



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No 605/10

In the matter between:

SAID MOHAMMED

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mohammed v State* (605/10) [2011] ZASCA 98 (31 May 2011)

Coram: HEHER, MAYA and MAJIEDT JJA

Heard: 25 May 2011

Delivered: 31 May 2011

Summary: Criminal law — robbery with aggravating circumstances — identification — proof of beyond reasonable doubt — requirements restated — alibi defence — effect of late disclosure — sentence — 15 years' imprisonment — no appellate interference warranted.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Cleaver J and Brusser AJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

MAJIEDT JA (HEHER and MAYA JJA concurring):

[1] This is an appeal against the judgment of Brusser AJ, with Cleaver J concurring, sitting as court of appeal in the Western Cape High Court, Cape Town, in terms of which the appellant's appeal against his conviction in the regional court of robbery with aggravating circumstances and the sentence of 15 years' imprisonment was dismissed. Leave to appeal was granted by the court below.

[2] The appellant's conviction in the regional court arose from the following set of facts:

2.1 The complainants, Ms Nomonde Patience Botha and her boyfriend, Mr James Mecca, were accosted in the latter's flat by four men, brandishing firearms. They were tied up, Mecca was repeatedly beaten up and dragged around the house, the flat was ransacked and the robbers eventually made off with the complainants' goods valued at approximately R22 000.

2.2 The ordeal lasted between half an hour (on Botha's estimation) to over an hour (as estimated by Mecca). The flat's lights were on throughout and the obvious ringleader of the gang, whom they both subsequently identified as the appellant, had his face uncovered.

2.3 Botha encountered and recognized the appellant on at least three

subsequent occasions. On one such occasion, she sought to engage the assistance of the security guards at a shopping mall, the Golden Acre, where she had seen the appellant, to have him arrested. They declined to do so in the absence of a case number.

2.4 Mecca also recognized the appellant on two subsequent occasions, namely at a Seven Eleven store and at the Cape Town railway station. After the first such occasion he furnished the Milnerton police with the registration number of the motor vehicle in which he had seen the appellant. After the second occasion, he alerted the police on patrol at the station, who arrested the appellant. Botha was asked to come to the police station where she immediately positively identified the appellant as the lead robber, even before she was asked to do so.

2.5 The appellant denied having robbed the complainants. His attorney raised an alibi on his behalf belatedly during the trial, namely when the State's second witness, Mecca, was being cross-examined. No such alibi defence was put to the first State witness, Botha, by the appellant's former attorney (he was represented by another one when Mecca testified).

2.6 The appellant alleged in his testimony that he had been in Pretoria at the time of the robbery. He had gone there at the request of his friend and compatriot (the appellant is a Tanzanian citizen), one Mr Malik Ponza, to assist him in his business. Ponza testified in support of this alibi.

3. The regional magistrate accepted the State's version and rejected the appellant's alibi defence as false beyond reasonable doubt. She found the State witnesses' identification of the appellant credible and reliable. She was satisfied that the identification occurred in circumstances where there was adequate opportunity for a reliable identification.

4. The court below endorsed the regional magistrate's aforementioned findings. I, too, can find no fault with her findings. This appeal turns on the reliability of the complainants' identification. The appellant has in my view failed to establish that the regional magistrate erred in finding the

identifications to be reliable. With regard to identification, Botha and Mecca had ample opportunity to observe the appellant who, as stated, directed proceedings during the robbery. The appellant's face was uncovered and the flat's lights were on throughout. Botha enumerated some of the identifying features of the appellant, namely his hefty build, a big face, thick lips and what she described as 'sexy' eyes. Mecca was adamant that he would never forget the appellant's face and stated that whenever he closed his eyes he could see the appellant's face. Added to this of course, is the fact that the appellant was in command, thus the complainants focused most of their attention on him. Moreover, the complainants recognized the appellant on several occasions thereafter and sought to have him arrested.

[5] The identification of the appellant unquestionably passes muster when measured against the well-known cautionary approach enunciated in a long line of cases, most recently by this court in *S v Ngcamu* 2011 (1) SACR 1 (SCA) para 10, where Mthiyane JA made reference to this court's earlier *locus classicus* on identification evidence, *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C. The cumulative weight of the factors enumerated by Holmes JA in *Mthetwa* such as 'lighting, visibility and eyesight; the proximity of the witness[es] . . . opportunity for observation, both as to time and situation . . . the [appellant's] face, voice, build, gait and dress' conduce to a reliable identification in the present matter.

[6] The appellant's counsel laid heavy emphasis on the complainants' lack of any description of their assailants, particularly of the appellant, to the police after the robbery. He contended that this omission raises reasonable doubt about the reliability of their identification. It seems to me that the police, rather than the complainants, are to blame for this omission. The police were told by the complainants that they would be able to recognize the robbers in the event that the complainants see them again. But no descriptions of the robbers were sought from the complainants. In any event, even if it can be said that the omission is attributable to the complainants, it must be

considered on the evidence as a whole. As stated above, the complainants had adequate opportunity for a reliable identification and the conditions were conducive to such reliability. As it turned out both complainants did, on their version, see one of their assailants, the appellant, again on more than one occasion and they took active steps to have the appellant arrested. The complainants' lack of any description of their assailants can therefore not detract from the reliability of their identification when all the facts and circumstances are considered.

[7] Criticism was also levelled against Botha's identification of the appellant at the police station after his arrest. The submission was made that it is tantamount to a 'dock identification' on which no reliance can be placed. In *S v Tandwa* 2008 (1) SACR 613 (SCA) para 129, this court reiterated that '... [d]ock identification ... may be relevant evidence, but generally, unless it is shown to be sourced in an independent preceding identification ... carries little weight'. The exception alluded to in this passage applies in this matter. Botha's identification at the police station therefore serves as a further factor enhancing the reliability of the identification, albeit to a very limited extent.

[8] Against this compelling identification evidence, stands the appellant's belatedly raised alibi defence. On a conspectus of the evidence as a whole, that defence cannot be reasonably possibly true. The regional magistrate correctly found that there were material contradictions between the versions propounded by the appellant and his witness, Ponza, on inter alia the precise reason for the appellant's visit to Pretoria and the extent of the injuries sustained by Ponza and his girlfriend in a car accident. She also correctly found it to be riddled with inconsistencies and improbabilities. The alibi defence simply lacked credibility, a fact which is exacerbated by its late introduction into the case (compare in this regard, the facts and findings in *S v Carolus* 2008 (2) SACR 207 (SCA) para 29). The appellant's explanation that the alibi defence was raised late because of his former attorney's neglect, lacks persuasion. It was the very essence of his case and it strikes one as

improbable that the attorney would not have referred to it in cross-examination; equally unlikely is that the appellant would have failed to draw the attorney's attention to this material omission.

[9] The appeal against conviction is devoid of merit and must be dismissed. Short shrift can be made of the appeal against sentence. The offence carries a statutorily prescribed minimum sentence of 15 years' imprisonment, unless substantial and compelling circumstances exist to justify a departure from it. The appellant and his confederates terrorised the complainants in Mecca's residence, his sanctuary where he and his visitors were supposed to be safe. Mecca was repeatedly beaten up and both he and Botha were threatened with firearms. Only two factors were advanced at the trial as substantial and compelling circumstances, warranting departure from the minimum sentence of 15 years prescribed in s 51(3)(a) of the Criminal Law Amendment Act 105 of 1997. These were the appellant's lack of previous convictions and the fact that the appellant has children to care for. The regional magistrate rightly rejected these factors. The aforementioned Act stipulates a sentence for first offenders. And it was not the appellant's case on sentence at the trial, or on appeal in the court below, or before us, that he is the sole breadwinner or primary caregiver to the children. The sentence fits the offender and the offence in my view.

[10] The appeal is dismissed.

S A Majiedt
Judge of Appeal

APPEARANCES:

Counsel for Appellant : Adv. J A du Plessis

Instructed by : Liddell, Weeber & Van der Merwe Inc,
Wynberg

Ben van der Merwe
Bloemfontein

Counsel for Respondent : Adv. S Vakele

Instructed by : The Director of Public Prosecution,
Cape Town

The Director of Public Prosecution,
Bloemfontein