REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: A51/2018

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

DATE..... SIGNATURE:.....

In the matter between:

THOMAS MATHEBULA **APPELLANT**

AND

STATE **RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The appellant was arraigned in the Regional Court Phalaborwa before the Regional Magistrate Adv. P.D Nkuna on one count of robbery with

aggravating circumstances read with the provisions of section 51(2) of Criminal Law Amendment Act 105 of 1997 (the Act). He was found guilty as charged and sentenced fifteen (15) years imprisonment. The appellant is appealing the conviction and sentence. The appeal is with the leave of this court.

[2] The background facts are as follows. The complainant testified as the State's first witness. He testified that on 23rd March 2015 between 15h00 and 16h00, he was at his shop John's Supermarket. Whilst busy serving his customers, three male persons entered his shop. As he was busy attending to one of the three males, one of them picked up a bottle and hit him on his head with it. He fell to the ground and lost consciousness. When he regained his consciousness, he went to the door of his supermarket and shouted for help. The neighbours came and gave chase to the three males.

[3] The complainant thereafter phoned his brother who took him to the hospital. He was admitted to hospital for three (3) days. The person who hit him with a bottle is the one whom he had attended in the shop and he was the appellant.

[4] Under cross examination the complainant stated that when the three males entered the shop, there were no other customers inside the shop. The complainant further stated that the three males have spent a minute or less in the shop. When asked whether there was any distinctive feature he used to identify the appellant, he stated that the appellant was close to him and he has seen him properly with his eyes when the appellant strike him with a bottle.

[5] The second State witness Q[….] M[….] testified that on 23rd March 2015 at about sunset she was next to John's Supermarket. Whilst there she saw three

unknown boys and one of them was the appellant. The appellant entered John's Supermarket whilst the other boys did not enter but remained on the street. Later the appellant came out of the shop and left with the two boys and went to the homestead of one R[….] M[….]. Whilst at R[….] M[….]'s place the appellant called her and asked her if she did not want a coke. After talking to her, the appellant and his two companion left and went back to John's Supermarket.

[6] When the three (3) boys came back from John's Supermarket, one of them was in possession of fanta orange and a plastic bag. R[….] M[….] saw them walking and asked her whether those boys did not steal from the supermarket. She and Rose rushed to the supermarket where they found an Indian man bleeding from his eyes and was crying. The Indian man told them that three boys have assaulted him. Next to the supermarket they saw one S[….] who had parked his vehicle. They explained to Sam what had happened and they boarded his vehicle and started looking for the three (3) boys until they reach another village.

[7] They could not find the three (3) boys and when they came back they found that the members of the community have already assaulted the appellant and was lying on the ground and was unconscious. By then police members have also arrived at the scene where the appellant was assaulted. One police official searched the appellant and took out coins, 30 Peter Stuyvesant cigarette and airtime from the appellant's pocket. The appellant was taken away by an ambulance.

[8] Under cross examination she conceded that she did not know the three (3) boys who had entered John's Supermarket. She could not tell who of the

three (3) boys was carrying a plastic bag and a cool drink when he came out of the shop. When counsel for the appellant asked the witness that if the person who had a plastic bag and cool drink was the appellant, she would have remembered, the trial court intervened and said the question was unfair to the witness. When counsel for the appellant tried to ask the witness as to which direction did the three boys took after walking past them, the trial court intervened and dismissed the question and stated that how would she have seen them as they have disappeared. Again when the counsel for the appellant wanted the witness to describe any distinctive feature on the appellant that he was the person who had offered to buy her cool drink on 23rd March, the trial court intervened and stated that it was during daylight, she had talked to him, and it was not necessary that she must have noticed certain special features. The witness stated that when she found the appellant being assaulted by members of the community, she recognised him by his height and his dark complexion. When counsel for the appellant tried to ask a follow-up question regarding the appellant's height, the trial court intervened and stated that the witness was speculating and did not have a ruler to measure him, and what she can only say was whether he was tall or short.

[9] The third State witness R[….] M[….]testified that on 23rd March 2015 she was next to John's Supermarket when she saw the appellant and two (2) boys. The appellant entered inside John's Supermarket whilst the other two (2) boys walked passed the supermarket. Later the appellant came out of the supermarket and joined the two (2) boys. From there the appellant and the two (2) boys came to where she was sitting with the second State witness. On arrival the appellant called the second State witness and talked to her. After

talking to her, the appellant called the two (2) boys and left heading towards John's Supermarket.

[10] On arrival at the supermarket, they all entered the supermarket. After some while they came out of the supermarket and headed upwards and walking in a hurry. After the appellant and the two boys have left, a certain lady came out of the supermarket calling for help. She and the second State witness ran to the supermarket and found the shopkeeper bleeding. They asked the shopkeeper what had happened and he pointed to the appellant and the two (2) boys.

[11] There was a bakkie that was driving out of the supermarket, and they explained to the driver of the bakkie what had happened and he allowed them to board it and they went to go and look for the three (3) boys. They could not find the three (3) boys. As they were looking, they came across the community members who told them that they have found the boys. They proceeded to the scene where the boys were found. On arrival, they found that the community members have assaulted the appellant and he was lying on the ground unconscious. The other two boys were not there. The police members have already arrived at the scene. One of the police official searched the appellant and found that he was in possession of airtime, 30 Peter Stuyvesant packet and coins. An ambulance was then summoned and the appellant was taken away by it.

[12] Under cross examination the witness stated that where they found the appellant lying unconscious was on a side road in the bushes. The witness stated that even though the appellant was lying on the ground, she could still identify him by his height as he was taller than the other two boys. When counsel for the appellant wanted to ask a follow-up question in relation to the

height of the appellant, the trial court stated that the witness had identified the appellant by his face and also she could see the appellant whilst lying on the ground that he was the tallest amongst the three. The witness could not tell what was it about the appellant's face that was distinguishable to say it was the person whom she saw at the supermarket. When asked as to when she became sure that the person lying there was the appellant, she stated that when she arrived where the appellant was lying, she looked at him, and in her mind just silently thought that he was the person who was pointed out by the Indian person as the person who had assaulted him together with two boys.

[13] The State fourth witness M[….] R[….] testified that he is a police official and Warrant Officer by rank. On 23rd March 2015 whilst at work he received a report that the community had apprehended a person at Honeyville village. He went to the scene and upon arrival he found an unknown person lying on the ground unconscious with injuries on his head and body. He then summoned an ambulance to come and examine his condition. Thereafter he searched the pockets of that person and found one packet of 20 Peter Stuyvesant, coins which amount to R140-00, and either MTN, Vodacom or Cell C airtime. The person he found lying there was the appellant. The ambulance on its arrival took the appellant to hospital.

[14] The witness was cross examined and he stated that when he arrived at the scene where the appellant was lying, he did not ask the people that he found there as to what had happened. He stated that the appellant was arrested by the community members at another village and not the village where John's Supermarket was situated. When counsel for the appellant tried to ask the witness the name of the police officer who arrested the appellant, the court

intervened and stated that the appellant was never arrested by any police officer, but was arrested by members of the community. However, it later transpired that in the witness's police statement, the witness has stated that he was the one who had arrested the appellant.

[15] The appellant has testified and he denied all the allegations levelled against him. He stated that on 23rd March 2015 he was at his brother's house in the company of his brother and his brother's wife. At about 18h00 he left his brother's house heading to Sewera village to go and collect his wife.

[16] On the way to Sewera village he met four (4) unknown men. As he was passing those man, one of then struck him with a stick and he lost consciousness. When he regained his consciousness he discovered that he was in the hospital, and his hands were handcuffed. He further stated that the four men that he met did not utter a single word to him.

[17] The appellant further stated that when he left his brother's house, he was in possession of one A[…]'s Nokia cellphone and about R100-00 cash. He had shaved his head and was wearing a pink trouser, red t-shirt and Nike sundowns shoes.

[18] The appellant under cross examination stated that he was staying with his brother at his brother's house.

[19] The appellant called his brother Elvis Mathebula as his witness. He testified that he was staying with the appellant at his (witness) house at the time of the appellant's arrest. The day the appellant was arrested, the appellant came back from work around 17h00. On his arrival the appellant stayed at home for about twenty (20) to thirty (30) minutes and thereafter left saying he was going

to fetch his wife. He never came back. Around 19h00 to 20h00 that evening he was told that the appellant has been severely assaulted. When he saw the appellant again he was in jail. The witness was not cross examined.

[20] The test in a criminal trial is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused person is entitled to be acquitted if there is no reasonable possibility that an innocent explanation which he had proffered might be true. These are not two independent tests but rather the statement of test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken. **(See S v Sithole and Others[1])**

[21] The appellant's defence was that of an *alibi*. There is no onus on the accused person to prove *alibi*. An *alibi* defence is essentially a denial of prosecution case on the issue of identity. What the accused is simply saying is that he could not have committed the offence as he was somewhere else at the relevant time.

[22] The appellant in support of his *alibi* defence has called his brother to testify. His brother corroborated his alibi and stated that the appellant came back

[1] 1999 (1) SACR 585 W

from work around 17h00 and thereafter left after twenty (20) to thirty (30) minutes to go and fetch his wife. The appellant has testified that he had left his brother's homestead before 18h00 to go and fetch his wife at another village. His brother was staying at N[….] which is not the place where the alleged robbery took place. As per the State witnesses, the alleged robbery took place between 15h00 to 16h00. The appellant's witness was not cross examined and his version thereafter remained unchallenged.

[23] It is trite that once the appellant raised the *alibi* defence, that *alibi* has to be accepted unless it was proved to be false beyond reasonable doubt**. (See S v Musiker[2]).** In the case at hand the appellant's *alibi* was not proved to be false beyond reasonable as the evidence of the appellant's brother that the appellant who was from work arrived home at 17h00 was not challenged. The trial court was faced with the evidence of the three State witnesses that placed the appellant at the scene of the incident and the appellant's own evidence together with that of his brother's that the appellant was at work. The trial court was therefore faced with two versions that were mutually destructive of each other.

[24] Faced with two versions that were mutually destructive of each other, the trial court was therefore duty bound to give sound reasons why it preferred the evidence of the State to that of the appellant. The trial court has failed to do so. What the trial court did was merely to state that the four State witnesses have corroborated each other to the effect that there were three perpetrators and that one of them was the appellant. The trial court did not even attempt to deal with the appellant's evidence and that of his witness.

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[2] 2013 (1) SACR 517 (SCA) at para 15

[25] In **S v Liebenberg**[3] the Court said:

> "The approach adopted by the trial court to the alibi evidence was completely wrong. Once the trial court accepted that the *alibi* evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the *alibi* evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the *alibi* evidence to be false."

[26] The evidence of the State witnesses is to the effect that the robbery at John's Supermarket was committed between 15h00 and 16h00 and were all consistent on that time. There is also evidence by the appellant that at that time he was at work. There is no evidence to prove that that appellant *alibi* was false beyond reasonable doubt. The trial Court's approach to the appellant's *alibi* was wrong as it failed to take into account that once the appellant had raised the *alibi* defence it had to be accepted unless it is proved to be false beyond reasonable doubt, and that the onus remained on the State to prove the guilt of the appellant beyond reasonable doubt. The trial court was also supposed to consider the evidence in its totality and not decide the matter only on the State version. Had the court considered the evidence in its totality, it would have realized that it was faced with two versions that were mutually destructive of each other, which would have made it to give sound reasons why it prefers one over the other. Its failure to do so in my view constitute a serious misdirection and on this point alone, the conviction cannot stand.

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[3] 2005 (1) SACR 355 (SCA) at para 14

[27] If I am wrong on this, the next question to be determined is whether the State had proved the offence of robbery against the appellant beyond reasonable doubt. The complainant did not give evidence about any items that the perpetrators had robbed him. The complainant's evidence proved assault only. The two State witnesses who allegedly saw the perpetrators leaving the complainant's supermarket, could not tell what the perpetrators were having except to say an orange coke and a plastic bag. To make matters worse, the two State witnesses could not tell who was in possession of the plastic bag.

[28] The State in trying to prove that the appellant was involved in the robbery at John's Supermarket is also relying on the evidence of Warrant Officer Raletsatse who testified that when he searched the appellant who was unconscious, he found one packet of Peter Stuyvesant cigarette; either MTN, Vodacom or Cell C airtime; and coins to the value of R140-00. However, the police have failed to establish where these items originate from. The complainant did not confirm whether these items originate from his supermarket.

[29] It is not strange for a person to have a cellphone with different networks. The police officer who searched the appellant is not even sure from which network the airtime were from. The police where therefore duty bound to gather more evidence about how the airtime came into possession of the appellant and where they originate from. They have failed to do so. There is nothing strange for a person to be in possession of one packet of Peter Stuyvesant cigarette and R140-00 coins. That on its own does not prove any offence. The State was therefore supposed to have led evidence that link the items found in possession of the appellant to any items that might have been robbed at

John's Supermarket. Even if the complainant was knocked unconscious and he could not have seen what was actually taken, when he regained his consciousness, if money was taken from the till he would have noticed that. If some of his airtime and cigarettes were missing he would have noticed that. It is not even clear whether the complainant was selling airtime as no evidence to that effect was led.

[30] In my view, taking into account the evidence presented in its totality and holistically, the State has failed to prove beyond reasonable doubt the offence of robbery against the appellant. If there was sufficient evidence linking the appellant to John's Supermarket, the least he could have been convicted of was the offence of assault. However, with the appellant's *alibi* defence which was not proved to be false beyond reasonable doubt, there is no sufficient evidence to sustain a conviction on a competent verdict of assault. In my view, the evidence before the trial court did not prove beyond reasonable doubt that the appellant was guilty and should have been acquitted.

[31] Another area of concern in the proceeding in the court *a quo* is the unwarranted interruptions and unjustifiable entry into the arena by the presiding magistrate. It will therefore be prudent to quote a few examples to show the seriousness of the misdirection by the trial magistrate. In the first instance this is what happened when counsel for the appellant was cross examining Ms M[….] the second State witness:

" **Mr M[….]**: Madam you cannot say before this court with certainty that the three boys entered the shop after they left you? Not so? … [intervened]

COURT: Entering, Madam, the question is about entering …. I did not see them.

MR M[….]: Am I correct to say that if the person who had a plastic and a cool drink was the accused before court, you are going to remember it….[intervened]

COURT: No the question is not fair."

[32] The question was vital as the issue was about the identity of the appellant. This was the relevant witness to have answered the question as per her evidence in chief the appellant had called her and she had talked with the appellant at close range. It would have been easy for this witness to tell whether the appellant was the one who was carrying the plastic or not. There was no unfairness in this question. The appellant counsel was therefore denied an opportunity to test the witness's credibility in relation to the identity of the appellant. The did not even object to the line of questioning.

[33] Again in relation to the same witness this is what transpired:

" After … did you see the direction they took… [intervened]

PROSECUTOR: They disappeared your worship.

COURT: Aah, thank you, prosecutor.

PROSECUTOR: She said they lost sight [intervened]

COURT: He is the one who came with that question that when she was looking at them, she said then they disappeared.

` Now how would she have seen the direction they have taken if they disappeared?

MR M[….]: Your worship it is not that despite the fact that a person gets out of the court, he takes a particular direction [intervened]

COURT: That question is dismissed."

[34] The appellant was apprehended by the members of the community in another village. The direction was relevant as that would have assisted the court to

find out whether the village where the appellant was apprehended was in the same direction which the witness would have pointed out. However, in his judgment the presiding magistrate said the following:

"But the accused was found in another direction. When these boys ran they were not running in a tunnel. They were running in an open space. They could change direction at any time. So the fact that when he started running he ran in the eastern direction and was later found in other direction it does not mean anything."

[35] The State has failed to call any witness from the community members who apprehended the appellant to testify about the circumstances under which he was apprehended, the direction of the village from the village in which John's Supermarket is situated, and also the distance from John's supermarket and the place where the appellant was apprehended. The question by the counsel for the appellant was not whether they have disappeared or not. Even if they have disappeared, they have disappeared in a certain direction. In my view the question was unfairly dismissed and the presiding magistrate analysis of the direction was based on speculation and not facts.

[36] Again this is what transpired still with the same witness:

" **MR M[….]**: What makes you say the accused is the person who approached you and offered to buy you cool drink of the 23rd March … Your worship, he said he wanted me, he … Yes but … Yes my question is, what makes you looking at him to say this person is the one who told me he loved me on the 23rd Mach? [intervened]

PROSECUTOR: I think that should be [indistinct-11:07]

COURT: Even despite that, I mean it was during the daylight, she talked to him, it is not always necessary that you must have, you know noticed certain special features.

Just like me, I know Mr M[....], but if somebody can ask me: Hey, what special features does he have which you...? I cannot, I cannot say anything but I can tell you even I can find you in Durban, I can find you right in the ocean, you know."

[37] I doubt whether the presiding magistrate was alive to the principle of identification as formulated in **S v Mthetwa**[4] where the court said:

"Because of the fallibility of human observation, evidence of identification is approached by courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested".

[38] The appellant's counsel was prevented from testing the reliability of the witness's observations. That in my view amounted to a serious misdirection by the trial magistrate.

[39] When Ms M[….] the third State witness was cross examined this is what transpired:

"MR M[....]: Let us take away the blue t-shirt and the maroon trouser, what is it that you identified the accused with as the person you saw on that day. Without him, identify him without clothing. What is it on in physical appearance that you can say, I know him because of this…This one is taller than those who was in his company.

Where you found being assault, he was lying down. Is that correct…?

Yes

Those other two, you referred to as being shorter to him were not even there …[intervened]

PROSECUTOR: Your worship, in evidence, but in evidence, Your worship, there is evidence to the effect that all three, the accused and two companies at some stage they came to the homestead of the woman. If I remember very well. Now, yes of course they were not there.

[4] 1972 (3) SA 766 (A) at 768

Now, I do not know whether Mr M[….]is suggesting that because they were then he could not take the height of that.

Yet he had seen them before at that homestead of the witness.

COURT: Yes

PROSECUTOR: I honestly do not know.

MR M[....]: Your worship, this is identification now. She has seen the person previously at the scene. There was a time when this person was no longer within her sight. Now she must come and identify him as the person she previously see. She says she identified him with the height compared to who?

There were no other, those other people who have been short [intervened]

COURT: No, Mr M[....]. At the time when you saw them the first time, she is saying she first and foremost, she identified him with his face.

PROSECUTOR: Exactly.

COURT: And secondly she identified him with his height because he was taller than the two.

PROSECUROR: Yes that she has said:

COURT: And when she saw him again for the second time when he was still lying, I mean when was…?

Lying on the ground she could see that this person I saw was the taller amongst the three."

[40] The witness did not say she had identified the appellant by his face, but had said by his height. The witness did not say when she saw the appellant for the second time lying on the ground, she could see that this is that person I saw who was the tallest amongst the three. These statements are misleading and in my view, amount to gross misdirection by the presiding magistrate.

[41] It is trite law that the court may intervene at any time during the proceeding to get clarity on any point, but should not take over the examination or put leading questions to support the State case before the parties have finished their examination of the witness. (**See S v Rall[5])**. A criminal trial is not a game. The presiding officer's position is not merely that of an empire to see that the rules of the game are observed by both parties. The presiding officer is the administrator of justice, he is not a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure, but to see to it that justice is done. (**See R v Hepworth[6]**).

[42] In the case at hand the trial court did not intervene to get clarity or to establish the truth, but was answering for witnesses, which answers in some instances were misleading as witnesses never gave those answers. The trial court did not allow the free flow of the trial but was unnecessarily interrupting time again and also preventing the appellant's counsel from asking relevant and pertinent questions which would have assisted the appellant as well as the court. In my view, the appellant was not given a fair trial. This unfairness is so gross and on that point alone the conviction cannot be sustained.

[43] I therefore make the following:

4.1.1 The appeal is upheld

41.2 The conviction and sentence are set aside.

41.3 Unless the appellant is serving sentence for other offences, he should be released immediately.

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[5] 1982 (1) SA 828 (A)
[6] 1928 AD 265 at 277

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MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

I concur

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M. G PHATUDI J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR APPLICANT : DJ NONYANE

INSTRUCTED BY : POLOKWANE JUSTICE CENTRE

COUNSEL RESPONDENT : ADV JJ JACOBS

INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTION

DATE OF HEARING : 31 JULY 2020

DATE OF JUDGEMENT : 13TH AUGUST 2020