FINAL NOT REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NUMBER	:	AR 614/2014
HEARD AT	:	PIETERMARITZBURG
DATE	:	12 OCTOBER 2018

SIPHIWE NKOSI MASONDO – 1st APPELLANT
DAVID BONGINKOSI NDLOVU DLAMINI – 2nd APPELLANT

versus

THE STATE

BEFORE
THE HONOURABLE JUDGE KRUGER
and
THE HONOURABLE JUDGE MBATHA

FOR THE APPELLANT	:	MR I KHAN
FOR THE RESPONDENT	:	ADVOCATE (MS) A WATT
INTERPRETER	:	
TRANSCRIBER	:	KERRY DICKINSON
DATE TRANSCRIBED	:	12 OCTOBER 2018

CONTRACTOR
Sneller Recordings (Pty) Ltd • P O Box 1193 • Pietermaritzburg • 3200
Tel 033 3425256 • Fax 033 3941190

JUDGMENT (12 OCTOBER 2018)

MBATHA J The appellants were convicted by the regional court, KwaDakuza, of one count of robbery with aggravating circumstances read with the provisions of Section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. They were both sentenced to fifteen years' imprisonment.

With leave of the court *a quo* their appeal on conviction is before this Court.

It is common cause that on 2 January 2013 the complainant, Mr Dumisani Lunga, was assaulted and robbed of money and goods at his tuck-shop in the Shayamoya area. The charges laid by Lunga gave rise to the convictions and subsequent sentences of the appellants.

Pivotal to this appeal is whether the appellants were identified as the culprits and if in the light of the evidence presented before the court *a quo* the appellants' guilt was proven beyond a reasonable doubt.

Lunga's evidence was that the robbery occurred at about 9:30 pm. He had been seated outside the house with one of his customers when suddenly a firearm and a knife were pointed at him by two males who then pushed him inside the tuck-shop where he was assaulted, together with his common-law wife, Ms Nelisiwe Cwele. Lunga was robbed of money, airtime vouchers, cellphones and a leather jacket. He testified that as soon as the robbers left he reported the incident to the police. Four days later his ten year old son, Yaseen, identified the first appellant who had just been to the tuck-shop to buy airtime as one of the robbers. Lunga followed the first

appellant so as to identify the place where he lived. He then reported this development to the police who, upon their arrival, took him to the first appellant's place of residence. At the first appellant's place of residence the police left with the first appellant for the second appellant's place of residence.

Lunga testified that he identified the appellants by their complexion, one was fair in complexion and the other dark skinned. He testified that the room where the robbery took place was part of a two-roomed RDP house, small in size, which was illuminated by a fluorescent electrical light.

According to Lunga the entire incident lasted for about ten minutes.

After the arrest of the appellants Lunga attended an identification parade where he positively identified the appellants. He testified that he initially made a mistake of identifying a wrong person before making a positive identification of the second appellant.

The evidence relating to the identification parade was confirmed by Lieutenant Nxumalo.

The State also led the evidence of Warrant Officer N K Naidoo, the officer who arrested the appellants. Naidoo's evidence was that Lunga informed him that through his own investigation he had found the persons who were responsible for the robbery committed against him. Naidoo was informed that it was Nkosi and Mdav and was taken by Lunga to Nkosi's place of residence.

The first appellant was found at home sleeping. He was asked by Naidoo to direct them to the place of residence of Mdav (the shortened form

of David), the second appellant. The appellants were then arrested at the instance of the complainant without any further investigation by the police. Naidoo's evidence was that Lunga never mentioned to him that the first appellant was identified by his ten year old son, Yaseen.

The court *a quo* invoked the provisions of Section 186 of the Criminal Procedure Act 51 of 1977 and called Cwele and Yaseen as witnesses. However, Yaseen was not available.

Cwele testified as to how the incident unfolded on the day of the robbery. She made a dock identification of the appellants only on the basis of having seen them in court on previous occasions when they attended court. Cwele was not able to give any identification features of the robbers although, according to her, the robbers were inside the house for about fifteen minutes and in her view throughout the entire incident. The most intriguing part of her evidence was that Yaseen was in another room watching television and not where the robbery took place. According to Cwele, Yaseen heard that there were criminals inside the tuck-shop and decided to hide. She confirmed that her statement was not before the court as police officers only took Lunga's statement.

It is trite that the powers of the court of appeal are limited. It can only interfere with the trial court's judgment if there is a misdirection on law or on the facts as stated in various *dicta*, including *S v Bailey* 2007 (2) SACR 1 (C), *R v Dhlumayo and Another* 1948 (2) SA 677 (A).

It is common cause that Lunga and Cwele were not able to make out a proper identification of the robbers though they were all in close proximity

to them in a small room which was well lit with fluorescent lights and the robbers were in their presence at least for about ten minutes. Disturbingly, a child of ten years who was not in the presence of the robbers claimed to have been able to identify them. Their failure to identify the robbers could be attributed to the traumatic nature of the events and the unexpected way in which they unfolded. Irrespective of this disturbing feature of their evidence the court *a quo* accepted that they were positively identified on the hearsay evidence of the child, Yaseen, who was not even called as a witness as to the identification of the first appellant.

To compound matters Lunga did not inform the police that it was the child who identified the first appellant. The only reasonable conclusion that one can accept is that the first appellant was pointed out due to the imaginativeness of the child, Yaseen, and his eagerness to assist in the finding of the suspects.

There is a plethora of judgments dealing with the adequacy of identification. These authorities caution about the fallibility of human nature as regards to the acceptance of identification evidence. (See *S v Mthethwa* 1972 (3) SA 766 (AD) 767–768 and *R v Shekelele and Another* 1953 (1) SA 636 (T)).

A person who gives evidence has to give some form of description of the person, including facial features, build, gait or any remarkable feature for purposes of identification. Lunga merely said that one was fair complexioned and the other was dark skinned which falls short of what is required in terms of the law to positively identify a person. His evidence materially lacks the

most obvious identification points like facial features, more so as the robbers' faces were not covered. These identifying and distinguishing features are important, particularly to a person who has no prior knowledge of the assailant.

Lunga participated in the identification parade where he already, not once but a number of times, had had sight of the appellants. Irrespective of having had such an opportunity he still made a wrong identification of the second appellant. This is a clear indication that Lunga was not able to identify the robbers.

The State has correctly conceded that on the totality of the evidence the guilt of the appellants had not been proved beyond a reasonable doubt.

The acceptance by the court *a quo* of the positive identification of the appellants by Lunga was a misdirection by the court. The court *a quo* accepted unexplored and uninvestigated evidence which left the door wide open for a possibility of a mistake. It is accepted that in general objects such as cellphone, airtime vouchers and cigarettes exchange hands very quickly but that should not have stopped the police to fully investigate the matter. There was not even corroborative evidence to support the weak evidence of Lunga as the appellants were not even found in possession of the stolen items.

The most disturbing feature of this appeal is that the arrest of the appellants occurred without any investigation by the police officers. They were merely arrested at the instance of the complainant. The second appellant was arrested only because Naidoo asked the first appellant where

Mdav lives and he was taken to the second appellant's place of residence.

The evidence of Lunga lacked clarity and logic and was therefore unreliable. It was riddled with material inconsistencies and contradictions. First, he was outside the house when the incident took place whereas under cross-examination he stated that he personally served the assailants inside the tuck-shop. He testified that the children, including Yaseen, were inside the room where the robbery took place as against the evidence of Cwele who stated that Yaseen was not in the room where the robbery took place. Yaseen was the person who identified the suspect that bought airtime but he never disclosed that to Warrant Officer Naidoo, hence no statement was taken from Yaseen.

These discrepancies were apparent from Lunga's testimony without even venturing into what was recorded on the police statement which also materially contradicted his evidence-in-chief. His evidence was also materially contradicted by that of Cwele who stated that Lunga was inside the house when the first person entered the tuck-shop whilst Lunga claimed that the two robbers bought cold-drink from Cwele and it was only when they were leaving the house that they turned back and pointed a firearm and a knife at him.

In *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 585 in cases where there are material differences between the witness' evidence and his prior statement the court held that the final task of the judge is to weigh up the previous statement against the *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 and I agree with him in this submission.

It is clear from the record that there are conflicting versions from Lunga on how the events unfolded on the day in question. The versions are completely different from each other.

The second question that 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 an accused beyond a reasonable doubt. In *S v van der Meyden* 1999 (1) SACR 447 (W) at 448F-G 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 and 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)"

Both appellants denied being at the scene of the crime and one of them raised an alibi. The correct approach for the court *a quo* was not to

reject the alibi but should have considered the alibi in the light of all the evidence and then decided whether the alibi might reasonably possibly be true. It is therefore clear that in the light of the totality of the evidence before the court *a quo* the guilt of the appellants was not proved beyond a reasonable doubt.

In *S v Nsele* 1998 (2) SACR 178 (SCA) the court held that *onus* rested upon the State in a criminal matter to prove the guilt of the accused beyond a reasonable doubt, not beyond all shadow of doubt. It held further that the court was not required to consider every fragment of evidence individually. It was the cumulative impression which all the pieces of evidence made collectively that had to be considered to determine whether the accused's guilt had been established beyond a reasonable doubt.

It was therefore important for the trial court not to have focussed on one component of the evidence and view that part in isolation from the other evidence. It was necessary for the court *a quo* to evaluate the evidence of the appellants. The court *a quo* appears to have been exclusively not aware of the defence case which I find to be irregular. There is no obligation on the accused to prove his innocence. If his version is reasonably possibly true he is entitled to an acquittal.

It is trite that the judgment of a court of law must be justified by adequate evaluation of evidence. The learned regional magistrate applied the incorrect standard of proof. In appearing to have rejected the appellants' version on the basis that it was improbable the magistrate committed a fatal misdirection. In criminal matters the State must prove its case beyond a

reasonable doubt. An accused's version can only be rejected if the court is satisfied that it is false beyond a 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 an accused's version against the improbabilities. However, an accused's version cannot be rejected merely because it is improbable.

In the light of the aforesaid I propose the following order –

- THE APPEAL IS UPHELD.
- THE CONVICTION AND SENTENCE IMPOSED BY THE REGIONAL COURT ON 24 JULY 2014 IS SET ASIDE.

KRUGER J I agree and it is so ordered.