



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R133/2016**
DATE HEARD: **27/02/2017**
DATE DELIVERED: **03/03/2017**

In the matter between:

BLENI, VUYO RAYMOND

Appellant

and

THE STATE

Respondent

Coram: Olivier J et Snyders AJ

JUDGMENT

Olivier J:

[1.] The appellant, Mr Vuyo Raymond Bleni, appeared in the Magistrate's Court at Jan Kempdorp on a charge that he had robbed the complainant, Mr John Swyfer, of a wallet containing R800.00 and a bank card. He pleaded not guilty and furnished a plea explanation which essentially amounted to an alibi defence. He stated that he had last seen the complainant at a tavern called Nonosi's when he left there with a woman called Ellie. According to him he and Ellie were on their way to his house when they stopped at Nono's Take-Aways to buy chips. The appellant explained that Ellie disappeared while he was waiting to buy the chips, but that he then met with his uncle, Mr Jack Ntema, and a person called Bongo there, and that he was in their company for the rest of the night.

- [2.] It was common cause that in the early morning hours of 15 August 2015 the appellant, the complainant, a woman called Ellie and Ms Mpho Moeketsi left the Bravick's tavern, after having consumed a considerable amount of liquor. It was in dispute whether there was also a fifth person among them, but it was common cause that at least the four of them then went to the appellant's house, which is a shack behind another house. It appears that the appellant and the complainant had taken the two ladies there with the intention of having a romantic evening with them. The appellant then did not turn on the light in the shack, and the two ladies refused to enter the shack if the light was not on. After a while they all left and eventually ended up at Nonosi's tavern, where the appellant bought three beers. The appellant and Ellie then left together, leaving behind the complainant and Ms Moeketsi.
- [3.] When the complainant was at some later stage on his way from Nonosi's tavern and was walking past the so-called chicken farm, he was attacked and robbed of his wallet, containing R800.00 and a bank card.
- [4.] What was in dispute was the identity of the robber/s. The prosecution presented only the evidence of the complainant in this regard. According to him the appellant and Ellie left Nonosi's tavern in the direction of the appellant's house, and then Ms Moeketsi also went to her house, which is apparently immediately next to Nonosi's tavern.
- [5.] The complainant then also left and while he was walking past the chicken farm he heard the footsteps of a person running. He turned around and the appellant hit him in the face with a brick. According to him he saw another person behind the appellant, but he was unable to identify that person. The blow with the brick caused a bleeding wound on his face and he lost consciousness. When he came to he discovered that his wallet was gone.

- [6.] The first witness for the defense was the appellant himself. As regards the events at his shack he testified that, while the two ladies were waiting outside, he at went outside to speak to Ms Moeketsi, apparently to persuade her to come into the shack. Ms Moeketsi then warned him that if he and Ellie took the complainant's money, she was "*going to tell*". He denied planning anything like that and pointed out to Ms Moeketsi that he had money of his own.
- [7.] The appellant testified that, when he and Ellie left the others at Nonosi's tavern, and were on their way to his house, they stopped at Nono's Take-Aways to buy chips, because Ellie said she was hungry. He handed two beers to Ellie to hold while he waited in a line to get chips. At a later stage he noticed that Ellie had disappeared. He then saw Mr Ntema and Bongo and asked them if they had seen Ellie. They said that they had not, and the three of them then left to a place called Brashe's, where the appellant bought four beers. From there they went to the house of Mr Charles Toto (also referred to as Bontsi), where funeral arrangements were underway. He, Mr Ntema, Bongo and Mr Toto drank the beers there.
- [8.] The evidence of Ms Moeketsi was also presented on behalf of the appellant. Ms Moeketsi testified that, while she and Ellie were outside the appellant's shack, and the appellant and the complainant inside, Ellie proposed to her that the two of them take the complainant's money. According to her she refused and threatened to "*tell*" if the complainant's money was taken.
- [9.] Ms Moeketsi confirmed that the appellant and Ellie had left from Nonosi's tavern in the direction of the appellant's shack. At that stage both Ms Moeketsi and the complainant were severely intoxicated¹. The complainant then left despite Nonosi having asked him not to leave alone at that time of the night. According to Ms Moeketsi she then went home herself.

¹ "*baie sterk onder invloed van drank*"

[10.] Mr Ntema was the next witness for the defense. He confirmed having seen the appellant at Nono's Take-Aways and also that the appellant asked him whether he had seen Ellie. He also confirmed that they had from there gone to Brashe's, and that the appellant had bought four beers there. Lastly he confirmed that they then went to the house of Mr Toto and that they spent the rest of the night there.

[11.] There were material contradictions between the evidence of Mr Ntema and that of the appellant, as well as unsatisfactory aspects in the evidence of Mr Ntema.

11.1 According to Mr Ntema he was alone at Nono's Take-Aways when the appellant approached him. According to the appellant Mr Ntema was at that stage accompanied by one Bongo. In cross-examination Mr Ntema testified that he had been at the house of Mr Charles Toto before he left and ended up at Nono's Take-Aways, and that he had left from that house with the owner, Mr Toto. Insofar as that would mean that Mr Toto would have been with the appellant at Nono's Take-Aways, that would also be inconsistent with the evidence of the appellant. At a later stage Mr Ntema said that Bongo had indeed been with him at Nono's Take-Aways, but that he had left before the appellant saw Mr Ntema, which would obviously still be inconsistent with the appellant's version. This became even more confusing when, during questioning by the Magistrate, Mr Ntema said that Bongo was indeed Charles Toto.

11.2 It was also not clear why, if Mr Ntema had left Mr Toto's house with the intention of fetching a jacket, he eventually ended up back there, together with the appellant, but without his jacket.

11.3 In cross-examination Mr Ntema said that he and the appellant had actually met with Bongo at Brashe's. When confronted with the appellant's evidence that Bongo was with Mr Ntema at Nono's Take-Aways, Mr Ntema appeared to adapt his version and said that Bongo

“went ahead” to Brashe’s, which created the impression that Bongo had indeed before that been with him at Nono’s Take-Aways.

- 11.4 Mr Ntema also eventually conceded that the appellant may not have been at Mr Toto’s house at all times for the rest of the night after they arrived there from Brashe’s.
- 11.5 There was also a contradiction between the appellant and Mr Ntema regarding whether the appellant eventually purchased chips or not, but this is not in my view material.
- [12.] The last witness for the defense was Mr Toto. He confirmed that there were preparations for a funeral at his house that night. He also confirmed that Mr Ntema had left there to get a jacket. He furthermore testified that Mr Ntema, Bongo and the appellant then later arrived there with beers. Clearly, on the evidence of Mr Toto, he could not have been Bongo.
- [13.] This brings me to the Magistrate’s judgment. He rejected the version of the defense because of the contradictions between the various witnesses. Only after having rejected the evidence for the defense, did the Magistrate look at the evidence for the prosecution. This approach is clearly wrong in law, because evidence must not be considered piecemeal, but holistically².
- [14.] In considering the evidence of the complainant the Magistrate did keep in mind that he was a single witness, but did apparently not keep in mind the dangers inherent in evidence regarding identification³. The Magistrate’s repeated references to the absence of a motive on the part of the complainant to falsely incriminate the appellant, suggests that the Magistrate regarded this as a decisive factor.

² Compare **National Director of Public Prosecutions v Kyriacou** 2003 (2) SACR 524 (SCA) para [52]

³ Compare **S v Charzen and Another** 2006 (2) SACR 143 (SCA) at 147i-148a

[15.] The Magistrate also found the complainant to have been an honest witness, apparently because he had been honest about how much liquor he had consumed that night.

[16.] The Magistrate made no finding, however, about the most crucial question when it comes to identification, namely whether the complainant's evidence regarding the identity of his attacker/s was not only honest, but above all that it was reliable as far as his observation of the attacker was concerned. In *S v Magadla*⁴ the correct approach was enunciated as follows⁵:

"Our courts have accepted many years ago that due to the inherent fallibility of human observation and memory, the evidence of identification should be approached with caution as it is dangerously unreliable. It is not so much the question of whether the identifying witness is sincere, honest or even confident about the identity of the person he or she identified. A court has to be satisfied that the evidence is reliable and further that every possibility of an honest but mistaken identity has been eliminated."

[17.] The closest the Magistrate came to even considering this question was when it was found that Ms Moeketsi's evidence that the complainant was not so drunk that he *"could not appreciate what was happening around him"* corroborated the complainant's evidence that he *"could appreciate what was happening around (him)"*. In coming to this finding the Magistrate obviously relied on the opinion evidence of a witness who herself had also been drunk at the time and who was in any event never asked to explain on what she based this opinion.

[18.] The fact is that the complainant had on his own admission been severely intoxicated when he was attacked. Shortly before that, Nonosi was clearly very concerned about the complainant walking home alone in his condition.

⁴ 2011 JDR 1553 (SCA)

⁵ *Ibid*, para [40] (In the dissenting judgment)

- [19.] The question was not only whether the complainant had been aware of what was happening around him, but rather whether he would in his intoxicated condition have been able to reliably observe and identify his attacker.
- [20.] There is no indication that the Magistrate was mindful of the fact that, on the complainant's own version, he would have had very little time to observe his attacker. It was clear that according to the complainant he had just turned around when hearing the approaching footsteps behind him, when he was struck by the brick and lost consciousness.
- [21.] The Magistrate apparently also paid no attention to the very material discrepancy in this regard between the complainant's evidence and his police statement, in which he had stated that he had actually spoken to the appellant after being struck in the face. When asked about this by the prosecutor, the complainant confirmed that this was how his statement indeed read. He denied, however, having spoken to the appellant at that stage, but he was never asked to explain this discrepancy. The obvious reason why this discrepancy was material, is because it had a direct bearing on the appellant's evidence regarding the circumstances under which he observed and identified his attacker.
- [22.] The attack took place in the dark of night and the only available light was from a nearby floodlight. There was no reliable evidence about how far from the scene of the attack that light was. The complainant estimated the distance to be similar to the distance between the court building and the municipal building. The prosecutor estimated this distance as *"150 close to 200 meters"*. The Magistrate, who had just before then estimated the distance to be a 100 meters, then apparently *"split the difference"* and decided that it was 150 meters. The appellant's legal representative was never asked for her opinion in this regard.
- [23.] The only potentially positive factor in the complainant's evidence as regards his identification of the attacker as the appellant was his evidence that he had known the appellant before then. It is, however, strange that the complainant's

evidence was that he had only known the appellant from having in the past walked past his house, while according to the appellant's undisputed evidence the two of them had actually worked at the same place before.

[24.] The Magistrate apparently also overlooked the discrepancy in the complainant's evidence about whether he had been alone at the time of the attack. In his evidence-in-chief he initially said "*when **we** turned around **we** saw Vuyo⁶*", but at a later stage, and in response to a blatantly leading question, he said that he had been alone.

[25.] Another issue that was clearly overlooked by the Magistrate is the possible involvement of the woman referred to by the witnesses as "*Ellie*". The appellant's evidence about Ms Moeketsi's remark that she would "*tell*" if he and Ellie were to rob the complainant, was never disputed. In fact, the prosecutor himself asked the appellant whether he was "*aware of the conversation between Mpho and Ellie when Ellie was telling Mpho that they should rob Punch⁷ or they should (sic) Punch's money*". The prosecutor clearly had information to this effect at his disposal. It was in any event Ms Moeketsi's undisputed evidence that Ellie had, when the two of them was outside the appellant's shack and the appellant and the complainant inside, proposed that the two of them rob the complainant. On neither the prosecutor's question nor the evidence of Ms Moeketsi was the appellant supposed to play any role in robbing the complainant of his money.

[26.] In her application for the appellant's discharge at the closure of the case for the prosecution the appellant's legal representative made reference to an available witness who according to the prosecutor had not been called because the witness had not been present at the time of the attack. Ellie was, even on the evidence of the complainant, in the company of the appellant when they parted company with the complainant and Ms Moeketsi at Nonosi's and walked in the

⁶ A reference to the appellant.

⁷ A reference to the complainant.

direction of the appellant's home. If the appellant's version that he and Ellie had then stopped at Nono's Take-Aways and that Ellie had at that stage disappeared was false, Ellie would have been able to refute it.

[27.] On the evidence as whole I am satisfied that the reasonable possibility that it had not been the appellant who attacked the complainant, was not excluded. The conviction therefore falls to be set aside on the evidence, but there is another reason why it cannot be allowed to stand.

[28.] The Magistrate who presided over the trial had earlier presided over the appellant's bail application. In the course of that application the appellant's previous convictions were disclosed. The previous convictions were related to the present charge, in the sense that they involved the unlawful taking of property. In fact, it appears that it was found that the appellant had not made full disclosure of his previous convictions and the Magistrate, in refusing bail, made adverse credibility findings in respect of the appellant.

[29.] The attorney who represented the appellant at the trial and in his subsequent application for leave to appeal, did not represent him in the bail application and there is no indication that she knew that the Magistrate had been involved in the bail application⁸.

[30.] The fact that the Magistrate had in the course of the bail application gained knowledge of the appellant's previous convictions, the nature of those previous convictions and the adverse credibility findings that the Magistrate had made in the bail application would in my view have led to, at the very least, a "*Perceived or apparent bias in the mind of the reasonable member of the observing public*" which would have been "*sufficient to disqualify*" the Magistrate from presiding at the trial⁹.

⁸ Compare **M Majikazana v S** [2010] 3 All SA 526 (SCA))

⁹ See **S v Booysen** 2016 (1) SACR 521 (ECG) para [16]

[31.] In **S v Nkuna**¹⁰ it was held¹¹ that *“The very fact, that the appellant knew that the Magistrate who presided over the trial, knew of his previous convictions, was enough to create a reasonable apprehension on his part that the Magistrate would not be impartial”*.

[32.] This makes it unnecessary to consider the question whether it is not in general in any event undesirable that the same Magistrate preside over both an application for bail pending trial and the subsequent trial¹².

[33.] It follows that the conviction would in any event, in my view, on this basis have had to be set aside. In the premises the following order is made:

**THE APPEAL SUCCEEDS AND THE CONVICTION AND SENTENCE ARE SET
ASIDE.**

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

I concur.

**J A SNYDERS
ACTING JUDGE
NORTHERN CAPE DIVISION**

For the Appellant:	MR A VAN TONDER (Kimberley Justice Centre)
For the Respondent:	ADV Q HOLLANDER (Office of the Director of Public Prosecutions)

¹⁰ 2013 (2) SACR 541 (GNP)

¹¹ *Ibid*, para [6]

¹² Compare **S v Thusi and Others** 2000 (4) BCLR 433 (N); **S v Hlati** 2000 (2) SACR 325 (N) (2000 (8) BCLR 921); **S v Bruinders** 2012 (1) SACR 25 (WCC)