REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: 08/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE 6.5.2020 SIGNATURE.....

In the matter between:

DENVER HLAYISANI MOLOTO : APPELLANT

And

THE STATE : RESPONDENT

JUDGMENT

SEMENYA J:

[1] The issue in this appeal is whether the trial court's findings that the evidence presented in this case proves beyond reasonable doubt that the appellant was the perpetrator of the offences he was convicted of. The appellant was convicted in the regional court sitting at Nkowankowa on a charge of robbery with aggravating circumstances as intended in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA). He was sentenced to fifteen (15) years' imprisonment in terms of section 51(2) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. Leave to appeal was granted on petition to the Judge President of this Division.

[2] The appellant raised a defence of alibi, thereby denying all allegations levelled against him-**S v Ngcina 2007 (1) SACR 19 (SCA)**. He alleged that he was at his uncle's place on the date and time of the commission of the offence. This version was corroborated by that of his uncle Willy Matjebele. It was held in **S v Malefo en Andere 1998(1) SACR 127 (W) at 158a-e** that there is no burden of proof on the accused to prove his alibi and that the burden is on the prosecution to prove that the accused's alibi is not reasonably possibly true. The state relied on the evidence of three identifying eyewitnesses as well as the results of the identification parade in its endeavour to discharge the onus that rests on it.

[3] The summary of the evidence presented before the trial court, that is relevant to the appeal before us, is that on the 25 December 2013 at about 16:00 to 17:00,

Fekado Sankuro Hegano (Hegano) was serving customers in his shop when three male persons arrived. He was seeing them for the first time on that date. He identified one of them as the appellant in this matter. The three stood in front of the counter and gave all customers who came in after them an opportunity to buy before they did. They eventually bought coke and chewing gum. The appellant was at all times engaging in some small talk with Hegano. At some stage one of the three persons went outside and returned shortly thereafter. He closed the door and they all produced firearms. The appellant hit him with a firearm on his forehead and demanded money. He showed the appellant where the money was. After taking the money which was estimated at R6480.00, airtime vouchers and some cigarettes, the three male persons continued to severely assault him and left. Hegano stated that he was able to identify the appellant because he spent about 15 to 20 minutes in the shop and also because he is the one who was doing much of the talking before the offence was committed. He attended an identification parade where he identified the appellant as one of the perpetrators. During cross-examination he stated that the appellant approached him on two occasions with a request that he should either withdraw the case or disappear.

[4] Few minutes after the three assailants had left the shop, Hegano went out and shouted for help. Gift Dlamini (Dlamini) was at that stage seated at a house next to Hegano's shop when he heard a sound of a gunshot coming from the direction of Hegano's shop. He also saw three male persons whom he had earlier on found in Hegano's shop, coming from the same direction heading to the bushes. Hegano was running after the three male persons shouting that he had been robbed. He identified

the appellant as one of the three male persons and as the person who allowed him to buy before he (the appellant) could buy. He, Dlamini and others joined Hegano and they all pursued the three males. As they were about to catch the three persons, a gun shot was fired from the direction of the male persons. One of the three persons warned them not to get involved unless they want to be killed for an Indian person's money. The group discontinued their chase out of fear. Dlamini attended an identification parade where he managed to identify the appellant as one of the people that he had been pursuing.

[5] Themba Golden Kwanya Nkuna initially refused to be sworn in and stated that he was in police custody in respect of an unrelated matter . He stated that he was not willing to testify because he will, in so doing, put his life in danger. He only testified after he was warned in terms of section 189 of the CPA. He testified that he was at a certain homestead on the date of the incident and that he joined members of the community in pursuit of the perpetrators. He and one Zoro used another rout to corner the fleeing perpetrators and came close to apprehending one of them. However, one of the perpetrators pointed them with a firearm and warned them not to get involved as they will be killed. They halted the chase. He attended an identification parade where he pointed at the appellant as one of the people he had been chasing after on the date of the incident. He testified that he did so with the assistance of police officers who told him about the built of the appellant and the type of clothes he was wearing. The police further threatened him with arrest should he refuse to do as ordered.

[6] Makoma Innocentia Molamudi, an administrative officer at Letsitele Police Station, captain Rabothata, the investigating officer, captain Mhlongo, constable Mapula Glacious Sekgota, constable Shipalane (photographer), Matimba Motaga and sergeant Vicky Norah Nkuna are all witnesses who took part during the identification parade. Crucial in the evidence of what happened during the identification parade is that the investigating officer requested the identifying witnesses to attend the parade. She further arranged the abovementioned witnesses to take part in guarding the witnesses before, during and after the parade. She also chose people who will be in the line-up, most of whom were police officers who were servicing the area where the offence was committed. Captain Mhlongo testified that the investigating officer had shown him who the suspect was prior to the identification parade. He further stated that all three identifying witnesses pointed the appellant as the person who committed the offence. Captain Mhlongo conceded that people who were on the line-up were not of the same age, physique and appearance.

[7] The main criticism levelled against the evidence of identification during trial was that the identification parade was not conducted in compliance with the National Instruction 1 of 2007 on Identification Parades. It was argued on behalf of the appellant that according to the said standing instructions, the investigating officer cannot be involved in the parade. This statement was made in view of captain Mhlongo's version that the investigating officer arranged people who were on the line up as well as police officers who took part in the conduct of the parade. It was contended on behalf of the appellant that the trial court erred in rejecting the version

of Nkuna that he pointed at the appellant at the identity parade because had been threatened with arrest and further that he was told who to point.

[8] I deliberately omitted to summarise the evidence of Ouma Ndlovu as it consisted of unconfirmed hearsay evidence. In the same breath, I will not deal with the unmeritorious criticism levelled against the trial court's failure to evaluate that evidence. Her version did not take the matter further as she testified that she heard some gunshots and saw people running out of Hegano's shop. Although she saw three people running out of the shop shortly after she heard the gunshot, she could not identify them as she was not close to them. The trial court stated in the judgment that it will not attach any value on the version of Nkuna on the basis that he had deliberately intended to mislead the court and to subvert the wheels of justice. I couldn't agree more with the trial court. The reason furnished by Nkuna in support of his reluctance to testify boils down to this: if he decides to testify and to tell the truth about what happened on the date of the incident, he will in so doing, put his life in danger. It follows therefore that a reasonable conclusion one may draw out of his version is that he lied when he testified that he was advised as to whom to identify as the culprit and warned that he will be arrested if he doesn't, which was contrary to the true facts. The version of the State witnesses who took part in the identification parade to the effect the Nkuna positively identified the appellant as one of the persons he saw at the scene is therefore correct.

[9] With regard to the version of Hegano, it was argued that the court ought to have rejected his evidence in as far as it contradicts the version of other witnesses. It was

contended that his version differs from that of Ndlovu with regard to the event that took place few days after the commission of the offence as to what happened at the satellite police station. I find the evidence as to whether police were found at the station or not to be irrelevant to the issues whether the appellant was properly identified as the perpetrator. The same applies to the injuries sustained by Hegano.

[10] It was contended on behalf of the appellant that the trial court ought to have rejected the version of Hegano in that the offence was committed on the 25 December 2013. The identification parade was held on the 17 February 2014. It was submitted that doubt exists as to whether Hegano would still have been able to have a proper recollection of the facial features and other characteristics of the appellant and to be able to identity him as one of the persons he had seen at the scene. More so in that he was seeing them for the first time on that date of the incident. It is indeed so that when it comes to the evidence of identity, it is not enough for the court to accept that the witness was honest. The court must go further and satisfy itself that the witness's recollection is reliable- See **S v Mthetwa 1972 (3) SA 766 (A)**. I am in agreement with the trial court's findings that the version of Hegano is indeed reliable. The appellant stood in front of him for about 20 minutes, which in my view is sufficient time, more so in that the appellant was busy talking to him and allowing other customers to be served before him. In any event, the incident took place during the day.

[11] I find no fault in the value that the trial court attached to the evidence that the appellant approached Hegano with a view of influencing him not to testify against

him. This is certainly not the conduct of an innocent person. Hegano testified that the appellant came to him before he made his appearance in the magistrate court and before the matter was transferred to the regional court for trial. Captain Mhlongo testified that he was informed that the appellant was not yet charged and had not made his appearance in court when he attended the identification parade. It is therefore evident that the meeting between the two took place before the holding of identification parade. This dispels the view that he may have already seen the appellant at the time he attended the identification parade

[12] In **S v Chabalala 2003 (1) SACR 134 (SCA) at 142b-d (Chabalala)** it was held that:

> *"…,although the evidence about the parade was less than the court was entitled to expect from the prosecution, its fairness, judged according to the objective facts (**S v Mlati 1984 (4) SA 629 (A) at 635G)** was not seriously challenged and the shortcomings were not such as to place the value of the identification parade in doubt. More particularly, there was, in my view, no danger that the parade created 'an impression which is false as to the capacity of the witness to identify the accused without the aid of his compromising position in the dock."*

The weaknesses pointed out in Chabalala were that the parade officer was not called to testify. There apparent contradictions in the notes made by the parade officer was common cause. The identifying witness travelled with the investigating officer, the parade officer and other police officers who may or may not have been involved in the parade. There was evidence that the parade officer left the room at some stage during the parade and that the parade took place nearly a year after the

event. In the appeal before us, it was contended that the investigating officer can as much be regarded as the parade officer in that she transported the identifying witnesses to the venue where the parade was held and further that she arranged the police officers who were to assist in the parade as well as those who were on the line-up. I find this argument to be without merits.

[13] I am of the view that there is no irregularity in the conduct of the investigating officer in this regard. It was her duty to make preliminary arrangements as long as she was not at the place when the identification parade was conducted at the crucial time. There was in any event no evidence to that effect. The evidence clearly shows that Captain Mhlongo is the one who was the parade officer. The trial court remarked that there is no evidence that suggested that the investigating officer influenced the witnesses. The trial court was further satisfied that, notwithstanding the fact that the investigating officer arranged the participants, that fact in itself is detrimental to the State's case.

[14] I am satisfied that there is no evidence that suggest that there was a startling dissimilarities between persons who were on the line-up. I agree with the trial court that it would be very difficult, if not impossible, to find eight people who look exactly the same, both in physique and complexion, and who are also dressed in the same way. It was contended that the evidence proved that the participants were police officer who were servicing the area where the offence was committed. It was submitted that the danger thereof is that there is a possibility that the identifying witnesses may have had prior knowledge of police officers on the line-up. It is

unfortunate that that question was put to the parade officer and not to the identifying witnesses. Witnesses were therefore denied the opportunity to state whether they had that prior knowledge that they know the participants as police officers.

[15] In **S v Moyane and Others 2008 (1) SCAR 543 (SCA) at paragraph [15]** Ponnan JA stated that:

> *"This court's power to interfere with the findings of fact of the trial court are limited…In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence clearly shows them to be clearly wrong"*

There is no evidence to suggest that the trial court misdirected itself in its factual finding with regard to the evidence of identification of the appellant as the person who committed the offence. There is no reason to interfere with that finding. As a result the appeal on conviction stands to be dismissed.

[16] On sentence, it was submitted on behalf of the appellant that the trial court failed to give proper consideration to the personal circumstances of the appellant, more in particular his chances of rehabilitation. The appellant is a married man of 35 years of age with two children. He was a first offender. He had already lost his job and is unable to maintain his three minor children. It was contended that the trial court failed to have regard to the fact that no one was injured during the commission of the offence. In **S v Malgas 2001 (1) SACR 469 (SCA)** it was held that courts should approach sentencing bearing in mind that the legislature created, in terms of section

51 of the Criminal Law Amendment Act, a benchmark which the court should have regard to when sentencing those who have been convicted of offences listed in the schedule thereto.

[17] The trial court found, as aggravating factors, the fact that the appellant was a police officer tasked with keeping the citizens of this country safe and has therefore abused the trust that members of the community bestowed in him. Although there were no injuries, the evidence proved that a number of gunshots were fired. That in itself is a conduct that endangers the safety of members of the community. The offence the appellant was convicted of is serious in nature. I am of the view that the sentence imposed by the trial court fits the crime, the criminal and the interest of the community. There are further no substantial and compelling circumstances that ought to have persuaded the trial court and this appeal court into imposing a lesser sentence that the minimum prescribed sentence of 15 years' imprisonment as envisaged in section 51(3) of Act 105 of 1997.

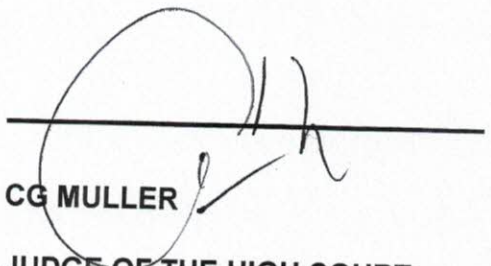
[18]In the result I make the following order:

The appeal against conviction and sentence is dismissed.

M.V SEMENYA

JUDGE OF THE HIGH COURT;
LIMPOPO DIVISION.

I agree



CG MULLER

JUDGE OF THE HIGH COURT;
LIMPOPO DIVISION.

APPEARANCES

ATTORNEYS FOR THE APPELLANT	**: NYAKANE ATTORNEYS.**
COUNSEL FOR THE APPELLANT	**: MR. RM NYAKANE**
ATTORNEY FOR THE RESPONDENT	**: DPP**
COUNSEL FOR THE RESPONDENT	**: ADV. M SEBELEBELE**
RESERVED ON	**: 28 FEBRUARY 2020**
JUDGMENT DELIVERED ON	**: 06 May ~~MARCH~~ 2020**