IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: **NO**
(2)	OF INTEREST TO OTHER JUDGES: **NO**
(3)	REVISED: ✓

..... 14/03/2018
SIGNATURE **DATE**

CASE NO: 552/2016

In the matter between:

WITNESS HOVE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

THOBANE AJ,

[1] This appeal has its origins from the Regional Court sitting in Pretoria. The appellant faced a charge of robbery with aggravating circumstances as well as a count of possession of suspected stolen property. He was legally represented throughout the trial, pleaded not guilty to both counts and as a plea explanation simply stated that he did not assault and rob the complainant and secondly that no items were found in his possession.

[2] The appellant was found guilty on count 1, the aggravated robbery count and acquitted on the second count, that of possession of suspected stolen property. He was sentenced to 15 years imprisonment and was in terms of section 103(1) of the Firearms Control Act 60 of 2000, declared unfit to posses a firearm.

[3] On 2 September 2013 the appellant launched an application for leave to appeal which was not successful. The petition which had been lodged in this court was also refused. This appeal, which is directed at the conviction only, is with leave of the Supreme Court of Appeal.

[4] The appellant attacks the conviction on the basis that the court *a quo* erred in its finding that he was properly identified. The appellant further advances an argument that the court *a quo* failed to treat the evidence of the complainant, being a single witness, with the necessary caution.

[5] The facts giving rise to the conviction of the appellant are briefly as follows;

5.1. On 10 October 2008 the complainant Sello Mofola was driving an Opel Kadett on the R25 near Bapsfontein. A motor vehicle he was following slowed down while another one which drove parallel to him sought to push him off the road. There was also another vehicle at the back. The three vehicles effectively boxed him in forcing him to stop his vehicle.

5.2. Once stationary a shot was fired and he was told to move to the passenger seat. Another person entered the vehicle and sat at the back. They started to strangle him and were trying to tie his hands. He was fighting back. As the vehicle was moving he was pulled towards the backseat and eventually ended up sitting there with one of the assailants.

5.3. Once at the backseat he managed to open the door of the motor vehicle while it was in motion and got out. He fell and in the process sustained injuries.

5.4. Another vehicle, a BMW, stopped to find out what was happening. The driver of the vehicle offered to go to the police station which was not that far away. The police arrived soon thereafter. They untied his hands and took him to the police station. He was later taken to the hospital where he received medical attention.

5.5. The following day he received a call to come to the police station to identify some items. Some of the items that had been taken away during the robbery the day before were positively identified. Among them was a wallet of the owner of the vehicle one Nkosinathi Ncube. Among the items was also a bag which he went through. Inside the bag was clothing as well as a photo album. When going through the photo album he was able to identify one of the suspects and immediately alerted the police. The clothes in the bag were a black lumber jacket with some purple color, black pants and a cap, which according to him one of the robbers wore on the night of the robbery. He had been able, on the day of the robbery, to identify one of the robbers through the light inside the car which had initially been on but was later switched off.

5.6. Having been informed that the suspect was in custody, he requested to see him but was not permitted to. The next time he saw the suspect was when he appeared in court. He spontaneously identified him when he saw him. No formal identification parade was held.

[6] The owner of the motor vehicle that the complainant drove, Mr Nkosinathi Ncube testified that he had lent his vehicle to the complainant and that after it was hijacked it was never recovered. He stated that he was called

by the police to attend to the police station. Once at the police station, in the presence of the complainant, he was able to identify items which were in his vehicle. He was able to identify car speakers, an amplifier and some tools. He stated further that there was also a bag with some clothes. Inside the bag he also saw a photo album with photos from which the complainant was able to recognize one of the robbers. He was present when the complainant went through the album and made an identification. The items that belonged to him were eventually returned to him including his wallet which had been in the car when it was hijacked. It also came out during cross examination that Mr Ncube visited the accused in prison and was provided with names of persons the accused believed could have information about the hijacked motor vehicle.

[7] Constable Pheme testified that he received a complaint from the 10111 call center about a hijacking. He proceeded to an informal settlement area in Bapsfontein where an informer pointed at a shack where the stolen goods were found. The suspect was also pointed out by the informer. When asked about the goods found in the shack the appellant failed to give an explanation. He was then arrested. The goods were taken to the police station to be booked in and there was also a bag with clothes inside. He denied that the goods were already in the police vehicle when the appellant was arrested.

[8] The appellant testified in his own defence and called no witnesses. He stated that he was at his place and was approached by two policemen in uniform as well as a third person who was not in uniform. The police wanted to search the house. They proceeded to the house and while busy searching he explained to the police that there was a bag and shoes that had been left by people who were staying next door. He was then arrested and taken to the police bakkie where he found the car speakers and radio. He stated that on 10 October between 08h00 and 17h00 he was at work. At the time he had bee staying with one Lovemore but his whereabouts were no longer known to him.

[9] During cross examination he stated that the bag left by his erstwhile neighbours had been at his place for about a month before the arrest. He never opened the bag to check what was inside. He however disputed that there was a photo album in the bag. With regard to the speakers he stated that he found them at the back of the bakkie and had no idea where they were from.

[10] It is settled that a court of appeal will not interfere with a finding of fact and credibility made by the trial court. The reason for this is simply that the trial court sees and hears the witnesses and is steeped in the atmosphere of the trial. It is in a position to take into account a witness' appearance, demeanor and personality. In the absence of factual error or misdirection on

the part of the trial court, its finding is presumed to be correct. ***Rex v Dhlumayo & Another 1948(2) SA 677(A) 705-6.***

[11] As a consequence of the aforementioned, the ambit for the interference by the appeal court on a finding of fact and credibility is restricted to a few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong. Factual errors may be errors where the reasons which the trial judge provides are unsatisfactory or where he/she overlooks facts or improbabilities. Also, where the finding on fact is not dependent on the personal impression made by a witnesses' demeanor, but predominantly upon inferences and other facts, and upon probabilities. The appeal court is also in an equal position to the trial court regarding the facts that are found to be correct by the trial court. ***S v Hadebe and Others 1997 (2) SACR 641 (SCA) t 645e- f. S v Bailey 2007 (2) SACR 1 (C).***

[12] When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. See ***S v Van der Meyden 1999 (1) SACR 447 (W) stated at 450***:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might

be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

[13] The complainant testified that he was able to identify the appellant in the car because initially the light in the car was on but was later switched off. While at the police station he spontaneously identified the appellant in the photo album that was in a bag found in his shack. The identification was observed by Mr Ncube who was with him at the police station. It must be borne in mind that the appellant was at the time in custody and the complainant had not seen him. He was further not permitted to see him when he asked. When the appellant appeared in court, the complainant was able to spontaneously identify him again. This time around he informed people who were in his company that the appellant was one of the robbers.

[14] The criticism directed at the trial court, that it failed to treat the complainant's evidence with the necessary caution, is in my view without foundation. I say this in light of what the magistrate said when he delivered his judgment. He stated the following;

> *"The state relies on the single evidence of Sello Mogola about the robbery. Such evidence have to be approach by the court with some caution. Another which comes into play is that this incident occurred during night and this brings identification of a suspect [indistinct]. Section 220 of the Criminal Procedure Act of 1977 read as follows;*

'That an accused may be convicted of any offense on the single evidence of any competent witness. The court can bears (sic) its finding on the evidence of a single witness as long as such evidence is substantially satisfactory in every material respect or if there is corroboration. The said corroboration need not necessarily link the accused to the crime.'"

[15] The above dicta indicates that the magistrate was alive to the fact that he was faced with evidence of a single witness which ought to be approached with caution. He went on to quote various reported cases as authority for his proposition, *inter alia*, ***S v Hlongwa 1991 (1) SACR 583 SCA, Stevens v S 2005 (1) SACR 1 SCA***. In further applying caution, the magistrate proceeded to deal with what he considered to be corroboration. He referred to the testimony of the complainant in terms of which he stated that the assailants first spoke Zulu and thereafter switched to another language he could not understand. He compared that with the fact that the appellant was both Zulu and Shona speaking.

[16] A further indication of the fact that the magistrate exercised caution is to be found in the judgment where the magistrate deals with the fact that the complainant was able to point out the appellant in a photo album. The magistrate did not simply accept the version of the complainant at face value

but sought corroboration and found it in the version of Nkosinathi Ncube who stated that he was present when the complainant spotted the appellant in a photo album at the police station.

[17] In so far as identification is concerned even though this is not referred to in the judgment by the magistrate, analysis of the evidence however shows that the complainant, testified that while in the vehicle during the robbery he was able to identify one of the robbers through the light in the motor vehicle which had been on momentarily, as indicated above. Counsel for the appellant submitted that the scene was a moving scene and that the appellant could not have, in such circumstances, been able to identify the appellant reliably. While recognizing that the scene was a moving scene, it does not follow as a matter of course that an identifying person could not have been able to make reliable identification for that singular reason. I take note of what is stated in ***S v Mthethwa 1972 (3) SA 766 (AD)***, to which we have been referred by counsel for the appellant. When the reliability of the observation of the complainant is tested, what can clearly be discernible is that whereas there was no prior knowledge of the appellant on the part of the complainant, inside the motor vehicle the appellant would have been within touching distance of the complainant, while the light was on. The opportunity to observe, moving scene not withstanding, would have been sufficient. The fact that the complainant spontaneously recognized the appellant from a photo album, which spontaneity is supported by the owner of the motor

vehicle, would have weighed in favour of reliability on the part of the magistrate, and that much is stated in the judgment. In the end the following statement by the trial court, can in my view not be faulted;

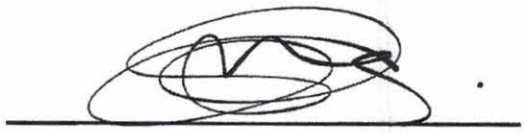
> *"Court is satisfied that he was involved in the robbery and that the identification by Sello Mogola is not faulty, mistaken or false. The Court is satisfied that the accused robbed the complainant with other (sic) of the Opel Kadette belonging to Nkosinathi Ncube."*

[18] The court further took into account the version of the appellant to the effect that the bag in which the photo album was contained, belonged to somebody else. The version of Officer Pheme, is that the items that were registered in the SAP13, were found inside the shack belonging to the appellant. The goods that had been robbed were to be later identified by the complainant and the owner of the motor vehicle. The appellant stated that the bag was left at his shack sometime ago. That version is improbable regard being had to the fact that the wallet, bank cards and speakers belonging to the owner of the vehicle, which had been robbed the night before, were found essentially in the possession of the appellant or at his place of residence.

[19] When all the evidence is accounted for, I am satisfied that the appellant was correctly identified. It follows therefore that the appeal must fail.

[20] I therefore make the following order;

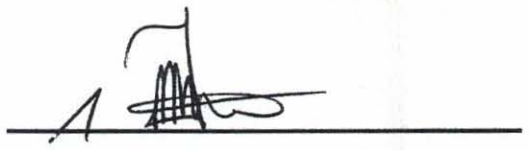
1. The appeal is dismissed and the conviction is confirmed.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA



I agree.

N JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

TA MAUMELA

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA