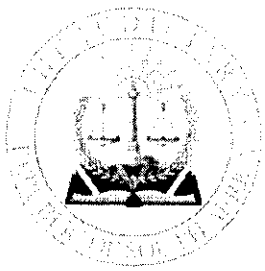

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A8/16

1/12/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO ✓

(2) OF INTEREST TO OTHER JUDGES: YES / NO ✓

(3) REVISED ✓

01/12/2016
DATE

SIGNATURE

In the matter between:

SIYABONGA SIBEKO Appellant

and

THE STATE Respondent

Date heard: 28 November 2016

Date delivered: 01 December 2016

J U D G M E N T

TSHABALALA, AJ

1. This is an appeal against the conviction and sentence imposed on the appellant after being found guilty on a count of robbery. The appellant

pleaded not guilty. He was sentenced to a fine of R6000 or one year imprisonment, suspended for five years.

2. The court *a quo* granted the appellant leave to appeal against the abovementioned conviction and sentence.

3. The state called four witnesses to testify on its behalf. The defence did not call a witness. The appellant did not testify in his defence and the magistrate did not evaluate the evidence, this is crucial point in this matter as it forms the focal point of the appeal as stated below.

4. The first witness to testify on behalf of the State was the complainant, Mathabelo Meisie Nkadimeng. She testified that on 24 May 2014 approximately 20h00 she was at East Rand at Las Vegas. She stated that she saw the appellant approaching, he was wearing a jacket with a hoody. He was busy with his mobile phone. She described the appellant's jacket as "black and grey and white". She stated that she took out her mobile phone, the appellant was now behind her, he snatched her mobile phone and ran away. She estimated that the appellant was approximately 5 metres away when she saw him for the first time. She stated that there were no street lights but motor vehicles illuminated the place as they passed.

5. The complainant testified that she screamed immediately the appellant snatched her phone because she intended to alert the public to assist her.

6. The complainant followed the appellant from where he snatched her phone towards the direction he had ran to despite discouragement from three taxi drivers. Her persistence paid off according to her evidence, because she found that some boys had arrested the appellant. There was a security guard and two policemen as well when she arrived at the scene. She was asked whether the mobile phone belonged to her. The police took the complainant and the appellant to the appellant's residence. The complainant described the phone as a black Samsung Galaxy Pocket.

7. The complainant also testified that when she arrived at the scene where the appellant was arrested there were three young men, two police officers and a school security guard. There was also her mobile phone and a torch.

8. Linda Samuel Ndlovu, was the second witness to testify on behalf of the State. Lind testified that he was in the vicinity of his residence on 24 May 2014. He stated that at approximately 20h00 they heard a woman scream, it was him and other young men. They were curious about the scream, they went to investigate and came across the appellant who was running. They stopped the appellant and asked him why he was running away. Ndlovu testified that he knew the appellant.

9. Linda further testified that his group asked the appellant why he was running away, the appellant replied that he was pursued by thieves who wanted to rob him. Linda and his group decided to confront the thieves but they were met by a security guard.

10. The complainant testified that she arrived immediately after the mobile phone was discovered, she was screaming. The complainant said this is the person who snatched my mobile phone. The police asked the complainant if the mobile phone was hers, when the phone was switched on, it had her profile picture. Linda confirmed to her that he was familiar with the appellant because they grew up in the same area.

11. The third witness to testify on behalf of the State was Constable Junior Likulani Makeke. Mr Makeke testified that he was on duty on 24 May 2014. He testified that he was on patrol with Constable Lengobela when they spotted a group of six young men who were holding another young man. The young men explained that they were restraining the appellant because they heard a woman scream and the appellant materialised running immediately after the screams.

12. Makeke testified that he and Const Lengobela stopped the vehicle and alighted, the appellant dropped the phone on the ground. The complainant was still some distance away from where the police had stopped their vehicle.

13. The complainant arrived thereafter, she was hysterical according to Makeke. She immediately said, without being prompted, this is the man who took my mobile phone. The appellant was restrained by Linda and his friends from leaving the scene at that point in time. Makeke described the phone as a Galaxy Pocket. The complainant was asked about the type of phone that was snatched from her, she informed the police that it is a Galaxy Pocket mobile phone. Makeke saw the picture of the complainant on the phone, a profile picture, when the phone was switched on.

14. Makeke confirmed during cross-examination that he saw the appellant drop the phone. According to the Constable they witnessed the appellant when he dropped the phone, namely, a security personnel who was behind the school fence, Const Lengobela, Linda and five other young men. Makeke insisted under cross-examination that he saw the appellant dropping a cell phone because there was light.

15. The defence closed its case without calling a witness after the State had closed its case. The Court *a quo* concluded that the State's evidence was uncontested, and that there was *prima facie* proof of guilt and the appellant was found guilty of robbery.

16. The focus of this appeal is firstly against the Magistrate's failure to make a credibility finding on the State witnesses and secondly against the Magistrate's subsequent conviction of the accused merely on the basis that the accused did not testify and the Magistrate therefore found the evidence of the State to be conclusive. It is contended that the Magistrate misdirected himself in failing to make a credibility finding before reaching the conclusion that the State has proved its case beyond a reasonable doubt. It is common cause that the trial court's judgement on conviction consists of approximately ten typed lines. The

Magistrate merely stated that the evidence as presented by the State, as well as the fact that the defence closed their case without leading any evidence and therefore left the State evidence uncontested, was sufficient for the court to find prima facie proof of guilt and therefore the accused was found guilty as charged. It is further contended by the appellant that the trial court neglected to apply the cautionary rules applicable to a single witness and that the Magistrate failed to evaluate the evidence on identification. Furthermore, the trial court omitted to evaluate the evidence presented by the State and ignored the discrepancies and inconsistencies in the State case. Lastly, the Magistrate failed to give adequate reasons for its judgement.

17. It is trite law that a conviction can only follow upon a proper evaluation of the evidence led before the court. Only then can it be concluded that there exists a prima facie case for the accused to answer. The failure by the Magistrate to evaluate the evidence places this court in the awkward position in that we are unable to estimate the value to be attached to each individual witness's evidence. This aspect is of utmost importance, as the complainant in the matter was a single witness who testified that this incident happened at night with only apollo lights lighting up the area. Secondly the complainant also conceded that she does not know the appellant and only recognised

him by his clothing and bodily features after he was arrested a couple of hundred metres away from the scene where her cell phone was robbed. Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may only be convicted on the evidence of a single and competent witness. As far as the actual robbery is concerned the complainant was a single witness. Our law requires that the evidence of a single witness must be approached with caution. The courts have laid down the rule that before any reliance can be placed on the testimony of a single witness, such evidence must be clear and satisfactory in every material respect. See in this regard ***R v Mokoena* 1956 (3) SA 81 (A); *S v Webber* 1971 (3) SA 754 (A) at 758G; *S v Sauls & Others* 1981 (3) SA 172 (A) at 179G-180G; *S v Stevens* 2005 (1) All SA 1 (SCA) at 5D-H** and ***S v Gentle* 2005 (1) SACR 420 (SCA) at para 17**. In the absence of a proper evaluation of the complainant's evidence, being a single witness, no credibility finding can be made in this regard. There is no indication that the court treated the complainant's evidence with caution. It follows from the aforesaid that this court cannot test and/or evaluate the judgement aforesaid.

18. It is furthermore contended on behalf of the appellant that where identification of an appellant is in dispute, it was held in ***S v Mthetwa* 1972 (3) SA 766 (A) at 768** that evidence of identification should also

be approached with the necessary caution because of the fallibility of human observation. It follows that a failure to do so constitutes another misdirection.

19. The appellant submits that the court *a quo* also misdirected itself with regard to the position of an accused who opts to exercise his right to remain silent in a criminal trial. An accused who decides to close his case without calling any evidence does so because there is no obligation on an accused to testify at the end of the State case. Only when the evidence presented by the State calls for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may be entitled to conclude that the evidence, in the absence of an explanation, is sufficient to prove the guilt of the accused. However, whether such a conclusion is justified will depend on the weight of the evidence. See in this regard ***S v Boezak* 2001 (1) SACR 1 (CC).** It follows from the aforesaid that negative consequences will follow upon an accused's decision not to testify only after a court has properly evaluated the evidence presented by the State and then concludes that there is sufficient evidentiary proof to establish a prima facie case. In ***S v Boesak* 2000 (1) SACR 633 (SCA) at para 47** it was held:

> *"Of course, a* prima facie *inference does not necessarily mean that if no rebuttal is forthcoming, the onus will have been*

> *satisfied. But once the main acknowledged instances where it can be said that a* prima facie *case becomes conclusive in the absence of a rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation...".*

Where there is evidence against an accused calling for an answer, an accused who chooses not to testify will be at risk. However, the court must still evaluate same evidence before concluding that, in the absence of an explanation, the evidence is sufficient to prove the guilt of the accused. This evaluation depends on the weight of the evidence. However, the failure to testify does not relieve the prosecution of its duty to prove the guilt of the accused beyond reasonable doubt. An accused person's election not to testify in his own defence does not necessarily convert prima facie proof into proof beyond a reasonable doubt. There cannot be any doubt that the appellant disputed his identity. The quality of the evidence led to prove identity was to be an important factor for evaluation before a conclusion could be reached that a prima facie case which calls for an answer exists. The application of the cautionary rules and evaluation of evidence are prerequisites before a finding of a prima facie case can be made. The same principles apply to the test of proof beyond a reasonable doubt. Taking into account that the complainant confirmed that she could not see face of the person who robbed her, that

there were no street lights in the immediate vicinity, and that the incident occurred in the main road where many taxis were moving around, it can safely be concluded that the complainant's visibility was obscured. This is confirmed by the complainant's evidence that she did not see the accused approaching as she was approached from behind. Immediately thereafter the assailant ran away in the direction from which he initially came. Sometime later the appellant was apprehended and the complainant only arrived at the place where he was apprehended some twenty minutes later. The complainant's testimony is that she only recognised the assailant from the jacket he was wearing as well as his tekkies. She testified that she has a similar jacket as the one worn by the appellant.

20. The State case further reveals that the appellant was not found in possession of the cell phone when he was arrested. The police official, Mr Makeke, testified that the appellant was in possession of the phone and dropped it on the ground in his presence. Makeke also testified that "Linda" later picked up the cell phone from the ground and handed it over to the police officials who attended the crime scene. Another State witness, Linda, the second state witness, however had a different version. According to Linda he requested the appellant to accompany him to the police vehicle and on their way, a security officer and other

boys indicated that there is a cell phone on the ground, in a different street, lying on the ground as if lost. Only a proper evaluation of the evidence could have established which of the two witnesses, Makeke or Linda, should be believed. If Linda was to be believed it would mean that there is no corroboration that the appellant had possession of the said cell phone. Contrary to that, if Makeke's evidence is to be believed, proof of possession could have been established on the part of the appellant, which could have been used against him. In the absence of a proper evaluation of the evidence of the complainant as a single witness on identification, scrutinised with the necessary caution, and in the absence of a clear evaluation of the evidence, it cannot be concluded that the State succeeded in proving a prima facie case. As a result no finding could have been made that the accused's guilt was proved beyond a reasonable doubt.

21. In the absence of any reasons for the decisions of fact or law as provided for in terms of s93(3)(c), (d) and (e) of the Magistrates' Court Act 32 of 1944, this court cannot find that it is in the interest of the open and proper administration of justice that the conviction and sentence should be upheld. In this instance there is no assurance that the court gave due consideration to the matter and did not act arbitrarily. We are therefore placed at a distinct disadvantage. In the present case we do

not know which witnesses the Magistrate accepted as truthful or why he did so. We also do not know on which facts he based his decision to come to a finding that the accused's guilt was proved beyond a reasonable doubt. See in this regard ***S v Van den Berg & Another*** **2009 (1) SACR 661 (C) at 665H-J;** ***S v Maake*** **2011 (1) SACR 263 (SCA)** and ***S v Molawa; S v Mpengesi*** **2011 (1) SACR 350 (GSJ).**

22. The trial court's omissions to substantiate the judgment and to do a proper evaluation of the evidence infringes upon an accused's right to a fair trial, which includes the right to have his appeal properly adjudicated by a higher court. See in this regard ***S v Molawa; S v Mpengesi*** where the court stated:

> *"There is indeed a further compelling reason why reasons for judgement ought to be furnished. The right to appeal or review is entrenched constitutionally for every accused person. In this regard s35(3)(O) of the Constitution of the Republic of South Africa, 1996, provides as follows:*
>
> '(3) Every accused person has the right to a fair trial, which includes the right --
>
> ...
>
> (o) of appeal to, or review by, a higher court'
>
> *These are certainly important rights that should not be overlooked".*

23. Accordingly the conviction and sentence imposed on the appellant cannot be upheld.

I THEREFORE PROPOSE THE FOLLOWING ORDER:

1. The appeal against both the conviction and sentence is upheld. The conviction and sentence imposed are set aside.

D.B. TSHABALALA
ACTING JUDGE OF THE HIGH COURT

I agree

H.J DE VOS
JUDGE OF THE HIGH COURT

Appearances:

For the applicant:	Adv. F Van As
Instructed by:	Pretoria Justice Centre
For respondent:	Adv. C.P Harmzen
Instructed by:	Director Public Prosecution