THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 604/12

In the matter between:

DAVID SITHOLE **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Sithole v The State* (604/12) [2013] ZASCA 55

(04 April 2013)

Coram: Mpati P, Majiedt JA, Southwood, Plasket, Saldulker AJJA

Heard: 14 March 2013

Delivered: 04 April 2013

Summary: Criminal Law - unrepresented accused - robbery with aggravating circumstances - reliability of identification - evidence of complainant not corroborated – criminal proceedings - right to a fair trial - role of Judicial officers and state prosecutors – lack of fairness and impartiality.

ORDER

On appeal from: North Gauteng High Court, Pretoria (De Jager AJ and Bergenthuin AJ sitting as court of appeal):

1. The appeal is upheld.
2. The order of the high court is set aside and substituted with the following: 'The appeal is upheld and the conviction and sentence are set aside.'

JUDGMENT

SALDULKER AJA (Mpati P, Majiedt JA, Southwood and Plasket AJJA concurring):

[1] The appellant was convicted in the regional court, Mamelodi, Pretoria on a charge of robbery with aggravating circumstances on 20 November 2002. Having found no substantial and compelling circumstances, the regional magistrate sentenced the appellant on the same date to 15 years' imprisonment in terms of the Criminal Law Amendment Act,105 of 1997 (the Act). On 17 July 2006, his appeal to the North Gauteng High Court (De Jager AJ and Bergenthuin AJ) against both the conviction and sentence failed. The appellant was, however, granted leave to appeal to this court on both conviction and sentence by Van der Merwe DJP and De Vos J on 21 September 2011.

[2] Regrettably for the appellant, given the outcome hereof, this appeal comes before us after his release on parole, and after he had served eight years of the sentence.

[3] The main issue in this appeal is whether the appellant, who was unrepresented during his trial, was properly convicted of the charge against him.

I shall also comment on whether he had a substantively fair trial. The events giving rise to the charges upon which the appellant was convicted and sentenced are as follows. The complainant, Ms Nancy Mokoena, testified that at 07h30 on 13 December 2001, she was walking in (the district of) Mamelodi East, on her way to visit her cousin, when she was accosted by two men, both unknown to her, one armed with a firearm, and robbed of her cellphone. They then ran away but a distance away, the one with the firearm fired two shots in her direction. The complainant proceeded to her cousin's home where she reported the incident. Her cousin Mr Edward Leyana then accompanied her to the site of the incident where they found a group of people sitting and drinking sorghum beer at a nearby house. Two of the people from the group claimed that they had seen the incident, and that the robber with the firearm was known to them, and that his name is David and he exercised at the nearby gymnasium. According to the complainant that afternoon, whilst she had been sitting outside her cousin's house, she saw the appellant, walked passed her to the gymnasium. The appellant was then identified as the robber and this led to his arrest.

[4] The appellant's version was an alibi. He denied his involvement in the robbery incident and stated that on that day, he was at work in Sunnyside. The trial court found that the state had proved the appellant's guilt beyond a reasonable doubt and rejected the appellant's version on the basis that it was so improbable and beyond belief that it could not reasonably possibly be true.

[5] On appeal the state contended in its head of argument that the appellant had been wrongly convicted and that he had not received a fair trial. The state confirmed this at the hearing. The state's case against the appellant rested on the evidence of the identification of the appellant by a complainant, who was a single witness to the robbery. In *S* v *Sauls*[1] it was held that when it comes to a consideration of the credibility of a single witness, the trial judge will weigh the evidence, consider its merits and demerits and, having done so, will decide

[1] *S* v S*auls* 1981 (3) SA 172 (A) at 179G-180H.

whether, despite the fact that there are short-comings or defects or contradictions in the testimony, he is satisfied the truth has been told. Futhermore, the exercise of caution must not be allowed to displace the exercise of common sense. The complainant's identification of the appellant in this case was not reliable and was based on what other people had told her, and none of these people testified. There is nothing in the objective facts which corroborates the complainant's identification of the appellant during the actual robbery. The magistrate accordingly erred in concluding that the complainant's evidence was satisfactory in every material respect and that the appellant's guilt was proved on the strength of her testimony, as a single identification witness[2].

[6] As far as the appellant's version is concerned, it appears that the magistrate gave it only cursory and superficial consideration. The magistrate did not follow the rules of assessing the appellant's evidence in the context of all the evidence to determine whether his defence was reasonably possibly true.[3] A court cannot simply reject the accused's version because it finds the prosecution witnesses to be credible. It must substantiate reasons for rejecting the accused's version.[4]

[7] The unreliability of the state's case on identification set out above and the fact that the appellant's version was wrongly rejected as not being reasonably possibly true, must result in the conviction and sentence being set aside.

[8] I deem it necessary to mention that there were disquieting features of the trial which amount to irregularities which were prejudicial to the appellant and which would, in any event, have resulted in the proceedings against him being vitiated. I propose doing no more than to mention them briefly:

(a) the magistrate failed to inform the appellant of his constitutional right to choose

[2] *S* v *Mthetwa* 1972 (3) SA 766 (A) at 768A-C.
[3] *S* v *Van Aswegen* 2001 (2) (SACR) 97 (SCA) para 8.
[4] *S* v *Guess* 1976 (4) SA 715 (A) at 718D-719A; *S* v *Shackell* 2001 (2) SACR 185 (SCA) para 30.

and be represented by a legal practitioner;[5] or his right to have a legal representative assigned to him by the state and at state expense where, as here, substantial injustice would otherwise result;

(b) the magistrate failed to assist the unrepresented appellant during the trial, and on the contrary, curtailed his cross examination concerning a material aspect, namely discrepancies between Leyana's *viva voce* evidence and his police statement;

(c) the magistrate was biased against the appellant by making the following statement at a stage in the trial when the state had not yet closed its case :

'Yes, Sithole. You must consider yourself lucky for getting away with this because even if the firearm is not found, if there is proof that it was fired you look to face prison charges. You must thank your lucky stars'.

[9] An unrepresented accused has a limited appreciation of the legal process and is greatly disadvantaged in legal proceedings, where he or she has to conduct his or her own defence. Judicial officers must ensure impartiality, objectivity and procedural fairness in respect of the unrepresented accused who lacks familiarity with courtroom technique and legal knowledge in order to ensure a fair trial. The judicial officer must assist the unrepresented accused in all facets of the trial, ensuring that only admissible evidence is placed before it.

[10] For more than a decade the appellant has tried to have his conviction and sentence set aside. After he was convicted and sentenced on 20 November 2002, he lodged an appeal against both his conviction and sentence which was heard by De Jager AJ and Bergenthuin AJ on 17 July 2006. In that court, the prosecution was unyielding in its quest to have the appellant's conviction confirmed and continued to contend that the complainant was a satisfactory and reliable

[5] *Hlantlalala* v *Dyanti NO* 1999 (2) SACR 541 (SCA) para 8; *S* v *Rudman*; *S* v *Mthwana* 1992 (1) SA 343 (A) at 382C-H; *S* v *May* 2005 (2) SACR 331(SCA).

witness. The appellant subsequently lodged an application for leave to appeal to this court in July 2007.This application was delayed and postponed on several occasions thereafter.

[11] On 7 January 2010, eight years after being sentenced, the appellant was released on parole. He continued to pursue the hearing of his application for leave to appeal which was eventually heard and granted by Van Der Merwe DJP and De Vos J on 20 September 2011. The state did not oppose this application as it was not convinced that the appellant had been correctly convicted. The state had an opportunity to concede in the court below that the appellant had not been convicted properly, but failed to do so until the matter was heard before this court. It is a travesty of justice that the appellant had to wait more than a decade to finally succeed in having his conviction and sentence set aside, and then only after being released on parole, having served eight of the fifteen year sentence.

[12] In the circumstances, I make the following order:

The appeal is upheld.

The order of the high court is set aside and substituted with the following:

‘The appeal is upheld and the conviction and sentence are set aside.’

H SALDULKER
ACTING JUDGE OF APPEAL

APPEARANCES

For Appellant:	M. Calitz
Instructed by:	Justice Centre, Bloemfontein
For Respondent:	A. Coetzee
Instructed by:	Director of Public Prosecutions, Bloemfontein