THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20738/2014
Reportable

In the matter between

SIMON MODIGA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Modiga v The State* (20738/14) [2015] ZASCA 94 (01 June 2015)

Coram: Bosielo and Saldulker JJA and Van der Merwe AJA

Heard: 13 May 2015

Delivered: 01 June 2015

Summary: Criminal appeal against convictions and sentences – appellant convicted on multiple counts – whether the appellant was a member of the gang of robbers – evidence by a single witness – circumstantial evidence – adequacy of the evidence.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Claasen, Pretorius and Makgoka JJ sitting as a court of appeal):

The appeal succeeds partially as follows:

1 The appeal against the convictions in respect of counts 1, 2, 6 and 7 is dismissed. The convictions and the sentences imposed are confirmed.

2 The appeal against the convictions in respect of counts 3 and 4 is upheld. The convictions and the sentences in respect of counts 3 and 4 are set aside.

JUDGMENT

Bosielo JA (Saldulker JA and Van der Merwe AJA concurring):

[1] At approximately 12h30 on 17 December 2007, a cash-in-transit heist took place on the Visgat Road near Vereeniging. A vehicle belonging to Fidelity Cash Management Services (Fidelity Guards) was on its way to its depot in Vanderbijlpark having collected money from Rand Water Board when a group of men waylaid and forced it out of the road. A number of men descended onto it and snatched the money containers. Two stolen vehicles, a Mercedes-Benz and a Mazda Drifter were used in the robbery. Reacting to a radio report, Sergeant Robert Henry Deere (Deere) who was doing patrol duties in the area drove to the scene. Whilst en route to the crime scene he observed a Mazda Drifter

and a Toyota Cressida driving away from the Fidelity Guards' motor vehicle which was parked alongside the road. As these vehicles passed him, some passengers at the back of the Mazda Drifter shot at him. He made a U-turn and chased them. A wild chase concomitant with some shooting ensued. Later that day, four males including the appellant were arrested by police officers in an area called Drie Rieviere.

[2] Subsequently, all the five men were charged in the Vereeniging Regional Court, with multiple offences which included two counts of robbery with aggravating circumstances in that firearms were used; two counts of theft of motor vehicles (the Mercedes-Benz and the Mazda Drifter); attempted murder of Deere; unlawful possession of a machine-gun (AK47); unlawful possession of ammunition for a machine-gun; unlawful possession of firearms and unlawful possession of ammunition. The appellant was convicted on two counts of robbery, two counts of a contravention of s 37(1) of the General Law Amendment Act 62 of 1955 (involving the Mercedes Benz and Mazda Drifter), unlawful possession of a machine-gun (AK47) and unlawful possession of ammunition for a machine-gun. He was sentenced to a cumulative sentence of imprisonment for 45 years.

[3] Aggrieved by his convictions and sentence, the appellant appealed to the North Gauteng High Court, Pretoria. His appeal succeeded partially in that, although his convictions were confirmed, his effective sentence was reduced to imprisonment for 22 years. The court a quo having granted him partial leave to appeal against counts of theft of motor vehicles, this appeal is with the leave of this Court.

[4] I interpose to state that a series of formal admissions were made in terms of s 220 of the Criminal Procedure Act 51 of 1977 (CPA) in terms whereof all the averments regarding the robberies, theft of motor vehicles, possession of firearms and ammunition were admitted. The only issue placed in dispute was the involvement of the appellant in these offences. As a result, this appeal falls to be decided on a narrow compass namely the identity of the appellant as a member of the gang of robbers which robbed the Fidelity Guards that day.

[5] Although the respondent called a number of witnesses, who included police officers, a security officer and the owners of the stolen vehicles and, importantly, the owner of the house where the appellant was eventually arrested by the police, only two witnesses implicated the appellant. These were Deere, the police officer who arrived first at the crime scene and Mr Saul Nxuma (Nxuma), the owner of the house where the appellant was arrested.

[6] I interpose to state that the trial court found the evidence of Deere unreliable as he had contradicted himself on material aspects of the case and therefore his evidence was rejected. It suffices to state that this finding is fully borne out by the record. As a result, I cannot quibble with it. Self-evidently there is no need to refer to his evidence. This resulted in Nxuma being a single witness regarding the appellant's involvement in the crimes. Undoubtedly, as the evidence of Nxuma was pivotal to the conviction of the appellant, it called for a cautious approach and serious consideration.

[7] The general tenor of Nxuma's evidence is as follows: that he is the owner of house number 22 Wallnut Street, Drie Riviere; on 17 December 2007, he was at his home with his four year old boy; whilst relaxing in his bedroom, he heard a commotion and screeching of tyres of a vehicle outside his home in the street; instinctively he peeped through his window to see what was happening; he saw a cream white bakkie with a green stripe on the side at the intersection; there were some males on the back of the bakkie who had fire-arms; the bakkie then made a U-turn and he lost sight of it. On the evidence as a whole this was the Mazda Drifter.

[8] Thereafter he heard footsteps inside his house; he moved down to the ground floor from the upper floor to see what was happening; he was met by an unknown male who had a plastic bag and a long fire-arm in his hand; this unknown man pointed the firearm at him and bellowed 'hamba-hamba' (walk, walk); shortly thereafter a second unknown male emerged into the passage and bumped against the two of them; Nxuma lost his balance and fell; he then stood up and fled to the outside through his sitting room door where he found a number of police officers.

[9] He told the police officers that he had left his son inside the house and that there were unknown people inside. He then re-entered his house with one policeman to fetch his four year old son; they found the appellant on the kitchen floor holding the child; he took the child from the appellant and went outside with him; the police then arrested and hand-cuffed the appellant; they then took him to their vehicle.

[10] It is clear from the record the main purpose of Nxuma's cross-examination by the appellant's counsel was to discredit him by showing,

contrary to his denial, that he and the appellant were acquaintances before this incident, and further that Nxuma was part of the gang of robbers. However, Nxuma persistently denied all suggestions by the appellant's counsel during cross-examination that he knew the appellant and that they were acquaintances; he also denied that the appellant had visited him on the morning of the robbery to fetch R3 000 to pay for motor vehicle parts which he had sold to him; he furthermore denied suggestions by the appellant that he was involved in the robbery.

[11] The appellant testified in his own defence. Although he admitted that he was arrested by the police inside Nxuma's house, he denied that he was part of the gang of robbers; he explained that he came to Nxuma's home at his request. His version was that he was a friend of Nxuma as they were both taxi drivers and from time to time they sold motor vehicle parts to each other. They had known each other for approximately 10 months before this date. On this day, Nxuma came to his home in Pimville, Soweto to fetch certain motor vehicle parts. As Nxuma did not have money to pay him, he requested him to accompany him to his home to fetch the money as apparently one of Nxuma's drivers would bring him money during the day. He explained further that he had been to Nxuma's home before and even went to the house of Spokes, the younger brother to Nxuma.

[12] In an attempt to show that he knew Nxuma and that they were acquaintances, he recounted intimate knowledge to the effect that he knew his brother called Spokes, who was also a taxi driver as well as his son Jomo, who drove a taxi for Spokes, and Nkosana. He also testified that he knew that Nxuma had had marital problems with his wife whom

he later shot and further that after this tragic incident, he tried to commit suicide.

[13] As indicated above, when confronted with this information during cross-examination, Nxuma steadfastly denied knowing the appellant. On being pressed by the appellant's counsel, he stated speculatively that possibly the appellant learnt all his personal information from his younger brother Spokes with whom he did not have a good relationship.

[14] In contradistinction, the appellant testified that Nxuma was part of the gang of robbers; that he saw him in the house talking to two men, one of whom had a bag and, further that when he went down from the upper floor, he saw Nxuma in possession of that bag and, that he appeared nervous.

[15] As already indicated the appellant admitted that he was arrested inside Nxuma's home by the police and that money was found in plastic bags bearing the name Fidelity Guards inside a larger plastic bag and further that a long firearm was also found. According to the evidence this firearm was an AK 47.

[16] It is clear from the record that the appellant had serious difficulties to explain why, if he suspected that Nxuma was part of the gang of robbers he did not tell that to the police when they arrested him instead of arresting Nxuma. His response is that he did not want to get Nxuma into trouble. It also came to light during cross-examination that even after he had voluntarily elected to make a warning statement, he still failed to

disclose this crucial information, as well as the fact that he had seen Nxuma talking to the robbers and further that Nxuma had been holding the bag which contained money belonging to Fidelity Guards. His response was that he was advised by his lawyer, Mr Pienaar not to disclose too many details. Furthermore, the appellant could not give any reasonable explanation why when Nxuma denied that they were acquaintances at his home during the arrest, he did not controvert that.

[17] In evaluating all the evidence, the trial court made positive findings regarding Nxuma's credibility and the reliability of his evidence. Conversely, it found that the appellant's evidence was riddled with material contradictions and improbabilities. In particular, the trial court found the following to be inherently improbable; that faced with the grim reality of an arrest on such a serious charge, the appellant failed to tell the police that Nxuma was the person involved with the robbers; he failed to disclose this to the police at the critical moment when he was arrested for a crime which he did not commit; that he did not tell the police because he did not want to get Nxuma into trouble, that even when the police told him that Nxuma denied that he knew him, he did not tell them how he knew him; that he only disclosed this crucial information much later during his bail application; even in his warning statement which he admitted that he made freely and voluntarily, he never informed the police officer that Nxuma was involved in the robbery and that he saw him in possession of the bag wherein money belonging to Fidelity Guards was found; that he did this because his lawyer, Mr Pienaar had advised him not to say a lot in his statement.

[18] Before us, the appellant's counsel unleashed a three-pronged attack against the judgment of the trial court. Firstly, he submitted that the trial court erred in relying on the evidence of Nxuma, who was a single witness, without applying the cautionary rule. It was contended that Nxuma did not pass the litmus test for a single witness as laid down in *R v Mokoena* 1956 (3) SA 81 (A) as he contradicted himself on material aspects of the case. However the appellant's counsel conceded, correctly in my view, that the Mokoena judgement has been qualified by *S v Sauls and Others* 1981 (3) SA 172 (A). Secondly, it was contended that Nxuma's demeanour left much to be desired as his eyes were shifty whilst testifying; that he was long-winded and evasive with his responses.

[19] Thirdly, relying on *S v Texiera* 1980 (3) SA 755 (A) the appellant's counsel criticised the state for having failed to call essential witnesses namely Nxuma's wife, his brother Spokes or his son, Jomo to corroborate Nxuma. He urged us to draw an adverse inference against the respondent for such inexplicable failure. In conclusion, the appellant's counsel submitted that, absent any rebutting evidence from the state, the appellant's version should have been accepted as being reasonably possibly true and that he should have been acquitted

[20] Regarding counts 3 and 4, the appellant's counsel submitted that the trial court erred in finding the appellant guilty for being in unlawful possession of stolen property without reasonable cause in terms of s 37 of the General Law Amendment Act 62 of 1955 as there was no evidence that the appellant was found in possession of the two vehicles involved in the robbery. It was contended that the admissions made in terms of s 220 of the CPA to the effect that the two vehicles which were used in the

robbery where the appellant was involved were stolen was not sufficient to justify the conclusion that he possessed them. In short, the appellant's counsel submitted that the legal elements of *detentio* and *animus possidendi* were not proved.

[21] On the other hand, concerning the two counts of robbery, the main submission by the respondent's counsel was that, as no misdirection had been shown on the part of the trial court, this Court was precluded by the authority of *R v Dhlumayo & another* 1948 (2) SA 677 (A) from interfering with its factual and credibility findings. It was contended further that, although Nxuma was a single witness, he gave his evidence in a clear, logical and satisfactory manner. It was submitted further that the presence of the Mazda Drifter in Nxuma's garage, the bag containing money identified as belonging to Fidelity Guards as well as the AK47 created overwhelming circumstantial evidence which justified, as being the only reasonable inference against the appellant that he was part of the gang of robbers. The respondent's counsel concluded that the appellant's version was so interspersed with serious contradictions and inherent improbabilities that it could not be reasonably possibly true.

[22] Regarding the contravention of s 37(1) of Act 62 of 1955, the respondent's counsel contended that the s 220 admissions by the appellant to the effect that the two motor vehicles in issue were stolen and further that they were used in the robbery where the appellant was involved, constitute sufficient proof of possession by the appellant. He contended further that it makes little or no difference that, having rejected the evidence of Deere, there is no evidence that the appellant was the driver of any of the two vehicles. It is sufficient that he was part of the

robbery where the two vehicles were used to facilitate the robbery, so the contention went.

[23] It is trite that as a court of appeal we have to show deference to the factual and credibility findings made by the trial court. This is so as the trial court has had the advantage which an appeal court never has of hearing and observing the witnesses as they testify and under cross-examination. As it was stated in *R v Dhlumayo* (supra) at 705 'the trial court is steeped in the atmosphere of the trial'. A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. *R v Dhlumayo* (supra) at 705-706; *S v Artman & another* 1968 (3) SA 339 (A) at 341E-H; *S v Hadebe & others* 1998 (1) SACR 422; [1997] ZASCA 86 (SCA) at 426a-f.

[24] Confronted with a similar argument in *Hadebe* (supra) this Court enunciated the correct approach to resolving such a problem as follows at 426e-I, with reference to *Moshesi & others v R* (1980-1984) LAC 57 at 59F-H:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the Appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step

back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

It should be clear from the above cases that the powers of this Court, sitting as a court of appeal are clearly circumscribed. It does not have carte blanche to interfere with the factual and credibility findings properly made by the trial court.

[25] It is indeed correct, as the appellant's counsel pointed out that there are aspects of the state's case which are unsatisfactory. It is furthermore correct that there were instances where Nxuma was argumentative, gave long explanations and sometimes declined to answer questions during cross examination. I agree that he can be criticised for this. However, the trial court was alive to these aspects and dealt with them in its judgment. Having had the benefit of hearing and observing Nxuma testify which we do not have as a court of appeal, the trial court found that Nxuma's demeanour did not detract from his credibility or the truthfulness and cogency of his testimony. It found such instances to be peripheral to the real issue.

[26] I pause to observe that the record shows clearly that Nxuma was subjected to a lengthy, robust and at times hostile cross-examination from the appellant's counsel. It is clear from the record that the only time when Nxuma became agitated was when the appellant's counsel repeated some questions. Undoubtedly this irritated Nxum, as one can discern from the following responses:

'Ek is `n persoon en die gebeure het by my huis plaasgevind en die polisie het daar gekom en hulle het toe hulle werk gedoen en ek is nie daarop geregtig om instruksies aan die polisie te gee wat om te doen nie'.

This was at time when the appellant's counsel demanded an explanation from Nxuma as to why the police officers did not take certain steps. Much clearer proof of Nxuma's agitation being caused by the manner in which the appellant's counsel cross-examined him is captured in the following response:

'En `n ander versoek wat ek wil rig is dat as u vrae aan my gestel het, dan u moet my `n geleentheid gee om die vrae te beantword en u moet nie woorde in my mond sit nie'.

This occurred at a time when Nxuma, correctly or wrongly thought that the appellant's counsel was badgering him.

[27] Having read the record, these responses by Nxuma appeared to me to be eminently reasonable. When read out of context these responses may appear impolite if not plainly arrogant, but they were direct responses to questions posed. To my mind, they do not cast any shadow on Nxuma's demeanor and candour. As those experienced in trials know that 'demeanour can be a tricky horse to ride'. It is clear to me that Nxuma was naively venting his frustrations at what he thought were unfair questions by the appellant's counsel.

[28] In order to avoid falling into the trap of failing to see the wood for the trees as per the warning expressed in *Hadebe* (supra), I propose to take a step back and consider the entire evidence as a mosaic, consider the strength and weaknesses in the evidence and consider the merits, demerits and the probabilities. See also *S v Trainor* 2003 (1) SACR 35; [2002] ZASCA 125 (SCA) para 9 and *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

[29] I am alive to the fact that the state bore the onus to prove the guilt of the appellant beyond a reasonable doubt and that there is no onus on the appellant to proof the truthfulness of any explanation which he gives nor to convince the court that he is innocent. Any reasonable doubt regarding his guilt must redound to the appellant's benefit. *S v Jochems* 1991 (1) SACR 208; [1990] ZASCA 146 (A); *S v V* 2000 (1) SACR 453 (SCA).

[30] However, as it was stated in *S v Ntsele* 1998 (2) SACR 178; [1998] ZASCA 49 (SCA) at 182a-g

'Die bewyslas wat in `n strafsaak om die Staat rus is om die skuld van die aangeklaagde bo *redelike* twyfel te benys – nie bo elke sweempie van twyfel nie. Ons reg vereis insgelyks nie dat die hof slegs op absolute sekerheid sal handel nie, maar wel op geregverdigde en redelike oortuigings – niks meer en niks minder nie (*S v Reddy and others* 1996 (2) SACR 1 (A) op 9*d-e*). Voorts, wanneer `n hof met onstandigheidsgetuienis werk, soos in die onderhawige geval, moet die hof nie elke brokkie getuienis afsonderlik betrag om te besluit hoeveel gewig daarvan geheg moet word nie. Dit is die kumulatiewe indruk wat al die brokkies tersame het wat oorweeg moet word om te besluit of die aangeklagde se skuld bo redelike twyfel bewys is (*R v De Villiers* 1944 AD 493 at 508-9).'

See also *S v Phallo & others* 1999 (2) SACR 558; [1999] ZASCA 84 (SCA) paras 10-11.

[31] The trial court was aware that Nxuma was a single witness and that his evidence had to be treated with caution. However, it found strong corroboration of his evidence in the undisputed evidence that soon after the robbery, the appellant was found inside Nxuma's home where items which were indisputably involved in the robbery in the form of the Mazda Drifter, the bag containing money positively identified as Fidelity

Guard's property and an AK47 with ammunition, were found. Furthermore, the trial court found that this evidence together with the appellant's patently mendacious version justifies the inference as the only reasonable inference from the proven facts, that the appellant was part of the gang of robbers.

[32] I am mindful of the salutary warning expressed in *S v Snyman* 1968 (2) SA 582 (A) at 585G that even when dealing with the evidence of a single witness, courts should never allow the exercise of caution to displace the exercise of common sense. Equally important is what this Court stated in *S v Sauls* (supra) at 180C-H that:

'In *R v T* 1958 (2) SA 676 (A) at 678 OGILVIE THOMPSON AJA said that the cautionary remarks made in the 1932 case were equally applicable to s 256 of the 1955 Criminal Procedure Code, but that these remarks must not be elevated to an absolute rule of law. Section 256 has now been replaced by s 208 of the Criminal Procedure Act 51 of 1977. This section no longer refers to "the single evidence of any competent and credible witness"; it provides merely that

"an accused may be convicted on the single evidence of any competent witness".

The absence of the word "credible" is of no significance; the single witness must still be credible, but there are, as *Wigmore* points put, "indefinite degrees in this character we call credibility". (*Wigmore on Evidence* vol III para 2034 at 262.) There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). 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 the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569). It has been said more

than once that the exercise of caution must not be allowed to displace the exercise of common sense. The question then is not whether there were flaws in Lennox's evidence – it would be remarkable if there were not in a witness of this kind. The question is what weight, if any, must be given to the many criticisms that were voiced by counsel in argument.'

[33] This is how the trial court approached and assessed Nxuma's evidence. Based on this, I am unable to say that the trial court erred in its accepting Nxuma's evidence as truthful and reliable as it was corroborated by the damning circumstantial evidence. As this Court held in *S v Reddy* (supra) at 8h with reference to *Best on Evidence* 10th ed § 297 at 261:

'The elements, or links, which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence, and consistency* of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish…. Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone….'

I am satisfied that the evidence of Nxuma together with the circumstantial evidence regarding the appellant's arrest at Nxuma's home constituted proof of his complicity in the robbery beyond reasonable doubt. Accordingly, I can find no fault with his conviction on the two counts of robbery. It follows that this Court sitting as a court of appeal cannot interfere with the findings by the trial judge.

[34] However, the appeal in respect of the appellant's conviction for contravention of s 37(1) of Act 62 of 1955 regarding counts 3 and 4

which are competent verdicts on the charges of theft of the motor vehicles is on a different footing. There is no evidence that the appellant was ever in possession of any of the two stolen motor vehicles which were used in the robbery at any given moment. Furthermore, no witness testified that the appellant either drove or was inside any of the two vehicles. It follows that the essential elements of these two offences have not been proved. Absent such proof, it cannot be said that the State had proved his guilt. See *S v Mbuli* 2003 (1) SACR 97; [2002] ZASCA 78 (SCA); *S v Manamela & Another (Director-General of Justice Intervening)* 2000 (1) SACR 414 (CC) 438 para 59 (2). It follows that these convictions cannot stand.

[35] In the result, the following order is made:

The appeal succeeds partially as follows:

1 The appeal against the convictions in respect of counts 1, 2, 6 and 7 is dismissed. The convictions and the sentences imposed are confirmed.

2 The appeal against the convictions in respect of counts 3 and 4 is upheld. The convictions and the sentences in respect of counts 3 and 4 are set aside.

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L.O. Bosielo
Judge of Appeal

Appearances:

For Appellant	:	A B Booysen Instructed by: Legal Aid SA, Pretoria Legal Aid SA, Bloemfontein
For Respondent	:	C L Burke Instructed by: Director Public Prosecutions, Pretoria Director Public Prosecutions, Bloemfontein