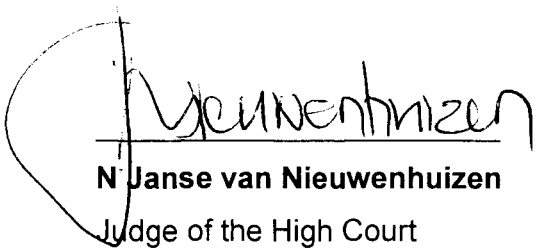
1 That the appeal be upheld; and

2 That the conviction and sentence of the appellant be set aside.

DP de Villiers

Acting Judge of the High Court
Gauteng Division

I agree, it is so ordered.



N Janse van Nieuwenhuizen
Judge of the High Court
Gauteng Division

Heard on:	**15 November 2016**
On behalf of the Appellant:	**Adv D P Van den Berg**
Instructed by:	**Du Toit Attorneys**
On behalf of the Respondent:	**Adv L Williams**
Judgment handed down:	**21 November 2016**