

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO A114/10

In the Appeal of:

SIMPHIWE RASIMENI

FIRST APPELLANT

POLOLO TSHOLOBA

SECOND APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT DELIVERED ON 18 MAY 2010

VAN DEN HEEVER AJ:

- 1] Both Appellants were convicted in the Regional Court of Hermanus on 28 July 2006 of one count of robbery with aggravating circumstances. First Appellant was sentenced to 10 years imprisonment and Second Appellant was sentenced to 15 years imprisonment. Appellants applied for leave to Appeal against both their convictions and sentences. Leave to Appeal was granted to Appellants against their convictions only.
- 2] Appellants now appeal against their convictions.

- 3] Both Appellants were legally represented at the trial and pleaded not guilty to the charge. It was admitted on behalf of the Appellants that they were at the premises of Flight Rubber Duck, Vermont, Hermanus on 3 May 2004, that they attended an Identity parade on 27 May 2004 and that they were identified by the complainants at such identity parade. Both Appellants denied that they were involved in a robbery at Flight Rubber Duck on 23 June 2003. First Appellant could not remember exactly where he was on that date but averred that he was in the Eastern Cape since 1999 and only returned to Hermanus in March 2004. Second Appellant could also not recall where exactly he was on the 23 June 2003 but averred that he was on parole at that point in time. The Appellants confirmed the statement and admissions that were made on their behalf by their legal representative.
- 4] Both complainants, Inspector Crove, First Appellant's sister, a correctional services official, Inspector Fisher and Inspector Abels produced evidence on behalf of the Respondent. Both Appellants also testified.
- 5] The trial magistrate, in her judgment, summed up the evidence produced in court with sufficient particularity and for purposes of adjudicating this appeal it is necessary to only refer to certain relevant portions of such evidence.

EVIDENCE RELATING TO THE ROBBERY AND IDENTITY OF THE APPELLANTS

- 6] Both complainants produced evidence relating to the robbery itself and the identification of the Appellants. Mr Charles testified that at approximately 20h30 on the evening of the 23 June 2003 himself together with his wife and one of his children were sitting in the family room when they heard their maid screaming while ascending the stairway to the family room, pursued by two armed men. After ordering them to sit down and to be quiet one of them pointed a black pistol at him and demanded money.

The man with the black pistol then took him down the stairs to his office and demanded to know where the vault and money were. In the office they were joined by a third man (Second Appellant) brandishing a large knife.

- 7] The whole office and adjacent area was lit by fluorescent lights and both the man with the black pistol and second appellant did not have their faces covered. He testified that he specifically looked at them carefully so that he would be able to identify them should he see them again in future. While they continued to threaten him he concentrated to note the tone of their voices, their faces and looked for specific identifying marks. The robbers found his wallet in the office and he handed them a hundred dollars and a few Euros. He was then ordered to go upstairs again. At that stage an unarmed fourth man arrived but his face was covered by a balaklava. They were then all ordered by the man armed with the black pistol to go downstairs again.
- 8] At that stage one of the robbers put his pistol against their two year old daughter's head. His wife then told them about more money in the same wallet and the robbers also found more money in one of the drawers in the office. They were then tied up with telephone cords by Second Appellant and the man with the black pistol. After an argument between the robbers they ran out of the house and a shot was heard outside. Mr Charles was able to describe Second Appellant's features with considerable detail and testified that both the man with the black pistol and second Appellant was in his presence for approximately half an hour in close proximity (one to one and a half meters)
- 9] During May 2004 while sitting in his office his wife alerted him that some suspicious looking person had come to ask for water. He went outside and saw four men. When he tried to speak to them they proceeded to walk away but he recognized

Second Appellant. He contacted the police and a short while later Mr Charles and his wife drove passed them. Mrs Charles was able to identify First Appellant amongst them. They took note of the clothing and advised the police. An identity parade was held on the 25 May 2004. He pointed out First and Second Appellants but testified that he was not too sure about the identity of First Appellant in court.

- 10] Mrs Charles testified that when two of the robbers took her husband downstairs First Appellant forced her, the maid and her little daughter into the bedroom where the light was shining. He pointed a grey pistol at her and demanded money and wanted to know where the safe was. He instructed her to open a linen kist and demanded gold jewelry. His eyes were initially masked but he removed the cover when he took the jewelry and threw it on the bed. At the time when the others returned upstairs she had already been in First Appellant's company for approximately 20 minutes. They were then hustled downstairs. One of the robbers held his gun to her daughter's head and threatened to shoot her if they did not tell them where the money was. She confirmed that a further amount of money was in an envelope in the wallet and she gave it to him. She confirmed that after they left they heard a gunshot. She testified that she could clearly remember First Appellant and was able to describe his features in some detail.
- 11] During May of the following year two men appeared at the door and one asked for water. She recognized him as being one of the robbers who had been in the room with her husband. She told Mr Charles that one of the men was definitely involved in the robbery. She confirmed that they drove passed them later and immediately identified the First Appellant amongst the group. At the subsequent identity parade she identified the First Appellant immediately and with much certainty.

EVIDENCE RELATING TO THE APPELLANTS' ALIBI DEFENCE

- 12] The prosecutor in this case requested Alida Grove to investigate the alibis of the Appellants which had been divulged when the accused pleaded. She confirmed that the Second appellant was on parole at the time of the robbery. First Appellant gave her the name of his sister who indicated that the First Appellant returned from the Eastern Cape in 2003 and she saw him in March 2004. The First Appellant's sister Ms Rameni was called by the Respondent. She testified that First Appellant was her brother and that she had been living in Khayelitsha in the Cape since 2002. According to her the First Appellant was residing in Mount Frere in the Eastern Cape with his mother during 2003. She produced conflicting evidence and changed her version under cross-examination.
- 13] A member of the Department of Correctional Services produced evidence to the effect that the Second Appellant had been placed on parole on 26 May 2003 and that he visited him on the 21st, 24th and 26rd June 2003. He did not visit Second Appellant on the date of the offence. He further testified that a person on parole was entitled to look for work between 08h00 in the morning and 15h00 in the afternoon after which he would be under house arrest.
- 14] Inspector Fisher testified that he assisted Inspector Abels with the investigation of the case and that he obtained warning statements from First and Second Appellants on 4 May 2004. He informed the Appellants of the allegations against them, the statutory requirements to affect a lawful arrest and their right to remain silent. Neither of the Appellants divulged an alibi to him. They signed their respective statements which were received by the court marked Exhibits "D" and "E" respectively.

- 15] Appellants' fingerprints were obtained by Inspector Abels while their warning statements were taken. Abels testified that during the time of the arrest First Appellant did not mention that he was in the Eastern Cape at the time of the robbery nor did Second Appellant mention that he was on parole at the time.
- 16] First Appellant testified that he had moved to the Eastern Cape in November 1999 and that he returned to the Western Cape in July 2003. He lived in Khayelitsha until he went to Hermanus. With regard to his arrest he testified that he was so angry at the manner in which he was arrested that he did not tell the police that he was in the Eastern Province at the time of the robbery. During cross-examination he contradicted his prior version and also changed his version with regard to his alibi defence. He also denied being pointed out at the identity parade.
- 17] Second Appellant testified that he had no knowledge of the robbery and that he was released from prison in May 2003 on parole. He contradicted First Appellant's evidence relating to the events leading up to their arrest in various respects.
- 18] When evaluating the evidence on Appeal, it is trite law that 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 shows them to be clearly wrong.¹ The Respondent bears the onus to prove the Appellants' guilt beyond reasonable doubt and in this regard it is important to evaluate the totality of the evidence.²
- 19] A defence of an alibi is essentially a denial of the prosecution's case on the issue of identity. Evidence of identification based on a person's appearance is dangerously unreliable unless approached with caution.³ The reliability of a witness's evidence must *inter alia* be tested with regard to the opportunity for observation, the witness's

¹ *S v Hadebe* 1997 (2) SACR 641 (SCA)

² *S v Trainor* 2003 (1) SACR 35 (SCA)

³ *S v Mthetwa* 1972 (3) SA 766 (A); *R v T* 1958 (2) SA 676 (A); *S v Ngcobo* 1968 (1) SA 905 (N)

ability to recollect and narration⁴. It is clear from the trial magistrate's judgment that she was well aware of the fact that the evidence of the complainants' with regard to identity should be approached with the necessary caution. With regard to the complainant's opportunity to observe, she found that the lighting in the various rooms and office where the robbery took place was of such a nature that the assailants could be observed clearly. As a result of the fact that both complainants spent at least half an hour in the company and close proximity of their assailants they had ample opportunity to observe them. Mr Charles testified that he specifically observed their assailants carefully so that he could identify them at a later stage. Mrs Charles similarly was in close proximity of the First Appellant and she watched him intently for at least 4 to 8 minutes without the cover over his eyes.

- 20] A further indication of the reliability of the evidence of the complainants relating to identification is the fact that they were able almost a year later to identify some of their assailants but in particular First and Second Appellant. They were also able to identify First and Second Appellants at a subsequent identification parade.
- 21] The complainants in their evidence in chief described the features of the Appellants in some detail and if these descriptions were inaccurate one would have expected their legal representative to join issue with the complainants during cross-examination with regard to any features described inaccurately. In the absence of such challenge by their legal representative the Court is constrained to accept that the evidence fitted the description of the Appellants⁵.

⁴ *S v Zitha* 1993 (1) SACR 718 (A)

⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC)

- 22] It was submitted on behalf of the Appellants that the fact that Mr Charles was unable to confirm his identification of the First Appellant in evidence has the effect that both Mr and Mrs Charles should have been regarded as single witnesses and the trial magistrate erred by not applying the applicable cautionary rule when evaluating such evidence. The court is mindful of the following instructive remarks by Dietmont JA in this regard:

" There is no rule of thumb or formula to apply when it comes to a consideration of the credibility of a single witness... The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite its shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense"⁶

- 23] The trial magistrate, in my view, in applying the cautionary rule with regard to the evidence relating to the identification of the Appellants also evaluated the merits of the complainants as witnesses and properly weighed them against factors which militate against their credibility. As such the fact that the complainants could be regarded as single witnesses with regard to the Appellants' identities should also be considered in the light of the totality of the evidence.⁷

- 24] Appellants' counsel also submitted that the fact that Mrs Charles recognized one of the men asking for water as the leader when they were robbed may have provided a suggestion to her that the other three men were part of the gang who robbed them. Her evidence relating to the subsequent recognition of the First Appellant while driving passed the men, however, strongly militates against such a possibility.

⁶ *State v Sauls* 1981 (3) SA 172 (A) 180 E-G

⁷ *State v Webber* 1971 (3) SA 754 (A)

- 25] When considering Appellants' alibi defense the late disclosure of an alibi is one of the factors to be taken into account when evaluating the evidence of an alibi. It does not justify an inference of guilt standing alone but is a factor to be taken into consideration in determining the weight to be placed on the evidence of an alibi. Absence of a prior warning is a matter which goes to the weight to be placed on the late disclosure of an alibi. In view of the fact that the Appellants were arrested almost a year after the robbery I am of the view that not much weight can be afforded to the late disclosure of the alibi defences.⁸
- 26] The Appellants did not make a favourable impression on the trial magistrate. They contradicted themselves, each other and also the instructions given to their legal representative in respect of the alibi defence. In this regard it is significant that the Appellants attorney quite fairly during argument did not make submissions with regard to the alibi defence but in view of the evidence left it in the hands of the court. In this regard I am of the view that we should necessarily defer to the trial court's findings of credibility because of the advantages it had of seeing and hearing the various witnesses.
- 27] An accused claim to the benefit of doubt when it may be said to exist must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with or outweighed by the proved facts of the case.⁹
- 28] When considering the totality of the evidence I am satisfied that the Respondent has proved its case beyond reasonable doubt and I would consequently dismiss the Appeal and confirm the convictions and sentences.

⁸ *State v Thebus and another* 2003 (6) SA 505 (CC)

⁹ *State v Phallo* 1999 (2) SACR 558 (SCA)



VAN DEN HEEVER AJ

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I agree and it is so ordered



CLEAVER J