THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No 165/09
No precedential significance

In the matter between:

EMMANUEL OLAWALE **Appellant**

and

THE STATE **Respondent**

Neutral citation: **Olawale v The State** (165/09) [2009] ZASCA 121 (2009)

Coram: **Mthiyane, Mhlantla JJA et Wallis AJA**
Heard: **11 September 2009**
Delivered: **28 September 2009**

Summary: Criminal Law ─ Robbery with aggravating circumstances ─ Appeal against conviction and sentence of 10 years' imprisonment ─ Evidence of complainant not corroborated ─ Appellant's version reasonably possibly true ─ Conviction and sentence set aside.

ORDER

On appeal from: High Court, Johannesburg (Epstein AJ, De Jager AJ sitting as a court of appeal.)

1. The appeal succeeds.

2. The conviction and sentence are set aside.

JUDGMENT

MHLANTLA JA (Mthiyane JA and Wallis AJA concurring):

[1] The appellant, an electrical engineer, was convicted in the Johannesburg regional court (Mr Pretorius) of robbery with aggravating circumstances and sentenced to 10 years' imprisonment. His appeal against both conviction and sentence was dismissed in the Johannesburg High Court (Epstein AJ, De Jager AJ concurring). The appellant was, however, granted leave by the court below to appeal to this court against both conviction and sentence.

[2] There is regrettably a paucity of detail on the record, mainly because of the poor manner in which the evidence was elicited from the witnesses, but compounded by the poor quality of the recording and the transcript. The essential facts which led to the conviction of the appellant are the following. The complainant testified that on 18 March 2006 at

about 9 pm he was accosted by the appellant and his companion, whilst walking along the street near the corner of Claim and Kaptijn Streets in Hillbrow. The appellant allegedly produced what he thought was a firearm, but which turned out to be toy gun, pointed it at the complainant and directed him to hand over his cellphone to his companion. The complainant duly complied. After the robbery, he shouted for help and certain municipal workers came to his rescue and apprehended the appellant, whilst the other man escaped. The police arrived and the appellant, who had been assaulted, was arrested. According to the complainant, his girlfriend was present when the incident occurred. He did not know why this fact was not recorded in his statement to the police.

[3] Mr Nkosi Temba, a member of the Metro Police, testified that he was performing patrol duties, with his colleagues, when they were stopped by the complainant. He found the appellant lying on the ground. The complainant reported to him that he had been robbed of his cellphone and said he was alone when the robbery occurred and that the appellant was one of the perpetrators. Mr Temba further testified that upon searching the appellant, he found pepper spray in the appellant's holster and a toy gun lying on the ground.

[4] The appellant testified that he was employed as a security guard (commonly known as a bouncer) at Hilton Plaza Club, Hillbrow. In the course of duty he carried pepper spray. His task was to search patrons when entering and leaving the club to ensure that they did not bring weapons inside. He denied the allegations against him and averred that it was the complainant who had robbed him. He said that the complainant

had falsely implicated him, because he had in the past had altercations with the complainant and his friends when they visited the club.

[5] The appellant described these altercations and suggested that they provided some grounds for suspecting the complainant may have had a motive to falsely implicate him. These are the following. According to the appellant, the first incident allegedly occurred on 8 February 2006. Three unknown men, including the complainant, approached him. They assaulted and robbed him of his cellphone. He reported the incident to the police and laid a charge of assault with intent to do grievous bodily harm. At that stage he was unable to identify the suspects.

[6] According to the appellant, he saw the complainant again on 24 February 2006 when he and his friends were on their way into the club. He recognised them as the same people that had attacked him on 8 February. He tried to search the complainant, but the latter resisted and a struggle ensued. In the course of the struggle he was stabbed. He reported the incident to the police, that night, and a statement was taken at 12.30 am on 25 February 2006. A docket was opened with case number 1759/02/2006, although for some unexplained reason his statement bore case number 1365/03/2006.

[7] His third encounter with the complainant, prior to the alleged robbery, was on 14 March 2006. He was again on duty searching patrons who were entering the club. He found a firearm in the complainant's possession and, after a struggle, confiscated it. He subsequently reported the incident to his employer. On 15 March 2006 he and his employer handed the firearm to the police. An entry was made by the police in the

SAP 13 Register, under number SAP 13/443/2006, and a receipt was issued to the appellant.

[8] The incident on 18 March, which led to the appellant being charged, was his fourth encounter with the complainant and his group. Shortly before the incident, he had seen the complainant and his friends and believing them to be intent on causing trouble, borrowed a gun used to fire rubber bullets from a fellow worker and went home to put on another shirt to conceal the gun. According to him, he met the complainant and his group as he got to his front gate, whereupon the complainant demanded the return of the firearm which had been confiscated by him. He suggested that they go with him to the police station, presumably to collect the firearm. The group attacked and stabbed him and then stole his money and cellphone. The police appeared at the scene and the complainant, who was present, falsely implicated him. He was never afforded an opportunity to explain what had happened.

[9] The appellant's employer Mr Francis Nwandroi, when he testified, corroborated the appellant's version that he carried pepper spray at work. He also confirmed that the appellant had made two complaints to him about incidents that occurred at work and that the appellant had confiscated a firearm from the people he had had an altercation with. This resulted in charges being laid at the police station, that is, an assault charge and a report about the handing in of the firearm. He confirmed that the firearm was handed in by him.

[10] The trial court thought it would be in the interests of justice to call the complainant's female companion and the investigating officer to trace the dockets referred to by the appellant. The complainant's companion

was not available and no explanation was provided for her unavailability. Constable Andrew Maluleke brought the relevant dockets and SAP register in respect of the complaints lodged by the appellant. Exhibit A related to an incident that occurred on 24 February 2006 where the appellant was allegedly stabbed with a bottle at Hilton Plaza. The case number allocated to the matter was 1759/2/2006. The appellant also made a statement setting out the details of the incident. According to the statement he reported that he had been stabbed and robbed of his possessions and that the suspect was a Nigerian and he would be able to identify him. An entry in the SAP register no 13/443/2006 reflected that Mr Nwandroi handed in a firearm on 15 March 2006, with a note that it had been found abandoned.

[11] The trial, court having cautioned itself that the complainant was a single witness, found him to be a credible witness. It found that the probabilities favoured the complainant's version and that he appeared to be a simple person not capable of doing what the appellant had alleged. In regard to the appellant's complaint, the court observed that in his police statement concerning the incident on 24 February the appellant had identified his attacker as a Nigerian, whereas the complainant was a Zimbabwean. The court found that this could not be a mistake and that the appellant could not have been referring to the complainant. Furthermore, the court held that his employer's version about the handing in of the firearm to the police differed from the appellant's, placing particular reliance on the note in the register that the gun had been found abandoned. The trial court rejected the appellant's version on the basis that it was so improbable and beyond belief that it could not reasonably possibly be true. The court below accepted the trial court's conclusions and confirmed the appellant's conviction.

[12] The issue for decision is whether the State established the guilt of the appellant beyond reasonable doubt.

[13] It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.[1]

[14] In evaluating the evidence against the appellant, one must look at the reliability and credibility of the witnesses, consider if any of them had a motive to falsely implicate the appellant and further look at the probabilities of the State's version.

[15] The State's case rested on the evidence of a single witness as to the actual robbery. The evidence of a single witness has to be clear and satisfactory in every material respect. The evidence has to be treated with caution. A court can accept the evidence of a single witness if it is satisfied that it is truthful beyond reasonable doubt.

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[1] *S v Shackell* 2001 (2) SACR 185 (SCA) para 30; *S v V* 2000 (1) SACR 453 (SCA) para 3.

[16] Before us counsel, for the appellant, submitted that the trial court erred in accepting the evidence of a single witness when there were insufficient safeguards to do so. He further contended that the regional magistrate's approach in comparing the two versions was incorrect and that it was not open to him to draw inferences without any evidence from the appellant and finally that the magistrate erred in rejecting the appellant's version. Counsel for the respondent supported the decision of the magistrate.

[17] Regarding the first challenge, I agree that the evidence of the complainant in regard to the actual robbery is not corroborated. As was said in *S v Gentle*,[2] :

'by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable *on the issues in dispute*.'

The complainant testified that his girlfriend had been present during the entire incident and when the police arrived. Mr Temba, however, never saw her. According to him, the complainant was alone and he did not see anyone in the vicinity save for the appellant and the complainant. The issue of the presence of the complainant's female companion was also not mentioned in the complainant's statement. It is clear, therefore, that the witnesses for the State contradicted each other in regard to the presence of the complainant's companion.

[18] The State failed to call the complainant's female companion. No explanation was furnished for her unavailability. It is not known whether she could not be traced or was unwilling to testify. One does not know what she would have told the court. Would she have corroborated the

[2] 2005 (1) SACR 420 (SCA) - para 18.

complainant's version or given a totally different version? In my view, the magistrate should have given greater consideration to this issue, especially since he had deemed it to be in the interests of justice to call this witness.

[19] The complainant had testified that municipal workers had apprehended the appellant. Strangely enough none of these workers were present at the scene, when Mr Temba arrived, to corroborate the complainant's version. Equally strange is the absence of curious bystanders. In the result all these potential sources of corroboration were absent.

[20] The magistrate, and the court on appeal, found it highly unlikely that the complainant would flag down the police if he had been the perpetrator. In my view, this is not the only inference that can be drawn from this circumstance. It is also consistent with the complainant having attacked the appellant as alleged and thereafter, when the police arrived, trying to create the impression that he was the victim to counter a charge of robbery by the appellant. The complainant was never searched. It is thus not known whether he had a cellphone in his possession or not. If the complainant had no opportunity to escape, upon the arrival of the police, a better option would be to falsely implicate the appellant as opposed to running away and risk arrest. By running away, he could have drawn the attention of the police.

[21] In so far as the finding regarding demeanour is concerned, it is so that the trial court had the advantage of observing the complainant while

testifying. In *S v Kelly*,[3] the court held that there can be little profit in comparing the demeanour only of one witness with that of another in seeking the truth. There is no doubt that demeanour can be most misleading. In my view it was dangerous to infer that because the complainant appeared simple he was not capable of devious behaviour, in the absence of corroboration for that view. It seems to me that the trial court made a final evaluation of the complainant's evidence on his demeanour and used it as some form of corroboration.

[22] In my view, there were shortcomings in the complainant's testimony and the court failed to approach his evidence with a sufficient degree of caution. There is nothing in the objective facts which corroborates the complainant's version in regard to the actual robbery. The magistrate accordingly erred in concluding that the complainant's evidence was satisfactory in every material respect and that it was safe to convict the appellant on the strength of uncorroborated evidence.

[23] In so far as the appellant's version is concerned, I do not find it improbable that the complainant would falsely implicate the appellant. The reasons suggested by the appellant were not so far-fetched that they could not reasonably possibly be true and there is no basis to reject them. The evidence of the appellant fits neatly together. He told a complicated story with great detail and provided documentary evidence to support his contention. One cannot say when considering his complicated version that it is false. Indeed its very complexity provides some reason for thinking that it might be true. Why invent such detail and run the risk of being shown to be a liar when simple contradiction of the complainant would have served just as well?

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[3] 1980 (3) SA 301 (A) at 308B.

[23] It is also impossible to reject his version as false beyond reasonable doubt as there are objective facts in the following respects:

(a) He is employed as a bouncer and in the course of his duties carries pepper spray;

(b) He laid a charge at the police station and a police docket was produced. The only discrepancy related to the nationality of the person who allegedly attacked him. In *S v Heslop*,[4] Cloete JA pointed out:

'It goes without saying that it is a requirement of the fair trial guaranteed by s 35(3) of the Constitution . . . that if a court intends drawing an adverse inference against an accused, the facts upon which this inference is based must be properly ventilated during the trial before the inference can be drawn.'

In this matter the appellant was never afforded an opportunity to explain why he referred to his attacker as a Nigerian. It is possible that the police made a mistake. The magistrate drew an adverse inference and made adverse credibility findings without any evidence on this point from the appellant. His approach in this regard was incorrect, as he ought to have brought the discrepancy to appellant's attention and allow him to respond thereto.

(c) The appellant confiscated a firearm and notified his employer, who a day later handed the firearm in at the police station. The only issue related to the entry on the SAP 13 register that the firearm was found abandoned. What is of importance and what the magistrate overlooked is the testimony of Mr Nwandroi that the appellant had called him to pick up a firearm which had been seized. That is consistent with the appellant’s version.

(d) Lastly, the appellant stated that his cellphone had been stolen. The police searched him and no cellphone was found in his possession.

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[4] 2007 (4) SA 38 (SCA) - para 22.

[24] In my view, these objective facts are most important. The appellant's version has some ring of truth and can reasonably possibly be true. I am accordingly not satisfied that the guilt of the appellant has been proved beyond reasonable doubt. In the result, the appellant's conviction and sentence cannot stand.

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

(a) The appeal succeeds.

(b) The conviction and sentence are set aside.

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N Z MHLANTLA

JUDGE OF APPEAL

Appearances:

For Appellant	R Krause
	David H Botha, Du Plessis & Kruger Inc JOHANNESBURG
	Symington & De Kok, BLOEMFONTEIN
For Respondent	P Nel
	Director of Public Prosecutions, JOHANNESBURG
	Director of Public Prosecutions, BLOEMFONTEIN