



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Review number: R22/2018

In the matter between:

THE STATE

and

PHEHELLO KHABANE

THABANG MOKGOJE

THABANG BENJAMIN MAPHIKE

CORAM: MATHEBULA, J et MHLAMBI, J

DELIVERED ON: 19 APRIL 2018

[1] The accused persons were arraigned on a charge of robbery in the Virginia Magistrate Court. At the outset of the trial they pleaded not guilty and did not tender a plea explanation. On 31 May 2017 they

were found guilty as charged and sentencing proceedings commenced with the state proving their previous convictions. They all admitted to their previous convictions as recorded in the SAP 69s. The learned magistrate exercising the provisions of the Criminal Procedure Act 51 of 1977 (“the CPA”) transferred the matter to the regional court for sentencing purposes.¹

[2] The matter served before Regional Magistrate Meintjies who on reading the transcribed record raised certain queries regarding the convictions. Her concerns centred around the findings of the district magistrate on two (2) issues viz:- identification of the accused persons and the inference made which was inconsistent with the proven facts. This matter is before us in terms of section 116 (3) of the CPA.

[3] The facts are briefly as follows. On 22 December 2016 in the afternoon, the complainant Win Long Chin (a Chinese businessman) was accosted by two male persons while walking alone in Government Street, Virginia. They both approached him from the back. He testified that accused number 1 took all his money that

¹ Section 116 (1) (b) provides:- “(1)If a magistrate’s court, after conviction following on a plea of not guilty but before sentence, is of the opinion-

.....

(b) that the previous convictions of the accused are such that the offence in respect of which the accused has been convicted merits punishments in excess of the jurisdiction of a magistrate’s court;”

was in a plastic bag and searched him while accused 2 was holding him tight from the back. The entire episode was over in approximately five (5) minutes and they made off with R11 500.00 of his money.

- [4] He attempted to follow them but accused 2 picked up a stone and hit him with it. He sustained bruises on his arm. The incident left him scared and traumatized. He reported the matter to the police and at no stage was he called to attend an identification parade.
- [5] The evidence of the members of the Police Service is that they received a complaint of a robbery from the complainant. Acting on a tip-off they proceeded to the residence of accused 3. On arrival they found accused 1 and 3 counting and sharing money on the bed. Constable Tseitsi enquired from accused 1 about the origin of the money. Accused 1 replied that they robbed the Chinese man (complainant). Accused number 3 did not say anything. In total they recovered the sum of R363.00 from them.
- [6] Accused 2, when he saw the police approaching, tried to make a dash for it. He was pursued and swiftly apprehended by Constable Nkhobo. He returned with him to join his co-accused at the residence of accused 3. He was searched and R5 coins were found in his

pockets and tekkies. In total he had R85.00 on him. He was also arrested with the others.

[7] The accused persons denied that they were involved. Identity was placed in dispute. According to them they were all sitting and enjoying alcoholic beverages since midday at the residence of accused 3 when they were surprised by the arrival of the police at around 16H00pm. They were sitting outside because the house is small and that accused 3's girlfriend was sleeping on the bed. Accused 1 and 3 denied that they were found counting money on the bed. Accused 2 testified that he was approached by a police officer on his way to the tavern to replenish their supplies. He was frogmarched back to the residence of accused 3. According to them they did not admit any involvement in the robbery of the complainant and were assaulted by the police. They confirmed that they all searched and a measly amount of R363.00 was found in their possession.

[8] Evidence relating to identification is problematic and needs to be approached with caution particularly where there is a single witness. In order to determine whether the witness has identified the person correctly beyond reasonable doubt, the observation must not only be credible but reliable. The dictum of the Appellate Division in **S v**

Mthethwa² is instructive. On that occasion the court said the following:-

“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; see cases such as R. v Masemang, 1950 (2) SA 488 (AD); R. v Dladla and Others, 1962 (1) SA 307 (AD) at p. 310C; S. v Mehlahe, 1963 (2) SA 29 (AD).”

- [9] The relevant part of the complainant's evidence in chief relating to the identification of accused 1 and 2 is contained on page 3 line 4 to 20 which reads as follows:-

² 1972 (3) SA 766 (AD) at 768 A-C

COURT: Just a second. Where was the money? -- The note I put in my pocket. But the coin, I used the plastic bag to hold in my hand. And how many persons attacked you? -- Two people.

What did they do to you? -- They from back, one hold me and then when I turn back, in front of me a people took my money from my hand. Even search my pocket.

Was it still the same person, or another person as well? -- Same person, but two people.

You may proceed.

PROSECUTOR: Did you see the people who attacked you? -- Yes.

Can you identify them? -- Yes, I can.

Do you see them here in Court today? -- Accused is pointed out ... Sorry.

COURT: The complainant. ... The complainant point accused number 1 and number 2.”

[10] Cross examination did not reveal much. According to the complainant's statement deposed to the police on the day, he stated that he would be able to identify the “one who was wearing a blue and white T-shirt, dark in complexion with no hair”. Further that he was uncertain with the identification of the other assailant because he was confused. On 16 March 2017 it was the second time that he pointed out accused 1 and 2. He unequivocally testified that he did not see accused 3 on the day and it was the first time he saw him on 16 March 2016.

- [11] There are certain negative aspects of the complainant's observation which the learned magistrate did not deal with in her evaluation of the evidence. The occurrences of the day unfolded for a relatively short period. The assailant's approached the complainant from the back and one held him tight while the other proceeded to search him. In his statement to the police the complainant stated that he was unable to identify the second assailant because he was confused. This implies that the fluidity of the events did not allow him to make proper observation.
- [12] The complainant did not testify about any distinct physical features of any of the accused persons. His description of accused 2 was limited to dark complexion and shaved head. This refers to the accused who was wearing a white T-shirt. This description is unhelpful to point in the direction of accused 2. It could easily have fitted thousand other men in that area at that time. The description of the clothing did not advance the matter to any great lengths. There is a contradiction whether accused 2 was wearing a white or white and blue T-shirt on that day. Even if there was none, without any distinct feature about the T-shirt, not much weight can be put on this part of his evidence. The conclusion is that the complainant did not have the sufficient opportunity to make the proper observation of his assailants.

[13] The reasoning of the learned magistrate that the complainant saw two instead of three assailants demonstrated his honesty is flawed. Honesty is not the only determinant factor but the reliability of his observation must be scrutinised as well.³ Both accused were unknown to him prior to that day and one would expect accurate description of the facial characteristics to take centre stage. In this matter the complainant made bold and unsubstantiated statements. The fact that he steadfastly stuck to his guns and said it was them, swayed the learned magistrate to misdirect herself in the evaluation of the evidence. The complainant did not mention anything implicating accused 1 except to say that it was him. There is no basis to convict on the basis of his evidence.

[14] This is a classic textbook case of dock identification. The complainant was invited to identify the accused persons who were sitting in the dock. He simply pointed them out. The danger of dock Identification was eloquently articulated in **S v Maradu**⁴ in the following manner:-

³ See S v Mthethwa supra

⁴ 1994 (2) SACR 410 (WLD) at 413 G-I

“This passage affords a good illustration of the danger of accepting evidence of identification in the circumstances of this case. Once the witness, Pantelis, sees the persons in the dock he feels reassured that he is correct in his identification, even though it may not have been the position were they not there. To any member of the public, such as Pantelis, the fact that an accused is standing in the dock must naturally be suggestive of him being one of the parties involved in the crime, and no witness can be blamed for making such an assumption, even though it is incorrect. In England the Devlin Committee has recommended that dock identification should become a purely formal matter allowed only where identification had been made by a parade, unless the Judge takes the view that to hold a parade would be impractical or unnecessary, depending on the circumstances of the case”.

I align myself with the views expressed in this passage. The learned magistrate misdirected herself by not applying the necessary caution.

- [15] Accused 3 was convicted on the strength of the information received by the police about his involvement in the commission of the offence. This prompted the police to proceed to his residence. On their arrival there, they found accused 1 and 3 counting and sharing money. The learned magistrate drew an inference that he was part of the persons who robbed the complainant.

- [16] The complainant categorically stated that he was accosted by two (2) persons. The “informer” was not called as a witness. Any evidence about the informer is hearsay evidence and cannot be relied upon by the learned magistrate. There is no basis in law to accept that evidence and this constitutes misdirection on the part of the learned magistrate.
- [17] Applying the principles laid down in **R v Blom**⁵, the learned magistrate concluded that the only inference to be drawn from the facts is that all accused persons acted together in robbing the complainant. Regrettably she applied the principles in an incorrect manner.
- [18] As the regional magistrate stated in her letter dated 12 January 2018, there is no specific link between the money that was being counted by accused 1 and 3 as well as the money robbed from the complainant. Further the amount of money found in their possession pale into insignificance when compared with the amount of money robbed from the complainant. The link is too remote and the only inference drawn that the accused persons are the ones who robbed the complainant is incorrect.

⁵ 1939 AD 202

[19] Accordingly, I make the following order:-

19.1. The convictions of accused 1, 2 and 3 are set aside.

M. A. MATHEBULA, J

I concur

J. J. MHLAMBI, J

/roosthuizen