



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO: CA&R 168/20

In the matter between:

RUBEN ADAMS

First Appellant

CORNAY GOODMAN

Second Appellant

and

THE STATE

Respondent

JUDGMENT

RUGUNANAN, J

- [1] The appellants were convicted in the Regional Court, Uitenhage on a charge of robbery with aggravating circumstances read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997. A deviation from the minimum sentence of 15 years' imprisonment founded on substantial and compelling circumstances attracted a sentence of 10

years' imprisonment for each appellant. The appeal to this court with the leave of the court *a quo* is directed against their conviction and sentence.

[2] It is not disputed that the complainant was violently robbed in Tiryville in the early hours of 16 August 2018 of *inter alia* cash, footwear, some clothing items and notably a Samsung mobile phone that was subsequently recovered by members of a neighbourhood watch from the first appellant on 18 August 2018. In determining guilt, the trial magistrate accepted the evidence of the complainant's identification of the appellants. This was with particular reference to a photograph (or 'selfie') that appeared on the screen of the phone. According to the testimony of the complainant the photograph linked the appellants to the commission of the offence. The appellants were legally represented in the conduct of their trial and raised alibi defences proffered by the mother of the first appellant, and the girlfriend of the second appellant.

[3] An appeal does not necessarily require consideration of the complete record of the entire proceedings in the trial court, but merely such part thereof as may be required to enable the court of appeal to properly consider the particular issue/s on appeal in the context of the trial proceedings.¹ The all-important issue on appeal concerns the reliability of the complainant's identification of the appellants. Although on our reading of the record, as well as in argument, a detailed examination of the components in the evidence was undertaken, when stepping back and considering the evidence the issue of identification inevitably assumes predominance for determining the course of this appeal. Since that issue is dispositive of this appeal it is unnecessary to consider each appellant's alibi, there being no *onus* on him to establish its validity.

[4] Despite commenting that the complainant "*might have given doubtful evidence regarding the identity of his assailants*"², the magistrate accepted

¹ *S v Zondi* 2003 (2) SACR 227 (W) at paragraph [9]

² Judgment 142

the complainant's identification testimony as reliable and rejected the version of events presented by the appellants. He did so without satisfying himself that the complainant was an honest witness, and mainly for the reason that the appellants did not impress him. Implicit in his reasoning is that their respective versions were improbable in the light of inconsistencies and internal contradictions. Our view of the matter is informed by the premise that there was no obligation on the appellants to have convinced the magistrate of the truth of their versions - the *onus* was on the state to have proven their guilt beyond reasonable doubt, in particular, on the issue presently before us.

- [5] The oft-quoted and established approach to be adopted when considering evidence of identification is set out in *S v Mthetwa* 1972 (3) SA 766 (AD) where at 768 A-C it is stated:

“Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and the probabilities...”

- [6] Between 04h00 and 05h00 of the morning in question the complainant, a driver employed by a bakery, was doing his usual rounds delivering bread. After a delivery outside a shop where two men were purchasing tobacco

he was struck at the back of his head/neck with a *panga*. He collapsed and was subjected to a further attack when he was stabbed on the back of his left shoulder and kicked. He was dispossessed of the earlier mentioned personal items, among them his mobile phone, personal cash of R210.00 and cash in the amount of R339.00 being the payment received for the bread delivery. He was dragged onto a tarred road but his assailants fled as soon as a local resident switched on the lights of her house which is located next to the shop.

- [7] The complainant received his phone a few days later after it was handed to his parents by a member of the neighbourhood watch. The witness Elena Jansen testified that the phone was recovered in circumstances when the neighbourhood watch, having received information about the robbery, encountered the first appellant. It is unnecessary to recapitulate the detail of the encounter but in the confrontation that ensued the evidence indicates that the phone was recovered when it slid out of the pocket of the coat worn by him.

- [8] With the phone back in his possession the complainant observed the photograph of the two appellants fixated on its screen. One of them has a dark complexion and the other is light in complexion. It is not disputed that the photograph indeed depicts the two appellants. As to how the phone was acquired the appellants contradicted each other; the first appellant alleging that he purchased it from the second appellant and the latter suggesting somewhat circuitously that he facilitated the sale of the phone by strangers to the first appellant. What can safely be accepted is that the first appellant had the phone unblocked by a hacker whereafter the photograph was taken.

- [9] On the evidence presented by the state the photograph served as the medium through which the complainant identified the appellants as the assailants who perpetrated the offence against him. That he did so subconsciously and retrospectively must be evaluated against a number of

incongruities inherent in his evidence - the resultant effect of which throws doubt on his honesty and the reliability of his observations, and most certainly his ability to have convincingly recognised his assailants in circumstances where he sustained traumatic injuries.

[10] In cross-examination the complainant stated that the appellants wore hats/bandanas and that their mouths and faces were covered. It also emerged that they were unknown to him prior to the incident. Moreover, the incident came as a surprise to him since it happened in the early hours of the morning while it was dark. Save for testifying that he was aware of two men purchasing tobacco at the relevant time, indications by the complainant that they were in fact the appellants and that they were wearing headgear are unmistakably and significantly absent. In an attempt to circumvent this inadequacy, the complainant went on to state that the bandanas worn by both appellants fell down during the incident. In the same breath he maintained that one of the appellants removed his bandana while the bandana worn by the other appellant fell off on its own. Later, and while still under cross-examination, he maintained that both appellants removed their bandanas when he was stabbed and kicked.

[11] It is apparent from an overall assessment of the complainant's testimony that he was unable to proffer evidence of any discernible characteristics to link the identity of his assailants to the appellants. His assertion by recourse to the photograph that one of the assailants was light in complexion, and the other dark in complexion, does not, in view of the abovementioned incongruities assist in apprehending a retrospective, honest and reliable identification of the appellants as his previously encountered assailants. The fact that it was still dark that morning and there being no evidence to indicate if nearby lighting enhanced visibility conditions, cannot be underestimated.

[12] In contending that this court ought to find that the complainant's identification was reliable, counsel for the state sought reliance on the case

of *Gwama v S*.³ In that matter the victim's identification of the perpetrator by reference to a photograph from a mobile tablet which had been removed from the home of the victim during a robbery was found to be reliable *a fortiori* due to the circumstances extant at the time of the commission of the offence. The circumstances indicated that the victim had reasonable opportunity for observation and identification *viz*; the incident occurred in broad daylight, the perpetrator's head and face were not covered, and the relative proximity between him and the complainant.

[13] Where, as in the present matter, no evidential basis has been laid to signify such opportunity, the reliance on the photograph on its own will not suffice. Nor does it suffice to contend generically that a person may be possessed of the ability to recognise another without being aware of physical characteristics or circumstances while exhibiting a total failure in verbalising a description of an individual previously encountered.⁴

[14] On our assessment of the matter it is not anything farfetched to conclude that the complainant's evidence is the product of mere inference and is rendered speculative. The evidence, indubitably, does not muster scrutiny under the yardstick laid down in *Mthetwa*, particularly on aspects pertaining to lighting, visibility, proximity, opportunity for observation and physical characteristics. The magistrate's failure to have undertaken an evaluation with the relevant degree of scrutiny resulted in an erroneous conclusion that the appellants were guilty as charged.

[15] In the result the following order will issue:

- (i) The appeal is upheld.
- (ii) The conviction and sentence for each appellant is set aside.

³ (CA&R 52/2020) [2021] ZAECHC 107 (25 November 2021)

⁴ *S v Majimane en Andere* 1999 (1) SACR 204 (O) at 211A-E

S. RUGUNANAN
JUDGE OF THE HIGH COURT

BESHE J: I agree. It is so ordered.

N. G. BESHE
JUDGE OF THE HIGH COURT

Appearances:

For the Appellants: H. Charles
Instructed by Legal Aid South Africa
Makhanda / Grahamstown

For the Respondent: S. Mtsila
Instructed by The Office of The National
Director of Public Prosecutions
Makhanda / Grahamstown

Date heard: 02 March 2022

Date delivered: 29 March 2022