

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between:

Case No: CA & R 261/2009

PETRUS XOLANI SKOSANA

Appellant

And

THE STATE

Respondent

Coram: **Chetty and Dambuza JJ**

Dates Heard: **13 October 2010**

Date Delivered: **25 October 2010**

Summary: *Evidence – Adequacy of proof – Identification – Assessment of evidence – Witnesses description of assailant perfect match of appellant – Circumstantial evidence additional safeguard for acceptance of such evidence – Appeal dismissed*

JUDGMENT

Chetty, J

[1] The alluring beauty of the Garden Route, along the Southern Cape Coastline, attracts visitors both local and abroad. On Monday, 12 March 2007, two Dutch tourists, Mr. *Matthias Sandner* (*Sandner*) and his companion Ms. *Charnette Ulsenheimer* (*Ulsenheimer*), to whom I shall interchangeably refer to either by name or merely as the couple, guests at the Tsitsikamma Lodge, at the eastern extremity of the Garden Route, decided to walk along a hiking trail from

the lodge. About 5 to 10 minutes into their walk, they encountered a person (the “guide”) who, under the pretext that he was responsible for their safety, cautioned them from proceeding any further. Perplexed, given the fact that they had the previous day also taken a walk without any interference, *Sandner*, somewhat in a quandary, nonetheless implored the guide to permit them to at least walk to the river. He relented and at the river engaged them in small talk. He then enquired whether he could use their camera to take a picture of them but *Sandner*, presciently, declined the offer with the riposte that they should rather return to the lodge.

[2] The “guide” accompanied them and en route back to the lodge regaled them with several stories, stopping frequently, which caused the couple, as a matter of courtesy to do likewise. During these, with hindsight, calculated stoppages, the couple, as politely as possible, sought to disengage themselves from his company by bidding him farewell. Undaunted, he followed them, proffering his opinions on a host of topics. After about the fifth stoppage, he asked them for a stipend for his services and when informed that they had brought none, he asked for something to eat. All that they had was some nuts which they provided to him. In a further attempt to extricate themselves from his company, they once more bid him farewell. As part of his charade the guide came up to *Sandner* and put his arm around his neck and instead of a farewell embrace tightened his grip around *Sandner’s* neck and remarked, “*please send your girlfriend away, she shouldn’t see what will happen now*”. *Sandner’s* immediate

reaction was understandable. He froze. *Ulsenheimer*, who heard the “guide’s” utterance, was more measured. Her response was that she would not go and simultaneously glimpsed a knife and warned *Sandner* that the “guide” had a knife in his hand. In the ensuing confrontation the “guide” managed to wrest the bag slung over *Sandner’s* shoulder and, seizing the opportunity, *Sandner* and *Ulsenheimer* made good their escape to the lodge. The bag contained two pairs of sunglasses, a digital camera, a blue towel pack and a visa card.

[3] At the lodge, the police were summoned and both of them made statements to Inspector *Kruger* (*Kruger*) in the course of which they had provided a detailed description of the “guide”. *Sandner* stated that the “guide” wore an old greyish pullover punctuated by holes through which a yellow, grey and white striped t-shirt was clearly visible, a woolen hat/cap was concentrated on the back of his head exposing a crop of bronze coloured hair; his cheek had a pronounced scar, which, by appearance, was clearly not caused by a knife but the result of a burn of some sort and, in addition he had a smaller scar on the top upper chest near the neck; his hands and wrists as tattooed with writing and not pictures. *Ulsenheimer’s* narrative of how the events unfolded mirrored that of *Sandner* and so too, her description of the “guide” and his apparel.

[4] Early the next day Constable *Johannes Net* (*Net*) encountered the appellant who enquired whether he was being sought by the police. At that stage *Net* had no inkling of the appellant’s involvement in the robbery the previous day

and replied in the negative. Later that day *Net*'s superior officer, *Kruger*, returned to the lodge and conducted a further interview with the couple. She showed them a pair of sunglasses which had been handed in at the local police station by a certain *Frederick Pietersen (Pietersen)*. The couple immediately identified the sunglasses as their own. *Kruger* summoned *Net* to the lodge on the supposition that he may, given the nature of his work and familiarity with the local inhabitants, know someone who matched the description provided by the couple. *Kruger's* intuition proved correct. *Net* immediately repaired to the appellant's home and arrested him for visually, he perfectly matched the description provided by the couple.

[5] Naively however, he returned to the lodge whence he had left *Kruger*, ostensibly for the purpose of the couple identifying the appellant as their assailant. When he arrived at the lodge, the couple were fortuitously standing outside the lodge. *Sandner* and *Ulsenheimer* both testified that when the appellant alighted from the vehicle they immediately and spontaneously identified him as their assailant. *Sandner's* words to the appellant were "*good morning my friend, nice to see you again*". The appellant's response, according to both of them and *Net*, was one of silence.

[6] *Pietersen's* involvement requires some explanation. The preceding evening, whilst en route to a community meeting he encountered a certain *Loftie* who informed him about the robbery on the hiking trail. At the meeting, the appellant, with whom *Pietersen* was acquainted and knew by the name *Petrus*,

showed him two pairs of sunglasses and handed a black pair to him for safekeeping which *Pietersen* duly kept. It appears from the evidence that details of the robbery spread like wildfire and became a focal point of discussion. Following the robbery Inspector *Breda* made routine enquiries concerning the stolen sunglasses during the course of which he questioned *Pietersen* who informed him that the appellant had handed him a pair of sunglasses. *Pietersen* was then instructed to take it to the police station to *Kruger* who in turn went to the lodge where *Sandner* and *Ulsenheimer* identified it as their own. This incident, as adumbrated earlier, occurred immediately prior to *Net's* arrival at the lodge with the appellant.

[7] Consequent upon his arrest the appellant was charged with robbery with aggravating circumstances. On 16 March 2007 he was arraigned for trial in the regional court, Joubertina. The state adduced the evidence of *Sandner*, *Ulsenheimer*, *Pietersen*, *Kruger* and *Net* and the appellant himself testified. The court below found the appellant guilty as charged and sentenced him to imprisonment for 10 years. An application for leave to appeal against both the conviction and sentence was dismissed but leave granted on petition addressed to the Judge President, only in respect of the conviction.

[8] On appeal before us the appellant's conviction was sought to be assailed on various grounds, *inter alia*, the alleged discrepancies between *Sandner's* and *Ulsenheimer's* description of the appellant's t-shirt and the impropriety of the

police conduct in taking the appellant to them for purposes of identification. Arguing from the supposition that such conduct on the part of *Net* tainted the reliability of their evidence identifying the appellant as their assailant, Mr. *De Jager*, somewhat tentatively, submitted that, having been irregularly obtained, the evidence of identification should be excluded.

[9] It appears from the evidence however that although *Net's* conduct in taking the appellant to the lodge for *Sandner* and *Ulsenheimer* to identify him as their assailant displays a lack of judgment, their spontaneous identification dispels any doubt that they were thereby influenced in identifying the appellant. Both *Sandner* and *Ulsenheimer* had been in the appellant's company for a protracted period the previous day when he regaled them with stories about himself and other inane subjects. The incident occurred in broad daylight and the opportunity for them to have made a proper identification is clear. Both of them had noticed that the appellant had a very pronounced scar on his cheek and on the neck close to the collar bone and it is no doubt that his physical appearance coupled to his pronounced identifying features made an indelible imprint on their minds. Their description of his tattoos was moreover precise. Both had stated that the tattoos were not of the conventional type but vocabular. His peroxided hair merely confirmed their initial recall of the colour of his hair.

[10] The thrust of the submissions advanced in appeal before us however concerned the evidence relating to their description of the t-shirt. I have already

alluded to the fact that both *Sandner* and *Ulsenheimer* described the t-shirt worn under the appellant's shirt as being white, yellow and grey striped. The appellant's evidence was that although he wore a striped t-shirt on the day he was arrested, he could not recall its exact colours. He emphatically denied wearing a t-shirt the day prior to his arrest i.e. on the date of the alleged incident. During *Sandner's* cross-examination the appellant's attorney put to him that on the day of his arrest, the appellant wore a white t-shirt with orange and black stripes and that the appellant had shown her the t-shirt earlier that morning, presumably, during a consultation with him at the police station. The question which immediately springs to mind is why the appellant would, prior to the trial commencing and any evidence being adduced, show his attorney a t-shirt, which, on his own admission, he had not worn on the day of the incident. If he had not worn a t-shirt there was no reason to refer his attorney to it. The reason is obvious.

[11] Immediately prior to the appellant's attorney's cross-examination of *Ulsenheimer*, she, in the concluding portion of her examination in chief stated that when the appellant was brought to the lodge he wore the same yellow and grey striped t-shirt. At the commencement of her cross-examination, the appellant's attorney produced a t-shirt and asked *Ulsenheimer* whether the appellant had worn it on the day in question. She replied in the affirmative. Much earlier, and before the t-shirt was produced in court, the appellant's attorney herself, during *Net's* cross-examination described the t-shirt to him as being "a

whitish t-shirt, with yellow and black stripes”, a statement with which he concurred save with the riposte that it was a grey and not a black stripe. Net’s further evidence that the colour was more akin to yellow than orange was never disputed. It was also never put to Ulsenheimer that her description of the t-shirt did not accord with what she was shown. On the overall assessment of the identifying evidence however the t-shirt is of minor significance.

[11] The trial court analyzed and evaluated the evidence relating to the identification of the appellant in detail. It recognized the dangers of an honest but mistaken identification but concluded that the identifying witnesses were credible and that their evidence could safely be relied upon. The trial court considered the appellant’s evidence and rightly rejected it as not being reasonably possibly true. In the overall assessment of the testimony adduced there was no room for a finding other than that it was the appellant who robbed the complainants of their possessions. The evidence against him was, in my view, overwhelming. It follows that there is no basis warranting interference either with the trial court’s assessment of the evidence or its factual findings. In the result the following order will issue:-

The appeal is dismissed.

D.CHETTY

JUDGE OF THE HIGH COURT

Dambuza, J

I agree.

N. DAMBUZA
JUDGE OF THE HIGH COURT

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