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

CASE NUMBER: A206/2012

DATE: 01 JUNE 2012

In the matter between:

XAVIER VALENTINE Appellant

and

THE STATE Respondent

J U D G M E N T

CLOETE, AJ:

The appellant, who was legally represented throughout the trial, was convicted, as charged, on 9 November 2011 in the Parow Regional Court on two counts of robbery with aggravating circumstances and sentenced on 16 November 2011 to an effective five years direct imprisonment. With the leave of the trial court he now appeals against both his conviction and sentence.

The appellant had pleaded not guilty and had exercised his right to remain silent and not to provide a plea explanation.

The State called three witnesses, being the two complainants and a security officer, Mr Mkuntse who was one of the people who had apprehended the appellant. The latter testified in his own defence and called his sister, Ms Barends, to testify on his behalf.

It was common cause that on the evening of 23 May 2011 the two complainants were robbed of their cell phones while standing on the platform at Netreg train station in Bishop Lavis, and that they subsequently identified the appellant as the perpetrator. Both cell phones as well as the firearm allegedly used in the robbery were never found. The only issue in dispute was whether the complainants had correctly identified the appellant.

The first complainant, Mr Masebe, testified that the robbery had occurred at dusk at about 6:15 p.m. A male person wearing a grey Nike top with a hood pulled over his head and black tackies approached him and his companion, Ms Kolokoto, the second complainant. The person had a firearm in his hand which he pointed at Ms Kolokoto, who was talking on her cell phone, and instructed her to hand the cell phone to him, which she did. He then pointed the firearm at Mr Masebe and demanded his cell phone, which he took out of his jacket

pocket and handed over. The person then put the gun into the side of his clothing and moved towards the steps leading down from the station platform where three others were waiting for him about 8 meters away. Mr Masebe chased after the attacker but stopped when the latter's companions started throwing stones at him.

Shortly thereafter a train pulled into the station and four security officers climbed out. Mr Masebe reported the incident to them and they apparently told them that there was nothing they could do since the perpetrator and his companions had already fled the scene. According to Mr Masebe, it had been five minutes later that the perpetrator was again seen by him on the station platform. This time the perpetrator was alone. Mr Masebe called the same security officers who had alighted from the train a few minutes earlier. They ran towards the appellant, who was standing with his back to them, and apprehended him. The appellant was found in possession of his own identity document.

Mr Masebe also testified that although it was dusk when the incident occurred, he could clearly see the perpetrator's face. He could not however dispute the appellant's version that he had already been standing on the station platform when Mr Masebe had returned after pursuing his attacker. He could

also not dispute the appellant's version that the train from which the security officers had disembarked had only pulled into the station about 30 minutes after the incident. Mr Masebe conceded that he was in shock after the robbery to the point that he was crying when he identified the appellant as the perpetrator.

During her testimony Ms Kolokoto confirmed Mr Masebe's version of events, although she claimed that the perpetrator had again been seen on the station platform five to 10 minutes after the incident. She testified that when the appellant was confronted by the security officers, he told them that he was waiting for his sister to arrive by train.

During cross-examination it was put to Ms Kolokoto that when the appellant was apprehended, he was wearing a red and black hooded top bearing the logo "Quicksilver" and brown and orange tackies. She was adamant, however, that his tackies had been black and that he was wearing a grey hooded Nike top.

Despite having initially testified that the perpetrator was again spotted on the station platform about five to 10 minutes after the incident, it is clear from Ms Kolokoto's subsequent evidence that this could not have been the case, since she

said that the train from which the security officers had disembarked pulled into the station at 6:55 p.m. or 7 p.m. This must mean that about 30 minutes had passed since the robbery before the train arrived. She confirmed that she too was extremely shocked after the incident.

Adding further doubt as to the timing of events was the testimony of the security officer, Mr Mkuntse who said that he had only arrived by train at the Netreg station at 7:20 p.m., thus approximately an hour after the robbery allegedly took place. Mr Mkuntse confirmed that the appellant was simply standing on the station platform and had said that he was waiting for his sister to arrive by train. Mr Mkuntse could not recall the colour of the appellant's clothing or tackies, nor did he volunteer that the appellant's clothing had any distinctive features.

No other witnesses were called by the State to corroborate the complainant's testimony relating to the clothing worn by the appellant, despite Mr Mkuntse's evidence that he had been assisted by the other security officers when apprehending the appellant and that the appellant had subsequently been handed over to the police.

The appellant testified that he received a call and immediately

thereafter left the home which he shared with his family, including his sister, at 6:26 p.m. that evening, in order to meet her at the station for safety reasons. It is about a 35 minute walk and he arrived there at 6:50 p.m. He usually met her at Bishop Lavis station but because trains were delayed that day she had requested him to collect her at Netreg station. She was scared to walk alone, because she had been robbed at that station on previous occasions.

When he reached the station he waited on the platform for her train to arrive. He was confronted by the security officers who demanded to know if he had robbed anyone and where his firearm was. He informed them that he had no knowledge of any robbery and that he was simply standing on the platform waiting for his sister. He claimed that the security officers then assaulted and handcuffed him and pulled him away from the platform. He sent his sister a text message to call him.

The appellant maintained that he was wearing a black, hooded top bearing the logo "Quicksilver" and orange and light brown tackies. He had pulled his hood over his head since it was raining. He explained that he had not run away when approached by the security officers since there was no reason for him to do so. He had only been standing on the station platform for five minutes before he was apprehended by the

/LHC

security officers.

The appellant testified that after he was taken from the platform he noticed a missed call on his cell phone from his sister. She arrived at the station about 15 minutes later. He was cross-examined about how exactly his sister had arrived at the station. His evidence was that she had walked there from their home, apparently accompanied by a family friend and that when she arrived her clothing was wet.

The appellant denied that he owned any clothing of the type described by the complainants. The appellant's sister confirmed that she had contacted him by text message and a phone call at 6:25 p.m. on the evening in question requesting him to meet her at Netreg station. She was able to provide detail as to why she could confirm the time of her text message. That detail was not seriously challenged during cross-examination.

When the appellant's sister eventually arrived at the station she could not see him on the station platform. Her cell phone was running out of airtime and she and her colleague decided to start walking. It began to rain and they walked quickly. As she arrived home, she saw a text message from the appellant, asking her to call him, which she then did. The appellant told

her that he was with the security officers and sounded to her as if he wanted to cry. She immediately left home and ran back to the station in the rain with a family friend. She confirmed that when she got there, the appellant had been assaulted.

The appellant's sister confirmed that he was wearing a black Quicksilver hooded top which she said she had purchased for him on her Edgars account, and red and light brown tackies. She denied that the appellant owned a grey hooded top.

It was against this background that the prosecutor correctly submitted in the Court *a quo* that although the State witnesses appeared to have been honest in their testimony it could not be said that objectively the evidence was sufficiently reliable to discharge the onus that rested upon the State to establish the guilt of the appellant beyond a reasonable doubt. He also correctly highlighted the fact that the appellant's conduct before he was apprehended was inconsistent with that of a person who had just committed two serious offences.

This notwithstanding the magistrate convicted the appellant after having reasoned as follows:

1. The two complainants had sufficient opportunity to

look at the appellant's face during the robbery itself.

2. After identifying the appellant by his clothing, when he later stood with his back to them on the station platform, they had recognised his face once he had turned around.

3. There were some contradictions in the evidence of the appellant and his sister which she regarded as material. In particular the evidence that according to the appellant his tackies were orange and light brown and according to his sister they were red and light brown. She also regarded the contradiction in their testimony about whether the appellant's sister had sent him a text message as well as having called him to meet her at the station, as sufficient to place real doubt on their version.

4. She found as a fact that the identification of the appellant took place 10 to 15 minutes after the robbery.

5. She delved into what can only be described as speculation about the presence of Ms Barends' work colleague when she arrived by train with him at the station and why, if the appellant and his sister were to be believed, they were content to leave Ms Barends' eight year old daughter alone at home every day for an hour so that the appellant could meet his sister at

the station in accordance with their arrangement. I say that this was speculation for the simple reason that neither of these two aspects had been sufficiently canvassed during the course of the trial.

In my view the magistrate was wrong in reaching the conclusion which she did. Of crucial importance was the timing of the robbery and the subsequent identification of the appellant. The evidence of both complainants showed that they had identified the appellant not minutes after the robbery as the magistrate found, but at least half an hour thereafter. The evidence of Mr Mkuntse was of no assistance in this regard since on his version he only arrived at the station at 7:20 p.m. which was an hour after the robbery.

It is not understood how the Magistrate in her judgment could have accepted Mr Mkuntse's evidence, then criticised the appellant's legal representative for not having challenged him on this aspect – although it was in the appellant's favour – and then found as a fact that the complainants identified the appellant as the perpetrator only 10 to 15 minutes after the robbery. The timing of the appellant's presence on the station platform to meet his sister about 30 minutes after the robbery was not only supported by the testimony of the complainants themselves, but also by that of the appellant and his sister.

Contrary to the magistrate's finding it is my view that the evidence of the appellant and his sister corroborated each other in all material respects. Despite having had the opportunity to do so, the State called no other witnesses to confirm what clothing the appellant was wearing when he was apprehended and subsequently arrested. It also cannot be said that the appellant's testimony that his tackies were orange and light brown, and his sister's testimony that they were red and light brown, constitutes a material contradiction. Further the evidence of the appellant and his sister that her clothing was wet when she arrived back at the station after he was apprehended, was not challenged.

However, having found the evidence concerning the appellant's tackies to constitute a material contradiction in the evidence of the defence witnesses, the magistrate appeared to attach little or no weight to the other evidence regarding the appellant's clothing and instead concentrated on the reliability of the complainants' identification of the appellant's face. In this regard the magistrate based her conclusion on the reliability of that identification on an incorrect assumption, namely that the identification had taken place 10 to 15 minutes after the robbery when on the evidence of all the witnesses it had to have been at least 30 minutes later.

/LHC

And it was common cause that both complainants were in shock; that the appellant's conduct prior to him being apprehended was not that of a person who had just committed two serious offences; and that the complainants' cell phones and the weapon allegedly used during the robbery were never found.

It is trite that the honesty of a complainant cannot on its own translate into reliability and, having regard to all of the evidence before the Court a *quo* it is my view that the magistrate was wrong in concluding that the appellant's version was not reasonably possibly true. She misdirected herself in convicting the appellant and the appeal must succeed.

In the result I propose the following order:

1. **THE APPELLANT'S APPEAL AGAINST HIS CONVICTION AND SENTENCE IS UPHELD**.

2. **THE CONVICTION AND SENTENCE ARE SET ASIDE**.

CLOETE, AJ

/LHC

I agree and it is so ordered:

5

BLIGNAUT, J

/LHC