

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

A350/2007

DATE:

20 MARCH 2009

5 In the matter between:

1. SABONGA MQANDULI

2. SHEBBERD NDONGENI

3. MTHUTHUZELI NOCANDA

4. PHELO NYANGI

10 versus

THE STATE

JUDGMENT

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CLEAVER, J:

The appellants were convicted in the Regional Court, Strand,
on 16 March 2005, on two counts of armed robbery and
thereafter sentenced to different terms of imprisonment. The
first appellant was sentenced to 15 years imprisonment and
the others were sentenced to 10 years imprisonment. With
the leave of the Court they now come on appeal before us
against both their convictions and the sentences.

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There are a number of unfortunate aspects about this matter, not the least of which is the sorry state of the record. It is apparent from the letter compiled by the regional magistrate which forms part of the record that there was no record of certain of the tapes containing the recorded portion of the proceedings with the result that the record was completed by the regional magistrate by having her notes transcribed. In the result further, we were unable to obtain a picture of the evidence presented by the accused or their cross-examination.

10 In the result, we are also unable to make any comment in regard to the credibility of the accused.

In short, the case for the State was that on 27 September 2003 two employees of the Elgin Tavern in Grabouw were attacked and robbed of money, cellphones and liquor by four persons.

I do not consider it necessary to detail the evidence. The evidence in short is that certain of the attackers jumped over the counter, one of the employees was taken into the office, money said to amount to approximately R5 000,00 was taken out of the cash register, the one witness, Adonis, was struck on the nose by one of the assailants using a firearm and resulting in a broken nose, and the four left the premises taking with them liquor which was identified by the witnesses as including Spiced Gold and Jack Daniels whiskey, and also the cellphones belonging to the two employees and the cash to

which I have referred. The one employee indicated that these events took place over the course of some ten minutes, while the other estimated the time as some 30 minutes. All this took place in the morning of 27 September, the time given by the two witnesses being between half past nine and ten o'clock that morning. The witnesses say that they remained inside for about five minutes after the robbers had escaped, came outside where a man said to be one Eric Adams, who was not called by the State, indicated to one of the witnesses that the robbers had got into a red BMW motor vehicle and fled in the vehicle. The vehicle was pointed out to the witness by Adams, who testified in court that he saw the vehicle. There is no indication from the record where the vehicle was when he saw it and whether he was able to see anyone in it.

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It is common cause that the police received a report of the robbery at about five minutes past eleven that morning and apprehended five persons travelling in a BMW motor vehicle in Lansdowne Road close to where the road from Browns Farm joins the road, and set about finding out from the persons in the vehicle what was in the vehicle. The driver was asked to open the boot, but in the course of doing so the key broke and somehow or other he managed to escape, leaving only the four appellants, all of whom denied being the robbers. It is common cause that the police found in the vehicle cash to the

value of R2 881,60, three cellphones, being one Eriksson T68 and two Nokia cellphones, two bottles of KWV 10 year old brandy, one bottle of Jack Daniels whiskey and one bottle of Captain Morgan Spice Gold.

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The defence put up by the appellants was that of an alibi. In brief it was to the effect that appellants 1, 3 and 4 were on their way on foot, and I am not going to dwell on the version, when the BMW drove past them. In it was appellant No 2, who was known to them, and they were invited to join the vehicle. They say they had no knowledge of the items found in the vehicle.

On behalf of the appellants the main issue raised was that of identification. It is common cause that neither of the two witnesses was able to identify the robbers by any distinguishing features. That is understandable in the light of the fact that they were traumatised during the course of a robbery which was a dynamic one with people moving all the time. What is also common cause, however, is that whatever identification did take place was in large measure based on both of the witnesses seeing the appellants very shortly thereafter at court. It is not entirely clear how the witness Adonis came to the court. Initially he indicated that he was there not in connection with his case, but it would appear that

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he subsequently conceded that he was there in regard to his case; and as far as the witness, Mzemiyati, is concerned it is quite clear that he arrived at the court (according to the appellants they heard him being told that the robbers were in the police van in which they were) and that he then identified them to the then investigating officer as a result of him having seen them. The other witness, Adonis, also conceded that seeing the appellants at court helped him identify them. In these circumstances, the identification is in effect what has been termed dock identification. It is trite that as far as dock identifications are concerned, they are by themselves of limited, if any, evidential value. This is confirmed in a judgment of the full court in this division of S v Bailey, SACR 2007(2) at page 1. It is not necessary for me to dwell on the aspects in respect of which the identification is uncertain, but I can remark on one aspect and that is that such evidence as the witnesses were able to tender in regard to identification related to the clothing worn by the appellants, which was only established by that witness when he saw them at court.

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The fact that the dock identification, for want of a better term, is in issue is one aspect, but that does not finalise the matter. It is still necessary to have regard to the alibis presented by the appellants, and to view their alibis as part of the entire picture placed before the Court. It is trite that the onus is on

the State to prove that the alibis presented by the appellants could not reasonably possibly be true. I have already remarked on the fact that due to the inadequacy of the record, we are unable to form any indication as to the credibility of the

5 appellants and there is therefore no reason to suggest that their evidence was not credible. The regional magistrate seemed to reject their alibis on the basis that she did not believe them. That is not a sufficient way of looking at it. Competent cross-examination would have assisted in exploring

10 the details of the alibis they presented, but we are in the dark as to what took place.

Significantly is the fact that not all the items which were alleged to have been stolen were found in the car. For

15 example the amount of money found in the car was far less than was said to have been stolen, and it is also of importance that the firearms which the witnesses said were carried by the assailants were not found in the car.

20 Having regard to the fact that the fifth man in the car escaped, and there is no evidence before us that there were five robbers, it cannot be said that the items which were found in the car were not introduced by the fifth man who ran away.

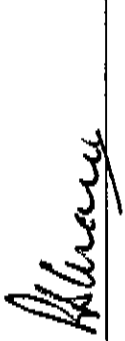
In all the circumstances, taking into account the unsatisfactory nature of the identification and the fact that the State has been unable to prove that the alibis presented by the appellants could not reasonably possibly be true, I have come to the conclusion that the appeals must SUCCEED. In the circumstances the convictions and sentences are SET ASIDE.

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CLEAVER, J

15 I agree.


_____ for AS DE VILLIERS, AJ

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