THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 167/17

In the matter between:

THABO WILLIAM MACHETE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Machete v S* (167/17) 2017 ZASCA 70 (31May 2017)

Coram: WALLIS and DAMBUZA JJA and GORVEN AJA

Heard: No hearing in terms of s 19 of the Superior Courts Act 10 of 2013

Delivered: 31 May 2017

Summary: Robbery – prosecution submitting that evidence of identification of accused unsatisfactory and that accused should be acquitted on appeal to full bench – appeal nonetheless dismissed – appeal upheld – function of appeal court where prosecution does not seek to uphold conviction.

ORDER

On appeal from: Limpopo Division of High Court (Makhafola J, Kgomo J concurring) on appeal from Regional Court:

1 The appeal is upheld.

2 The appellant's conviction and sentence are set aside.

JUDGMENT

Wallis JA (Dambuza JA and Gorven AJA concurring)

[1] Mr Machete, the appellant, was charged in the regional court, Tzaneen, with robbery with aggravating circumstances and after conviction sentenced to imprisonment for 15 years. On appeal to the Limpopo Division of the high court his conviction was upheld but his appeal was reduced to one of eight years' imprisonment. This appeal against his conviction alone is with the special leave of this court.

[2] In the high court the prosecution concluded its submission as follows:

'We pray that the conviction be set aside.'

In this court the prosecution repeated that submission. It summarised its submissions in the following terms:

'The trial court and the high court adopted a wrong approach in their evaluation of the complainant's evidence taking into account his evidence was that of a single witness whose evidence had to be clear and satisfactory in all respects and the fact that for identification to be satisfactory it ought to comply with certain requirements. It is submitted that the complainant's evidence which forms the mainstay of the state's case falls short of the onus resting upon the state.'

Accordingly the prosecution concluded its submission by saying that they 'cannot support the finding that the Appellant was properly identified as one of the robbers'.

[3] It is surprising in the light of the clear statement by the prosecution that Mr Machete's conviction in the regional court was unsafe, that it was not overturned by the high court on appeal. It is astonishing that the high court could disregard the submission by the prosecution that the evidence did not justify the conviction, without even mentioning it or dealing with the careful exposition by the prosecution of the weaknesses in the evidence of identification.

[4] It is open to a court of appeal to uphold a conviction by a lower court in the face of a concession by the prosecution that the evidence led at the trial was insufficient to discharge the onus of showing the

accused's guilt beyond reasonable doubt.[1] But it should only do so after the most careful consideration of the evidence and the reasons for the prosecution adopting that view. If the prosecution has no faith in its case it will be an unusual outcome for the court to say that the evidence nonetheless suffices to discharge that onus. In this instance the high court did not examine the prosecution's reservations and I am satisfied that, had it done so, it would have held that the approach of the prosecution was entirely proper and correct. It must be borne in mind that the function of the prosecution is not to obtain a conviction at all costs, but to present the prosecution case fairly, which includes making concessions whenever it is appropriate to do so. That is what it did in this case and it is to be commended for its stance.

[5] The sole issue at the trial was whether Mr Machete was properly identified as one of three assailants who attacked and robbed the complainant, Mr Mabeka, as he was making his way home from a tavern after watching a football match. Mr Mabeka claimed to have known Mr Machete before the attack, but it was unclear from his evidence where he had previously encountered him. He claimed that Mr Machete was known to his brother-in-law, who had 'shown' Mr Machete to him. The brother-

---

[1] *S v E* 1995 (2) SACR 547 (A)

in-law was not identified and the circumstances of this identification were never clarified.

[6] The assault and robbery occurred at night and a tavern was the source of the light by which Mr Mabeka claimed to have recognised Mr Machete. But there was no evidence of the proximity of the tavern to the place where the robbery occurred, so that there was no basis for the court to assess its sufficiency for that purpose. His evidence was that he had not seen his assailants until they were ‘too close to me’. Although three people perpetrated the attack, Mr Mabeka disavowed any ability to identify the other two robbers and no identification parade was convened. In addition, Mr Mabeka had been drinking in the tavern where he was watching the football and there was no endeavour to ascertain whether his powers of observation were impaired to any degree.

[7] There were also significant contradictions between the evidence of Mr Mabeka and that of the investigating officer regarding the circumstances of Mr Machete’s arrest. In that regard Mr Machete’s evidence was detailed and convincing. Certainly there was no apparent basis upon which it could be rejected and the magistrate ignored it. Indeed his judgment lacked any reference to this evidence and gave no

reason for rejecting Mr Machete's denial that he was involved in the robbery perpetrated on Mr Mabeka.

[8] The approach adopted by the prosecution in the high court and in this court was entirely proper and justified by the evidence. The appeal succeeds and Mr Machete's conviction and sentence are set aside.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: D J Nonyane

Instructed by: Polokwane Justice Centre,

Biccard & Bodenstein, Bloemfontein

For respondent: N Mathabatha

Instructed by: Office of the Director of Public Prosecutions, Polokwane