



**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**

**(REPUBLIC OF SOUTH AFRICA)**

DELETE	WHICHEVER	IS	NOT
<b>APPLICABLE</b>			
(1)	REPORTABLE:	YES/NO	
(2)	OF INTEREST	TO OTHER	
	JUDGES:	YES/NO	
(3)	REVISED		
DATE: 23 March 2016			
SIGNATURE: [Signature]			

24/3/2016

In the matter between:

**KANSAS MCINTOSH NKOSI**

And

**THE STATE**

**CASE NO: A304/2015**

Appellant

Respondent

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**JUDGMENT**

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**DE KLERK AJ**

**Introduction:**

[1] This is an appeal against conviction only.

- [2] The appellant was convicted in the Regional Court, Benoni, on one count of robbery with aggravating circumstances. It was alleged in the charge sheet that on 31 August 2008 at Tsakane the accused intentionally and unlawfully assaulted Phemetse Pheto Malepe and Tshepo Christopher Malepe and forcefully took a Volkswagen Jetta motor vehicle, a wallet containing R500.00, R45 000.00 cash, two cell phones and cutlery from them. It was further alleged that a firearm was used in the commission of the crime.
- [3] The appellant was sentenced to 15-years imprisonment. He was also declared unfit to possess a firearm.
- [4] The appellant was at the time of his conviction 27-years old.
- [5] The appellant was legally represented throughout the proceedings.
- [6] The appellant denied all knowledge of the robbery and pleaded not guilty.
- [7] In his plea explanation the appellant averred that he had been sick at home, being cared for by his mother. The appellant further stated that he had been identified at an identification parade by a person whom he knew very well. The appellant also stated that, notwithstanding his request to have his attorney present at the identification parade, same was conducted in the absence of his attorney.

[8] Save for the identity of the robbers all the elements of the crime were formally admitted.

[9] The State's case rested upon the identification of the appellant by a single eye-witness.

[10] The issue in this appeal is therefore one of identification.

**Evidence:**

[11] The principle witness for the State was Mr. Kgomotso Petso Malepe also known as Bra Jasmine or Bra Jazz. He testified that on 31 August 2008 at about 22:15 three men wearing balaclavas robbed him and his wife at their home from amongst others a Volkswagen Jetta, R45 000.00 cash, a wallet containing R500.00 and two cell phones.

[12] He said that he was able to identify two of the three robbers at the time when they had already left the house and removed their balaclavas.

[13] He testified that he could see them from where he was standing inside the house through a glass sliding door as they were walking towards the Volkswagen Jetta that was parked right outside the sliding door with its front facing the sliding door.

- [14] There were three lights outside the house that provided illumination being one at the corner of the house which actually illuminated the vehicle and two sensor lights at the entrance.
- [15] The robbers also noticed him. The driver quickly got inside the vehicle. The other two were talking to each other while pointing in his direction. At that time the two robbers were about two meters away from him while facing him and he had a good look at them.
- [16] He testified that the robbers were all dressed in the same white tops and navy-blue tracksuit pants.
- [17] He further testified that the driver was lighter in complexion compared to the other two but that he did not have a good look at the driver and consequently could only identify the other two robbers at the identification parade.
- [18] He testified that he did not know them.
- [19] During cross-examination Mr. Malepe denied knowing the appellant's mother.

- [20] The appellant's version that the appellant and Mr Malepe knew each other very well was similarly denied by Mr. Malepe.
- [21] Much time was spent on this issue and the evidence of the third, fourth and fifth state witnesses revolved around this issue.
- [22] In this regard it was put to Mr Malepe that the appellant's mother had purchased liquor from him (to sell at her house) which the appellant would go and fetch. While waiting in line the appellant would on occasion enter the tavern and buy a beer to drink.
- [23] It was further put to Mr Malepe that he and a certain Zero once came to the appellant's mother's house to discuss business with her while the appellant was also at home.
- [24] It was further put to Mr Malepe that the appellant was also friends with Mr Malepe's neighbour and that they would greet each other in passing.
- [25] Mr. Malepe denied all of this and explained that their tavern only catered for a specific group of people and that the appellant would not have been allowed access to the tavern.
- [26] He further said that he and his wife left home at 07:00 and only returned at about 22:00.

- [27] He said that he knew Zero but denied that he ever went with him to the appellant's mother's house.
- [28] It was put to Mr. Malepe that the reason why he pointed the appellant out at the identification parade was because he recognised him. This was denied by Mr Malepe who stated that he had not made a mistake in pointing the appellant out as one of the robbers. He further testified that he did not point out his neighbour who was also part of the line-up because he did not take part in the robbery.
- [29] The appellant's alibi was also put to Mr Malepe. He said that it was a lie.
- [30] The third and fourth state witnesses (who were 62 and 70-years of age respectively) testified that they were both patrons at Mr Malepe's tavern. They confirmed that the patrons were older people (45 and upwards) and that access was strictly controlled by the owners. They further said that they have never seen the appellant before.
- [31] The next state witness, Gloria Malepe testified that she is the wife of Mr Malepe and that they run the tavern together.
- [32] In cross examination it was put to her that the appellant would testify that he would on occasion enter the tavern to buy a beer. She said it would

never have happened and that not even her son (who was 40-years old) was allowed access.

[33] Nothing further turns on the testimony of the third, fourth and fifth witnesses.

[34] The second state witness was Warrant Officer Musa Nikodemus Moagi.

[35] He testified that he was in charge of the identification parade.

[36] He further testified that he had explained to the appellant his right to legal representation. The appellant however indicated that he would proceed without his legal representative. It was noted as such by him on the SAP 329.

[37] That concluded the State's case.

[38] The appellant and his mother gave evidence in his defence.

[39] With regard to his alibi he testified that he was in bed most of the time while being cared for by his mother and the mother of his child.

[40] He testified that he could not walk properly. He had to call somebody to take him to the police station on 5 September 2008.

- [41] His out patient card was handed in as evidence indicating that his first visit (initiation) was on 6 August 2008. In cross-examination he said that he was released from hospital three days before the initiation date. He further said that he started walking without assistance after five months.
- [42] He further testified that he asked for his lawyer to be present at the identification parade. The police officer however told him that he was only doing his job and continued with the parade in the absence of his lawyer.
- [43] He testified about what was put to Mr Malepe with regard to how well they knew each other.
- [44] Rosalina Lindiwe Nkosi testified that the appellant is her son and that he resided with her at the time of his arrest.
- [45] She said she knew Mr. Malepe and his wife but not their children. She had never spoken to Mrs Malepe. She bought liquor from a small window at their tavern. She had never been inside the tavern. She used to send the appellant to buy the liquor.
- [46] She said that Mr. Malepe and a mutual friend, a certain Zero, once came to her home to talk to her about buying liquor in bulk. While they were

talking outside the appellant passed them on his way out and they greeted each other.

- [47] At the time of his arrest the appellant was sick. He was recently from hospital and he was in bed most of the time. They had to help him to the vehicle to fetch his medication.

**Discussion:**

- [48] The main submission for the appellant was that the State failed to prove beyond reasonable doubt that the appellant was one of the robbers.

- [49] The State's case rested upon the identification of the appellant by a single eye-witness.

- [50] The appellant's defence was a denial of any complicity together with an alibi.

- [51] The Magistrate was according to his Judgment conscious of the risks and difficulties in identification and that the evidence had to be regarded with caution.

- [52] The Magistrate gave a well-reasoned Judgment.

[53] The Magistrate was satisfied that Mr. Malape had adequate opportunity for observation of the appellant.

[54] The Magistrate came to the conclusion that Mr Malepe was a credible witness who had told the truth, that the appellant had lied and that he took part in the robbery.

[55] **Section 208 of the Criminal Procedure Act, Act No. 51 of 77**, provides that:

*"An accused may be convicted on the single evidence of any competent witness."*

[56] In **Abdoorham 1954 (3) SA 163 (N) at 165 E-F** the Court held as follows:

*"The Court is entitled to convict on the evidence of a single witness if it is satisfied beyond a reasonable doubt that such evidence is true. The Court may be satisfied that the witness is speaking the truth notwithstanding that in some respects he is an unsatisfactory witness."*

[57] In **S v Sauls and Others 1981 (3) SA 172 A at 180 E-G** the Court held that:

*"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a guide to a right decision but it does not mean that the appeal must succeed if any criticism, however slender, of the witnesses' evidence was well founded. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."*

[58] In ***R v Hlongwane* 1959 (3) SA 337 A at 340** the Court held that:

*"The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted."*

[59] In ***R v Biya* 1952 (4) SA 514 (AD)** the Court held that:

*"But It is important to point out that in applying this test, the alibi does not have to be considered in isolation..."*

*The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impression of the witnesses."*

[60] In ***S v Mthetwa* 1972 (3) SA 766 A at 768** the Court held as follows:

*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).**"*

- [61] Mr. Malepe is a single eye-witness and his evidence must be looked at closely.

[62] With regard to Mr Malepe's opportunity for accurate observation the evidence shows that he was standing behind a glass sliding door watching the robbers as they were walking towards the Volkswagen Jetta that was parked right outside the sliding door with its front facing the sliding door. The vehicle was illuminated by an electric light. When the robbers noticed him they were about two meters away from him while facing him. Two of them were pointing in his direction while talking to each other.

[63] Mr. Malepe had no reason to falsely implicate the appellant.

[64] The appellant's version that Mr. Malepe pointed him out because he recognised him is highly unlikely.

[65] I am satisfied that the Magistrate was not wrong in convicting the appellant.

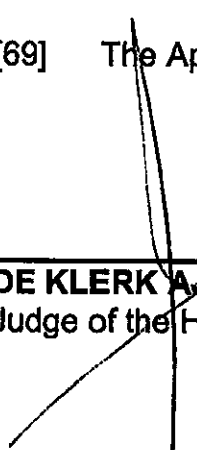
[66] The Magistrate exercised due caution in regard to the evidence of Mr Malepe.

[67] Mr. Malepe had the opportunity for dependable observation and he made a very good impression on the Magistrate.

[68] The evidence proves beyond a reasonable doubt that the appellant took part in the robbery.

In the result it is ordered that:

[69] The Appeal is dismissed.

  
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**DE KLERK AJ**  
Judge of the High Court

I agree and ~~was~~ so ordered.

  
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**MM JANSEN J**  
Judge of the High Court

**For the Appellant**

Advocate :  
Instructing attorney : Miss MMP Masete

**For the Respondent**

Advocate : S Scheepers  
Instructing attorney :