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

CASE NO. AR64/19P

In the matter between:

LINDELANI SAKHILE MKHIZE **APPELLANT**

and

THE STATE **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representative by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 7 July 2020.

ORDER

On appeal from: Durban Regional Court (sitting as court of first instance):

(a) The appeal against the convictions and sentences, imposed on 11 December 2013, is upheld.

(b) The convictions and sentences are hereby set aside.

JUDGMENT

Chetty J (Steyn J concurring):

[1] The appellant and his co-accused, Mr Xolani Myeza, were tried in the Regional Court, Durban, facing charges of housebreaking with intent to rob, and robbery with aggravating circumstances as well as attempted murder. At the conclusion of the State's case, the appellant applied for a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 (the CPA). The application was

refused and the court proceeded to find the appellant and his co-accused guilty on both counts. The appellant was sentenced on 11 December 2013 to fifteen (15) years' imprisonment in respect of housebreaking, and five (5) years' imprisonment for attempted murder, with the sentences ordered to run concurrently. He was granted leave to appeal against his convictions and sentence on 11 October 2018.

[2] The charges against the appellant and his co-accused arise from an incident at the home of Mr Evan Du Plessis (the complainant) in Umdoni Grove, Winkelspruit, on the KwaZulu-Natal south coast in the early hours of 24 May 2011, when his home was broken into by possibly three men, who were armed and who threatened the complainant with physical harm. The evidence of the complainant was that at about 11h00 on 23 May 2011, he was asleep in the spare room when he was alerted to the dogs barking outside. After looking around outside and finding nothing untoward, Du Plessis returned inside the house. He had recently installed a sliding door at his home with the assistance of the appellant, who used to work for his father-in-law, Mr Potgieter, who ran a home improvement business. Owing to the door being the incorrect size, it was unable to close. The complainant placed a large dustbin in the gap between the gate and the wall, intending to prevent his dogs from entering the house. It was common cause that the appellant had been employed by Potgieter until the appellant left Potgieter's employ. A dispute subsequently arose between them over difficulties which the appellant had apparently encountered in accessing unemployment insurance fund (UIF) benefits.

[3] Sometime later that evening, or in the early hours of 24 May 2011, Du Plessis heard the dogs barking again and on investigating, noticed three males entering through the gap in the sliding door. He screamed and attacked them with a hockey stick. He was overpowered and one of the assailants threatened to shoot him if he resisted further. In the process, he was forced to hand over his wallet to Myeza. At the outset of his testimony, Du Plessis was positive that the appellant was not at the scene of the robbery. When he was asked by the prosecutor whether he knew the accused who was before the court, Du Plessis said the following:

'And is it also correct – before I proceed, do you know the two persons before the Court? Yes.

From where do you know them Sir? -- Lindelani used to do work for me at the house, or he used to work for my father-in-law and he used to come help me by the house, and obviously – well, I hadn't seen him the day of the robbery. The other guy I recognise from the day of the robbery.'[1]

[4] In so far as the appellant's co-accused is concerned, Du Plessis stated that he interacted with Myeza during the course of the robbery, and was able to positively identify him as one of the assailants. In addition, Myeza was found with Du Plessis's wallet at the time when he was apprehended. Throughout his evidence, Du Plessis was uncertain whether there were two or three men who had entered his house on 24 May 2011 and who had participated in the robbery. To the extent that a third person may have been present at some time in the house, Du Plessis testified that as one of the assailants was trying to leave the house, he tried to restrain him, resulting in the assailant threatening to stab him. He did not at any stage in his evidence identify this person as being the appellant. The issue remains whether the appellant was either of the two remaining assailants, and whether the State was able to adduce sufficient evidence to prove the identity of the appellant beyond reasonable doubt.

[6] While the perpetrators were in the house, Potgieter arrived on the scene, having been informed by his wife that a robbery was in progress at their daughter's home. Potgieter was armed with a firearm and called out to the robbers to surrender. The robbers emerged, holding a knife and a screwdriver to Du Plessis's chest and throat. Potgieter ordered them to lay on the floor. When asked how many people were in the room he replied: 'There was a total of – there was (sic) the two suspects and my son-in-law.'

[7] The suspects then attacked Potgieter, who responded by firing several shots, fatally wounding one suspect, with the other managing to flee from the house. As the second suspect fled, Potgieter fired two more shots in his direction. The security company who was patrolling the area, later apprehended a suspect and returned him to the scene of the crime. Potgieter and Du Plessis identified this person to be the appellant's co-accused, Myeza. Upon searching Myeza, they found Du Plessis's

[1] Record, pages 58-59, lines 21-22.

wallet on him. In so far as the appellant's connection to the scene of the crime is concerned, neither Potgieter nor Du Plessis were able to place him at the scene. This would be consistent with the appellant's plea explanation in which he denied that he was anywhere near the scene of the crime. Potgieter testified that while he was at the crime scene with Captain Dewing, he had been informed that the police had picked up an individual with a gunshot wound at the footbridge in Umdoni Road, not too far from the crime scene. He was further informed that the person had been taken to Prince Mshiyeni hospital for treatment.

[8] A few hours later, the police arrived at Du Plessis's house with the appellant in their vehicle; his foot heavily bandaged. Potgieter was informed by Warrant Officer Erasmus that the appellant – referred to as Lindelani – had a one centimetre hole in his foot. Apart from neither of the State witnesses being able to positively identify the appellant as being at the scene of the robbery, neither testified that they had seen him at the house that day, apart from when he was brought to the house by the police. When Potgieter arrived at the house and confronted the suspects, the house was in complete darkness. Similarly, Du Plessis's identification of Myeza was done with the assistance of the light from the television, which was on at the time when the suspects entered the house.

[9] Moreover, Potgieter confirmed that he fired two shots at one of the suspects who fled from the house, both those shots were fired into the concrete floor. It is therefore inconceivable, on the basis of the evidence before the court, that either of the shots fired by Potgieter could have caused the injury to the appellant. Moreover, Potgieter testified that the suspect was fleeing the house – in other words, running away from him. It is entirely speculative that in these circumstances, a bullet would have struck the suspect in his foot. The person who fled the property and was later apprehended by the security company, uninjured, was Myeza. Potgieter's evidence under cross-examination also confirms that he saw two suspects in the house that morning – Myeza and another suspect who was fatally wounded.[2] He only saw the appellant when he was brought to the house by the police.[3] Although Du Plessis testified that he had initially seen three suspects as they entered the house, he noted

[2] Record, page 37, line 21; and page 38, line 8.
[3] Record, page 38, line 1.

that the third suspect left the house at some stage. At no stage in his testimony did Du Plessis identify any of the suspects as being the appellant.[4] Although Du Plessis stated that Myeza informed him that they had been directed to his house by a person referred to as 'Sakhile', it is entirely speculative that this was a reference to the appellant. Du Plessis conceded this much when he stated in response to a question: 'I am not too sure, because as I said before I wasn't aware that he's name was Sakhile'.[5]

[10] In so far as the evidence that Myeza informed Du Plessis that the appellant had sent him to commit the robbery is concerned, Du Plessis himself concedes the improbability of that version, particularly in his response below:

'You didn't see him? I just find it highly improbable that the conversation you had with accused 2 in respect of who sent them there. -- I think they were shooting themselves in the foot, telling you will send them there. --- That's exactly what thought at the time. I thought why break into a house and tell you done it. That's why I kept on mentioning to the police and to everyone else and to re-question the guy for that very reason.'[6]

[11] In any event, when it was put to Du Plessis that the appellant would deny that he was anywhere near the crime scene on the night in question and that he had nothing to do the robbery, the witness conceded that he could not dispute this contention saying that 'besides the fact that the police caught him just up the road, no not really'.[7]

[12] Warrant Officer Erasmus then testified that he had attended the crime scene at the home of Du Plessis and while he was there, he received information of a possible suspect having been admitted to Prince Mshiyeni hospital for treatment of a gunshot wound. At the hospital, he was informed by the nursing staff that a person lying on one of the beds in the emergency ward been shot in the foot. According to him, he interviewed the patient, who stated that he had injured his foot by stepping on a nail. Myeza was in the company of Erasmus at the hospital, and pointed out the patient as being his accomplice at the robbery. The appellant was then

[4] Record, page 71, lines 20; and page 73, line 13-14.
[5] Record, page 72, line 17–18.
[6] Record, page 73, line 15-22.
[7] Record, page 74, lines 13-14.

transported back to the scene of the housebreaking, with his foot heavily bandaged, and still wearing his bloodstained clothes. Under cross-examination, Erasmus conceded that he could not testify as to whether the wound which he observed on the patient was caused by a gunshot or a nail. He described it as a 'small little wound'.[8] Erasmus also conceded that the J88 form made no mention of a wound through the foot, nor did he see an exit wound, which presumably would have been case in the event of a gunshot. In summary, Erasmus confirmed that he arrested the appellant based on the information which Myeza had given him.

[13] None of the other State witnesses who testified were able to place the appellant at the scene crime. Without leading any further evidence, the State closed its case. An application for a discharge was made on behalf of the appellant in terms of section 174 of the CPA, which was refused. The appellant elected not to testify. His co-accused, Myeza, testified and implicated the appellant as having come over to his house, together with the other suspect who was fatally wounded, asking him (Myeza) to accompany them to a party. They proceeded to Winkelspruit by train and arrived at Du Plessis's house at about 23h30 on 23 May 2011. On realising that their intention was to commit a crime at the house, Myeza stated that he left his companions and headed off. On his return to the house, he heard gunshots, causing him run away. He was then arrested. He denied having been at the scene of the housebreaking, and denied that he was found in possession of Du Plessis's wallet.

[14] In analysing the evidence before it, the court a quo relied on circumstantial evidence against the appellant, namely the wound which he sustained to his foot. Accordingly, as no medical evidence was tendered in respect of the appellant's injury to his foot, the court had to draw an inference. In this regard, *R v Blom*[9] is relevant:

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct

---

[8] Record, page 98, line 4.

[9] *R v Blom* 1939 AD 188 at 202-203.

[15] Warrant Officer Erasmus testified that he had been informed by the nurses at the hospital that the appellant's injury was the result of a gunshot wound. Erasmus conceded that he was not medically qualified to render an opinion as to whether the wound sustained was the result of a gunshot, or whether on the appellant's version, that it could have been caused by a nail. The State could have resolved this discrepancy by calling the doctor who compiled the J88 report, to testify as to his findings. Alternatively, the State could have called the nurses who attended to the appellant at the hospital as to their knowledge of his wounds. This would have definitively clarified the type of injury sustained by the appellant, calling for an explanation by him. Although *Simelane v S*,[10] which deals with self-defence, para 23 is relevant with regard to the drawing of inferences from injuries sustained by an accused:

'[23] The reasonable inference which the learned Magistrate purported to draw from the location of the appellant's injuries in her hand does not exclude other reasonable inferences or possibilities save the one drawn (*R v Blom* 1939 AD 188 at 202 - 203 and *R v De Villiers* 1944 AD 493 at 508 - 509). The appellant's version that she sustained the injuries during the struggle for possession of a mug is not implausible and cannot be discounted as unreasonable and remote. In the absence of expert evidence by the doctor who examined the appellant's injuries, the learned Magistrate could not draw any adverse inference based purely on his imagination and/or speculation of how the appellant might have sustained the injuries which she sustained.'

[16] It was evident that neither Potgieter nor Du Plessis was able to place the appellant at the scene of the crime, despite them having worked with him prior to the incident, making identification easier on the basis of prior interaction with the individual. In the absence thereof, all that remained is whether the State discharged its duty of proving the guilt of the appellant beyond reasonable doubt by relying on the evidence of his co-accused, who was positively identified by the homeowner, Du Plessis, as being one of the robbers. In addition, Myeza was found in possession of Du Plessis's wallet, although he simply denied this.

[10] *Simelane v S* [2011] JOL 27022 (KZP).

[17] I am in agreement with the submission by counsel for the appellant that Myeza had every reason to falsely implicate the appellant in the commission of the crime. I am not satisfied that the court a quo could have, without more, relied on the evidence of an accomplice to convict the appellant, where as a single witness, his version was riddled with inconsistencies and contradictions.[11]

[18] Myeza was faced with a monumental burden of overcoming the direct evidence of the complainant and Potgieter, placing him at the scene of the crime, as well as being found in possession of the complainant's wallet. He clearly had a motive to diminish his role in the perpetration of crime, and to implicate the appellant. There is no basis in, in my view, on which the court a quo could have been 'satisfied beyond all reasonable doubt that in its essential features the story that he tells is a true one'.[12] He was not a credible witness and I am not satisfied that the court treated his evidence with the necessary caution as it was obliged to.

[19] I am also of the view that the court a quo misdirected itself by simply relying on the fact that the appellant was known to the complainant and his father-in-law, having previously done work for them, thereby placing a heavy duty on him to testify. On the contrary, both the complainant and his father-in-law failed to identify the appellant as one of the persons present at the house on the day of the robbery.

[20] Moreover, there is nothing in the evidence to suggest that the appellant made common purpose with his co-accused, either in planning or in carrying out the housebreaking. In this regard the court a quo materially misdirected itself in making the following finding:

'Concerning the accused one, the only thing that is implicating him is by circumstantial evidence as well as by the fact that the offence that was committed the[re] was done through the actions of being common purpose'. (sic)[13]

---

[11] See *S v Mkohle* 1990 (1) SACR 95 (A); *S v Mafaladiso* 2003 (1) SACR 583 (SCA); *Haarhoff & another v Director of Public Prosecutions Eastern Cape (Grahamstown)* 2019 (1) SACR 371 (SCA).
[12] *S v Francis* 1991 (1) SACR 198 (A) at 205F.
[13] Record, judgment, page 212, lines 21-24.

[21] It is important to keep in mind that an accused's version can only be rejected if it is so improbable that it cannot be true, or that his version is false beyond a reasonable doubt. In *S v Shackell*[14] the court held that:

'. . .It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version it true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

[22] It is evident from the evidence in the court a quo that this incident was a traumatic experience for the homeowners, as well as Potgieter, who came to their assistance. One has no idea as to what may have been the fate of the complainant and his family had Potgieter not come to their rescue. The facts in the matter clearly cast a suspicion over the appellant as to his possible involvement in the commission of the offence. He was known to both the complainant and his father-in-law, with whom he had a dispute following the termination of his employment. He had also assisted the complainant in installing the sliding gate through which the robbers gained entry to the house. All of these factors tend to implicate the appellant. Had the investigating officer and the State prosecutor been alert to the standard of proof required in order to secure a conviction, they would have been conscientious enough to ensure that the doctor and nurses who had attended to the appellant at hospital were called to testify. Had they done so, the appellant, in my view would have been under a stronger obligation to testify in his defence. Despite the strong suspicion pointing towards the involvement of the appellant, the burden of proof, as stated in S *v V*[15] remains constant. The court said the following:

'It is trite that there is no obligation upon an accused person, where the State bears the *onus*, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt

[14] *S v Shackell* 2001 (2) SACR 185 (SCA) para 30.
[15] S *v V* 2000 (1) SACR 453 (SCA) at 455A-C.

it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.'

[23] In the result I make the following order:

(a) The appeal against the convictions and sentences, imposed on 11 December 2013, is upheld.

(b) The convictions and sentences are hereby set aside.

_____

CHETTY J

I agree

_____

STEYN J