IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: **AR18/2017**

In the matter between:

JUNIOR R ROBINSON	**First Appellant**
EUGENE J DUNN	**Second Appellant**
DARRYL J STRYDOM	**Third Appellant**

and

THE STATE	**Respondent**

APPEAL JUDGMENT

Delivered: 25 May 2018

Mbatha J (Steyn J concurring)

[1] The appellants were charged and convicted by the Regional Court, Richards Bay on 12 April 2015 on one count of robbery with aggravating circumstances, read with the provisions of s 51, and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The court a quo found that there were substantial and compelling circumstances and imposed a sentence of 10 years' imprisonment.

[2] The appellants were refused leave to appeal by the court a quo. They thereafter petitioned the Judge President of this Division for leave to appeal and leave to appeal against conviction was granted.

[3] It is common cause that on the night of 11 July 2014 the appellants boarded a metered taxi driven by Skhumbuzo Mathaba (the complainant) to take them to the beach in Richards Bay, where they were to meet their girlfriends. Upon their arrival, they could not locate the girls and tried to call them. At one stage appellant two gave the phone to the complainant so as to give directions to their girlfriends as to their whereabouts, but when the complainant took the phone there was no one on the line.

[4] According to the complainant he was then grabbed from behind, pulled to the driver's seat and a knife and a firearm were pointed at him. Appellant two, who was seated in the front passenger seat, alighted from the motor vehicle. The complainant was pulled out of the motor vehicle and assaulted all over his body. He was pushed into the boot of the motor vehicle but managed to escape through the rear door. As he was running away the appellants drove off in his motor vehicle. He managed to call Sipho Nxumalo and alerted the police through the 10111 emergency call number. The police fetched him near the place where he was assaulted and proceeded to look for his assailants.

[5] The appellants denied assaulting the complainant and hijacking his motor vehicle. Their version is that when they realised that their girlfriends were not at the arranged place, they requested the complainant to take them back to the CBD in Richards Bay. Whilst proceeding to their destination the motor vehicle driven by the complainant capsized. Upon regaining consciousness appellants one and three managed to get out of the motor vehicle wreck. They looked for both the driver and appellant two. Appellant two was found lying unconscious on the road. The complainant was nowhere to be found. Appellant two upon regaining consciousness complained of a back injury and as a result thereof they moved him to the side of the road. At that stage motorists who had stopped to assist them kept watch over appellant two whilst appellants one and three walked towards the robots to seek assistance. Their evidence was that they were surprised when they were arrested for hijacking at the instance of the complainant.

[6] The appellants attack against their conviction is that the court a quo adopted a wrong approach to the evaluation of evidence, that it attached weight to the uncorroborated evidence of the complainant, who was a single witness, the court

failed to treat his evidence with caution, that there were material contradictions and inconsistencies to the evidence of the complainant. It was further contended that the court erred in not finding his version improbable as compared to that of the appellants, which it was submitted was reasonably possibly true. In that regard the court should have found the complainant's version to be inherently improbable and that it could not be reasonably possibly true.

[7] At the heart of this appeal is the correct approach to the evaluation of evidence by the trial court. The only issue in dispute is whether the complainant was hijacked or whether the motor vehicle which he was driving capsized.

[8] It is common cause that the evidence of the complainant is evidence of a single witness and needs to be treated with caution. In criminal proceedings a conviction will normally follow only if the evidence of a single witness is substantially satisfactory in every respect or if there is corroboration.[1]

[9] In *S v Mafaladiso en Andere,*[2] in cases where there are material differences between the witness's evidence and his prior statement, the court held that the final task of the judge is to weigh up the previous statement against viva voce evidence, to consider all the evidence and to decide whether it was reliable or not and whether the truth has been told, despite any shortcomings. This means that the court is enjoined to consider the totality of the evidence to ascertain if the truth has been told. It is submitted by counsel for the appellants that the evidence of the complainant is riddled with contradictions and inconsistencies on a number of material issues. The following contradictions have been brought to the attention of this court:

(a) The complainant stated that when he was assaulted outside his motor vehicle, he was held face down as blows were delivered upon him like rain, he could not see how he was assaulted and could not make out who put him in the boot of his motor vehicle. Having been severely beaten up and confused, he managed to get out of the motor vehicle and ran to a nearby swamp where he made a call to a Sipho Nxumalo and the police. He described his injuries as being very serious: the back part of his head was swollen; he had a sprained leg and an injury on his private parts and in fact a torn ligament. He did not

[1] *Stevens v S* [2005] 1 All SA 1 (SCA) para 17.
[2] *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 584.

seek medical assistance the following day and even later on when his injuries did not heal.

(b) In his evidence in chief he indicated that he parked the motor vehicle at an area where there were trees, but under cross-examination it was pointed out to him that in his statement to the police he stated that he was directed by the appellants where to park, being under the trees, in darkness, giving an impression that the appellants directed him to an isolated and dark spot.

(c) In his evidence in chief he described the assault like 'heavy rain' which made him unable to describe how he was assaulted. However, it was pointed out to him under cross-examination that in his statement to the police there is no mention of the assault in the motor vehicle as described in his evidence in chief. He was only grabbed, a knife and a firearm were drawn and that one of them jumped out and came to drive the motor vehicle. He further went on to state that he even fought back trying to rescue himself. He could not come with a reasonable explanation as to why the assault was not mentioned in his statement. When he was asked about further discrepancies in his evidence, he also claimed not to have informed the police as to what his assailants were wearing; who had grabbed him and that he started fighting when they grabbed him though this appeared in his statement.

(d) The complainant's evidence was so contradictory to a point that he was unable to state whether the assault started in the motor vehicle or outside the motor vehicle. Initially his version was that the assault started in the motor vehicle, later on he stated that it started outside the motor vehicle.

(e) In his evidence in chief he could only assume that the motor vehicle was driven to the direction where it was facing, but in his statement to the police, he stated that one of the appellants' got in and drove the motor vehicle in his presence.

It is clear to this court that the complainant materially deviated from the sworn statement he had made to the police.

[10] The complainant made his statement shortly after the arrest of the appellants, which he confirmed to have been read back to him before he signed it. However, the most glaring omission in his statement is that there is no mention of the assault, being put into the boot of the motor vehicle and escaping therefrom. He claimed that the police officer who took the statement omitted to write that down. In this case the

version is completely different from that given in court. It is not only a question of contradictions here and there, but they are so material to a point that they touch to the core of the nature of the crime that the appellants were convicted of. Regarding the statements made to the police officers, this court bears in mind the dicta in *S v Govender & others,*[3] *S v Bruiners en 'n Ander,*[4] and *S v Mafaladiso*.[5]

[11] It is clear from the record that there are two conflicting versions on how the events unfolded on the day in question. The versions are completely different from each other. The second question which needed to have been considered by the court a quo was whether on the totality of the evidence it can be said that the State had proved its case beyond any reasonable doubt. It is trite that in criminal cases the onus rests on the State to prove its case against the accused beyond reasonable doubt. In *S v Van der Meyden*[6] the test is set out as follows:

'The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example *R v Difford*, 1937 AD 370 at 373 and 383).'

[12] The court a quo found that the medical form (J88) completed by the district surgeon corroborated the evidence of the complainant as a single witness. It erred in this regard as in actual fact such evidence is non-existent. The doctor's handwriting is indecipherable. The conclusions which were to be made by the medical doctor are conspicuously absent from the J88 nor the type and nature of injuries sustained by the complainant. It is trite that 'wherever the implications of the doctor's observations are unclear the doctor should be called to explain those observations and to guide the court in the correct inference to be drawn from them', as stated in *MM v S*.[7] Besides this there was no further medical evidence before the court which indicated that the complainant's injuries were consistent with assault.

[13] The evidence of officer Ndlanzi and other police officers was that no firearm or knife was found on the scene. They were the first officers to arrive at the scene of the accident. The motorists who had offered to assist the appellants were still at the

[3] *S v Govender & others* 2006 (1) SACR 322 (E).
[4] *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SE).
[5] *S v Mafaladiso* note 2 at 593.
[6] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448F-G.
[7] *MM v S* [2012] 2 All SA 401 (SCA para 24.

scene of the accident. The motor vehicle, the surrounding place where the motor vehicle had capsized and appellants were searched. It is inconceivable that the appellants would have disposed of the weapons so speedily. If the motor vehicle had been hijacked they would also fled the scene of the accident.

[14] It has been further submitted on behalf of the appellants that the regional magistrate erred in law by simply considering the version given by the State witnesses and axiomatically rejecting the appellants versions. The court a quo considered the evidence of the State witnesses in isolation. It did not follow the test in *S v Van der Meyden,*[8] where Nugent J, stated as follows:

'These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. 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 might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

[15] It was incumbent on the trial court to have properly evaluated the evidence of the State witnesses in the light of all the discrepancies, improbabilities and contradictions thereto to determine if it came up to the required standard acceptable by our courts. In this case, it has not been established that the complainant was robbed of his motor vehicle due to the unreliability of the evidence of the State witnesses.

[16] It is trite that a court of appeal does not lightly interfere with the credibility findings of the trial court. The court a quo found the complainant to be a reliable and credible witness who told the truth. I do not agree. The complainant was a single witness and the court ought to have treated his evidence with caution. The finding by the court that the complainant was traumatised and terrified is unconvincing. The complainant clearly struggled to answer questions during cross-examination as it

[8] *S v Van der Meyden* note 6 at 448F-I.

became apparent that his version was a mere fabrication. He could not have been traumatised in the middle of cross-examination, whilst throughout the entire evidence in chief he was fully composed. The shoe had started to pinch on the complainant. The court erred in finding that he was a reliable and credible witness.

[17] It was necessary for the court a quo to evaluate the evidence of the appellants. The court appears to be exclusively not aware of the defence case, which I find to be consistent throughout the trial. There is no obligation on the accused to prove his innocence. If his version is reasonably possibly true he is entitled to an acquittal.[9]

[18] The court a quo also erred in law by accepting the statement made by a police officer in terms of s 220 of the Criminal Procedure Act.[10] This is irregular as it amounts to the admission of hearsay evidence. This impacts on the appellants rights to a fair trial. In *S v Jaipal*[11] the Constitutional Court stated as follows:

'The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

This was a serious misdirection, as this was untested evidence irrespective that it was handed in by consent.

[19] It is trite that the judgment of a court of law must be justified by adequate evaluation of evidence (see *S v Teixeira).*[12] The learned regional magistrate applied the incorrect standard of proof. In *Shusha*[13], a full bench decision of the SCA held that a perusal of the Magistrate's analysis of the evidence revealed that he had applied the incorrect standard of proof. In appearing to have rejected the Appellant's version on the basis that it was improbable, the Magistrate committed a fatal misdirection. In criminal matters, the State must prove its case beyond reasonable doubt. An accused's version can only be rejected if the Court is satisfied that it is false beyond reasonable doubt. An accused is entitled to an acquittal if there is a reasonable possibility that his or her version may be true. A court is entitled to test

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[9] Above at 449J-450B.
[10] 51 of 1977.
[11] *S v Jaipal* 2005 (1) SACR 215 (CC) para 29.
[12] *S v Teixeira* 1980 (3) SA 755 (A).
[13](2011) JOL 27877 (SCA).

an accused's version against the improbabilities. However, an accused's version cannot be rejected merely because it is improbable.

[20] The magistrate, in her judgment, did not point to any improbabilities in the complainant's version, and this court is of the opinion that there are improbabilities. In that case it cannot be said that there was proof beyond reasonable doubt and the appellants' were therefore entitled to an acquittal.

[21] In the light of the aforesaid, I find that the State failed to prove its case beyond a reasonable doubt. I therefore propose the following order:

a) The appeal is upheld.

b) The conviction and sentence imposed by the Regional Court on 12 April 2015 is hereby set aside.

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Mbatha J

Date of hearing	:	25 May 2018
Date delivered	:	25 May 2018

Appearances

For the Appellant	:	Adv HN Mlotshwa
Instructed by	:	Justice Centre Durban
For the Respondent	:	Adv PWR Manciya
Instructed by	:	The Director of Public Prosecutions Durban