

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A16/2012

In the appeal between:-

WELLINGTON MASILO

Appellant

and

THE STATE

Respondent

CORAM:

MOLOI, J *et* PHALATSI, AJ

HEARD ON:

19 AUGUST 2013

JUDGMENT BY:

PHALATSI, AJ

DELIVERED ON:

29 AUGUST 2013

[1] The appellant was charged with robbery with aggravating circumstances in the Regional Court at Welkom. He was convicted on the said charge on 7 June 2011 and sentenced to 10 (ten) years imprisonment. He came before us on appeal against his conviction, by leave of the Court *a quo*.

[2] The evidence in this matter is largely common cause in that it was not disputed by the appellant that a robbery took place at Edgars, Welkom, on 1 February 2009, where cash in the amount of R8 550.00 was taken from the personnel of the

said Edgars. The only point in issue was the identity of the appellant, as he (appellant) raised the defence of an alibi.

- [3] The State called the evidence of four witnesses, as well as the record of the identity parade and the video footage, in support of its case that the appellant was one of the two people who committed the robbery. For the purpose of the appeal, the evidence of Annie Blom is not relevant, as she testified that she did not see the appellant on the said day. The appellant testified in his own defence and called Walton Tyala as a witness to confirm his alibi.
- [4] The first state witness was Kgotleng Hlohlolo, who testified that at the time of the incident he was employed by Edgars and on the morning of 1 February 2009, he was on duty. He saw two male persons standing with his co-employee, Maluka, but what was strange was that the two male persons were on the other side of the counter, which was reserved only for the personnel of Edgars and not members of the public. He went to enquire, but one of the assailants pointed him with a firearm and he was ordered to go and knock at the “cash office”, where money was taken from. He, Maluka, and the other witness, Kholoane were forced into the cash office where Annie Blom was ordered to put money in the sports bag. He saw the appellant as one of the assailants and he pointed him (appellant) out at the identity parade, which was held later. Before he could attend the identity parade on 28 May 2009, he had occasion to look at the video footage of the robbery and also discussed the

matter with his colleagues. It appeared, from the information he gained from other colleagues, that the appellant had worked at Edgars in Welkom before.

[5] Thabang Eric Kholoane was the next witness who testified. He testified that he firstly met the appellant on the day of the robbery at the bathroom of Edgars and a certain Gert told him (the witness) that the appellant was Wellington and was previously employed at Edgars. Gert greeted the appellant, but he (the appellant) avoided them and pretended to be talking on his cell phone. He again saw the appellant when he was holding a shining object against the neck of Maluka when they were taken to the cash office. The appellant was wearing a white cap and white striped T-shirt. He later, during cross-examination, said he heard the name Wellington in court. He also pointed the appellant out at the identity parade. He could identify the appellant even though he froze for a while when he saw the appellant holding a shining object against the neck of Maluka.

[6] Lazarus Mokoena testified that he was employed at Wimpy, which is in the same Liberty Centre as Edgars in Welkom. On the morning of the robbery he was going to deliver food to one of the personnel at Edgars. He had to go to Edgars through the security gate from the basement. He knocked for security officers to open and two unknown male persons responded by opening the door. He later identified one of these male persons as the appellant and also pointed him out at the identity parade. The appellant was wearing a cap

and had a bag in his possession when he saw him. He did not identify him by any special features.

[7] Maluka Sylvia Ramosedi testified that she was helping a customer when two male persons came to where she was in the shop. She wanted to help them, but the other one was busy on his cell phone. After helping this customer, the two males came to her to the side of the counter where she was. She asked them whether she could help them as they were not allowed to be on that side of the counter. They then took out a firearm and told her that she could be helpful by knocking at the door. They showed the door where she was supposed to knock with the firearm. She became frightened and Khotleng came. Khotleng was then pointed with this firearm and Eric also came and was told to join them. They then all went to the cash office, together with the two assailants. She identified one of the robbers as the appellant and testified that she also pointed him out at the identity parade. Some unknown object was placed on her neck and she thought that she was dead. All this happened very quickly and in the cash office, they were tied up and left there.

[8] The report of the identity parade was read into the record and accepted as Exhibit "F". What is worth noting from this report is that there were nine people in all, including the suspect (appellant), who were said to be more or less of the same age. The ages of the people are noted as 25, 26, 27, 28, 30, 39 and two who are 29 years of age. Only the

suspect (appellant) is 45 years of age. In the light hereof I find it interesting that it is said that the people who were there were of more or less the same age, except for the appellant. The court also put on record what it had observed from the video footage. The essence thereof is that the faces of the people committing the robbery are not visible from the footage, but the person with a white cap is wearing a floral shirt. The State then closed its case.

[9] The accused then testified that he went from Bloemfontein to Kimberley on the 31st of January 2009 to go and visit his ailing father. After buying groceries with his mother, he went to a tavern, where he met a prostitute lady called Naomi. He then went to a guest house called Didimalang there in Kimberley, where he booked in from the 31st of January to the 2nd of February 2009 with this lady, Naomi. He also produced a receipt as proof of the fact that he was booked there and it was accepted as exhibit "H". In cross-examination, other than it being put to him that he was the one who robbed at Edgars in Welkom, as identified by the State witnesses, nothing more came out.

[10] Mr Walton Tyala testified that the guest house, Didimalang, is a family business and he is the one who is running it. He further testified that he is always there, as he is staying on the premises. He further testified that on the 31st of January 2009 the appellant booked a room at the guest house in the company of a female companion. He furthermore testified that the following day, the 1st of February 2009, between

10h00 and 11h00 in the morning, the appellant gave him the key to the room which he (the appellant) had booked, in the driveway of the guest house and told him that they (the appellant and his companion) were going to town. In cross-examination by the prosecutor he testified that he knows the appellant from Kimberley by sight, but that he does not know his parents. On the question as to how was it possible that he remembered what happened two years prior to his testimony so vividly, he replied that some days after the appellant had stayed at the guest house, he received a telephone call from a policeman who enquired whether the appellant had stayed there and he confirmed after he had checked his books. That, he said, is what made him not to forget the incident. The court then asked questions, which, I must say, was an unusually lengthy judicial questioning. Be that as it may, it was put to the witness that the times that he testified on were an estimation, which he confirmed. Then it was put to him that the time that he saw the appellant on the 1st of February 2009, could have been earlier and the witness replied that it could have been earlier or a little later.

- [11] In its judgment, the trial court finds that Tyala could not precisely recall the date on which the incident occurred and he was not precisely sure of the actual time at which he saw the appellant and the lady when he was at the driveway and conceded that it could be an hour or two earlier than 10H00 or 11H00. The trial court is further of the view that the evidence of Tyala did not corroborate the appellant's version as to where he (appellant), was on the 1st of February 2009.

- [12] These findings and observations are difficult to comprehend, for the following reasons:-

Firstly, it is trite that where the defence of the accused is an alibi, that fact should be disclosed to the State at the earliest possible opportunity, to enable the State to investigate and verify the alibi. *In casu*, it would seem that the police were told about the alibi upon the arrest of the appellant and they did call Tyala, who confirmed it (the appellant's alibi). It would seem, however, that the police did not follow it up, for the reasons that are not apparent from the record. The trial court, however, does not question this obvious omission on the part of the State, which should have put this matter to rest, without having to speculate.

- [13] It is also never possible for a witness to precisely recall the date and time as to when an incident occurred and to criticise and reject the evidence of a witness on the basis that he/she was not precisely sure of the time, is to place too high a burden on the witness. *In casu*, the witness Tyala did say that he was not making a mistake about the date on which the appellant booked in at the guest house and the day that he saw the appellant when he gave him the keys, which was the 1st of February 2009. He did concede that the time between 10h00 and 11h00 is an estimate and that it could have been earlier or a little later, but he never said an hour or two earlier, as found by the trial court. The uncontested evidence is that the robbery was committed on the 1st of February 2009, at about 10h00 in Welkom and

Tyala testified that he saw the appellant on the 1st of February 2009 at about 10h00 or 11h00 in Kimberley. I therefore do not understand how the trial court could have come to the conclusion that this uncontested evidence of Tyala did not corroborate the appellant's version as to where the appellant was on the 1st of February 2009. This is a clear misdirection on the part of the trial court.

- [14] The trial court also appears to have rejected the evidence of Kgotleng Hlohlolo, on the basis of, among other reasons, that he did not have sufficient time to observe the appellant, because he was frightened. This finding was made despite the fact that the witness identified the appellant at the identity parade. The trial court, however, accepts the evidence of the other witnesses and finds that the State's case against the appellant is overwhelming. The common aspect of the evidence of all the witnesses who identified the appellant is that they had very limited time to observe the appellant, yet they were very sure that it is the appellant who they saw on the day of the robbery. It would seem from the report of the identity parade that they all did not take time to identify him. I have already alluded to the fact that the appellant was the only "oldie" of all the other participants at the identity parade, which would make him easily distinguishable from the others. The date of arrest of the appellant is 2 March 2009 and the date of his first appearance in court is 28 April 2009, according to the charge sheet. The appellant again appeared in court on 22 May 2009 and on 28 May 2009, six days after the second

appearance by the appellant in court, the identity parade was held. This leads to the unsatisfactory state of affairs where the suspect is taken to the identity parade after he has twice appeared in open court, which could have given the state witnesses the opportunity to identify the suspect beforehand.

[15] In **S v Liebenberg** 2005 (2) SACR 355 (SCA) at 359c – d the court found at follows:

“Where a defence of an alibi has been raised and the trial court accepts the evidence in support thereof as being possibly true, it follows that the trial court should find that there is a reasonable possibility that the prosecution’s evidence is mistaken or false. There cannot be a reasonable possibility that the two versions are both correct.”

I have already found that the trial court misdirected itself by rejecting the evidence in support of the appellant’s alibi and I find that the said evidence is possibly true. I have also shown the pitfalls in the State’s evidence, which indicate that there is a reasonable possibility that the said evidence is mistaken or false. In the light of these findings, it is clear that the appellant’s conviction cannot be sustained and should be set aside.

[16] I therefore make the following order:

1. The appeal succeeds.

2. The Court *a quo*'s order is set aside and replaced with the following order:

“The accused is found not guilty and discharged.”

N.W. PHALATSI, AJ

I concur.

K.J. MOLOI, J

On behalf of appellant:

Adv L. Smit
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv C.F. Steyn
Instructed by:
Director of Public Prosecutions
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