IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A567/10

DATE: 3 December 2010

In the matter between:

MLUMKELO NGAYE Appellant

and

THE STATE Respondent

JUDGMENT

BLIGNAULT, J

This is the judgment in the appeal of Mlumkelo Ngaye. Appellant was convicted in the Regional Court, Parow, on a charge of robbery with aggravating circumstances in that on 29 May 2009 at zone 12, no 8, Langa firstly he robbed Mr Tinti of a cell phone, R10 000 cash, and R1 000 worth of airtime vouchers, whilst threatening him with a firearm, and secondly he robbed Mr Wei of a cell phone, key and belt whilst threatening him with a firearm. Appellant was sentenced to 15 years imprisonment. He was subsequently granted leave by the Magistrate to appeal against his conviction and sentence.

Appellant was accused 2 at the trial. There was one other

accused named accused 1. Appellant enjoyed legal representation and he pleaded not guilty.

Much of the evidence at the trial was not disputed. On the day in question three or four men entered the shop owned by Mr Tinti. One of the men had a gun which he pointed at Mr Tinti and then took his belt, cell phone and R10 000 cash, the man then pushed him into a fitting room. A second man went to the counter where he took certain goods. Mr Tinti's cousin, Mr Wei, was also in the shop. He was also pushed into the fitting room by the intruders. They, that is Mr Tinti and Mr Wei, emerged about five minutes later and found that the three men had left.

Mr Tinti testified that the public did not have access to the counter referred to but this was later not clarified in the evidence as there were two counters referred to. The other one was marked G on the plan, to which the public had access. Mr Tinti testified that appellant was one of the intruders but he did not appear to be certain of this. Mr Wei confirmed Mr Tinti's evidence and he in turn identified accused 1. The State called Mr Barend Swanepoel, a fingerprint expert. He testified that the finger and palm prints of accused 1 and appellant were found on the counter marked G on the plan.

Accused 1 gave evidence, he denied that he was involved in the robbery. He said that he knew the shop and that he had been there at least once to buy a bag and a phone cover. Appellant also gave evidence. He also denied being involved in the robbery and he too said that he had been to the shop at some stage to buy a phone charger.

It is well known that fingerprint evidence is normally of considerable probative value. In some cases it can be decisive but this is not necessarily so. The value of fingerprint evidence ultimately depends upon the evidence as a whole. In this regard I want to refer to the case of S v Legote en Ander 2001(2) SACR, pg 179 and in particular para 3 thereof, where these principles were established.

The magistrate's general approach to the question of identification was in principle consistent with the legal principle thus laid down. It is trite law that the factual and credibility findings of the trial court will normally carry considerable weight on appeal. Inferential or legal reasoning on the other hand is different in regard to such matters and the Court of appeal is in as good a position as the trial court to decide such issues.

In the present case the magistrate acquitted accused 1, but

convicted appellant. I will come back to this question of the similarity of the circumstances in regard to both of them. Given the nature of the magistrate's factual findings it is necessary to examine the precise grounds on which he came to this result.

The position of accused 1 and the appellant was particularly similar. It is useful to consider the similarities or differences in the evidence implicating them under three headings. In the first place there was eye witness identification of each of the two accused, in the second place there was a fingerprint identification of both of them and thirdly there was in each case an innocent explanation for the presence of the fingerprints.

The fingerprint evidence implicated appellant and accused 1 in the same manner, although it was suggested in argument before us by the advocate for the State that this was not necessarily so. The tenor of the judgment appears to be to support this similarity and counsel was not able to point to any differences in the evidence on record.

I turn then to the next item, the eye witness identification. Some of Mr Tinti's evidence tended to identify appellant as one of the perpetrators. The magistrate dealt with this evidence

quite thoroughly, and he referred to general principles and then also discussed the problems with identification known as dock identification. He summarised this aspect in his judgment in the following terms, after referring to photos he said the following:

> "There was no evidence in that regard placed before me. I find his evidence with regard to the identification of the accused of little value, in fact I will go so far as to say the impression I got from his evidence that he only implicates accused 2 when he saw him there in the dock, in the witness stand. So seen on its own if it stood the identification on its own then I would have had grave doubt as to its reliability and acceptability."

In regard to the eye witness identification of accused 1. This evidence was given by Mr Wei and the magistrate summarised it briefly by stating that this identification evidence was unsatisfactory to say the least. Apparently Mr Wei changed his version a few times in evidence and its clear that the magistrate also attached very little to this identification evidence.

It appears then at this stage that in regard to both the eye witness identification and the fingerprint identification there is

very little, if any, difference between the evidence implicating accused 1 and appellant.

A third aspect that was considered by the magistrate was the probative value of the innocent explanation put forward by each of the accused for the presence of his fingerprints on the counter in the shop. The tenor of their evidence was the same, namely that they knew the shop and had been there in the past, but they were unable to say that it was on the day in question. The magistrate's judgment on this aspect is not clear at all. Dealing with accused 1's version he said it is very evasive, and it is unclear on certain aspects to the points which I have just alluded to. Then he refers to accused 2's version and in this regard the magistrate seems to equate the two of them. Then he proceeded to say with regard to accused 1's version, especially in the light of the concession made by Mr Swanepoel, that it might be possible that while visiting the shop, he might have left his print there, and in the absence of any other evidence he found his version not reasonably possibly true. On that basis accused 1 was acquitted.

The magistrate then proceeded to discuss the version of accused 2. On the face of it there does not appear to be any difference in either the quality or the probative value of the evidence given by accused 2, that is appellant in this regard.

It is not necessary for me to analyse this evidence in depth, save to say that there is no clear indication as to why the magistrate would distinguish between the two of them.

The only point of distinction to be discerned in the judgment is the statement to which I referred above, that apparently Mr Swanepoel, the fingerprint expert, made a concession that it might be possible that while visiting the shop he might have left his print there. Now I gather from this that this concession would have been elicited from Mr Swanepoel under cross-examination. It follows however from the evidence in regard to the fingerprints and their position, and the fact that the two accused each gave a similar explanation for the innocent presence of their fingerprints that Mr Swanepoel's concession in regard to the one accused carry no weight whatsoever. It could have carried perhaps some weight if Mr Swanepoel had been asked whether it was not equally possible for appellant's fingerprint to have been left there, that question was however not explored.

This Court is then left with the curious situation that on the evidence before it there does not appear to be any discernible difference in the evidence adduced by the State as regards on the one hand accused 1, and on the other hand, appellant.

It is trite law that under the Constitution everyone is equal before the law and has the right to equal protection and benefit of the law. In the case before us accused 1 did enjoy the protection and benefit of the law in that he was acquitted. Appellant for no reason apparent at all was not given that same protection and benefit.

In the circumstances it seems to me that it would only be fair and just that appellant should also be acquitted. I therefore make the order that APPELLANT'S APPEAL IS UPHELD AND THAT HIS CONVICTION AND SENTENCE ARE SET ASIDE.

BLIGNAULT, J

I concur with the order,

WEYER, AJ

/ds