

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG**

CASE NO: AR175/2015

In the matter between:

MELODY BONGANI KHUMALO

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

Delivered on: Tuesday, 09 February 2016

MOODLEY J (MARKS AJ concurring):

[1] The appellant, Melody Bongani Khumalo, was charged in the Regional Court, Ladysmith with robbery with aggravating circumstances.¹ He pleaded not guilty but was convicted as charged on 24 July 2014 and sentenced to ten (10) years imprisonment. His appeal against conviction is with the leave of the court *a quo*.

The Trial

[2] The appellant elected to conduct his own defence in the court *a quo*. He disclosed that his defence was that he was not present when the crime was committed and none of the stolen items was found in his possession.

1 as defined in Section 1(1) of the Criminal Procedure Act No 51 of 1977 (the Act), read with sections 51 and 52 of the Criminal Law Amendment Act No 105 of 1977

[3] It was common cause that a robbery had been perpetrated at the complainant's place of business on the morning of 23 August 2013 by three Black males, during which the complainant was robbed of a cellphone and money in his personal possession and stabbed in his stomach, and a bag taken from his shop. It was also not in dispute that the woman who was employed as a shop assistant by the complainant, knew the appellant as she had been at school with him.

[4] The issue for determination in the trial was whether the appellant had been properly identified as one of the three robbers.

State case

[5] The state called two witnesses. The first was the complainant, Chen Weide, a Chinese national who testified through an interpreter as he could not read or speak English. Weide testified that at about 11h10 on the day of the robbery, he was inside his business premises attending to an Indian customer. Three black males entered the shop; their faces were uncovered. One of them, who was very tall and wore a maroon pants, stabbed Weide in his stomach and searched his left pocket from which he removed R800. Although he could not identify this tall robber, Weide had observed that he had 'gold' front teeth. The second robber searched and removed the complainant's cellphone from his right pocket. The third robber searched the counter and took away a black bag.

Weide denied that when he made a statement to the police after the robbery, he had stated that a firearm was pointed at him during the robbery as he had not seen a firearm. He explained that he had made the statement through his son who himself could speak only a little English.

[6] The second witness, Nonbulelo Happiness Shabalala, testified that she worked for Weide and was at work with him when the robbery occurred. She was serving an Indian customer when the robbers entered. She confirmed Weide's evidence that there were three black males, whose faces were uncovered; that two of them approached Weide, and the third went to the parcel counter; one of the robbers pointed an Okapi knife at Weide's stomach and took money and a Samsung cellphone from his pocket. She saw no weapon other than the knife.

Ms Shabalala recognised the robber who pointed the knife at Weide as she had been at school with him from Grade 1 to 7; he also frequently walked passed the complainant's shop

while she was at work and greeted her. She identified him as the appellant who was known to her as Melody.

When the appellant instructed Ms Shabalala and the Indian customer to leave the shop, she stood outside the shop with a girl who worked with her, while the robbers remained inside. She observed the robbers leave the shop: two of them ran in one direction and the other ran towards the taxis travelling to Johannesburg; he was carrying a backpack which had been for sale in the shop.

[7] Under cross-examination, the appellant put to Ms Shabalala,

‘What I know is that I robbed you and I took your cellphone. The person that I was with had intercourse with you. When you came to me the following morning at the rank where I was playing dice, you asked for your phone.....’

Ms Shabalala interjected, emphatically denying that she had attempted to implicate him falsely on a prior occasion, or that she had alleged that she had been raped by his friend or that she had owned a Blackberry cellphone. She responded that she had no knowledge of what the appellant was putting to her and that she knew nothing of any offences committed by the appellant. She had pointed him out because he was the only one of the three robbers whom she knew, although she was confident that she could identify the second robber who searched and robbed the complainant with the appellant. She did not know the third person who went to the parcel counter.

The Defence Case

[8] The appellant testified in his own defence and did not call any witnesses. He described how he was arrested while waiting to board a taxi and alleged that he was assaulted by the police in an attempt to make him hand over a firearm. He persisted that Ms Shabalala was falsely implicating him. Under cross-examination he confirmed her evidence that they had attended school together, although his version was that they were only in primary school together, and that he also saw her at her place of employment when he passed. He described an incident in which he had been accused by Ms Shabalala of robbing her of her cellphone. He admitted however that she had not laid a charge against him or even asked him for her cellphone again, although she subsequently saw him passing the shop where she worked. The appellant alleged that between the hours of 9h00 and 17h00 on the day of the robbery he had been drinking and had passed the time with various people.

The judgment of the court a quo

[9] The learned magistrate relied on the identification of the appellant by Ms Shabalala, noting that the appellant was identified by the ornament in his mouth but also because she knew him well having been at school with him. She found Ms Shabalala's evidence reliable because she had nothing to gain by identifying the appellant as one of the robbers and her evidence was consistent and remained uncontroverted under cross-examination. The magistrate held that had Ms Shabalala previously accused the appellant of robbery, it was improbable that she would not have pursued the matter. She therefore rejected the motive offered by the appellant for Ms Shabalala falsely implicating the appellant and rejected his version as false. Finally she held that the two witness corroborated each other as to the events that occurred during the robbery, and although Weide had not identified the appellant, he did note the ornament in his mouth. The learned magistrate was therefore satisfied that the state had proved that the appellant was one of the three robbers and convicted him as charged.

Legal Principles

[10] It is trite that a court of appeal will not interfere with the findings of fact and credibility of the trial court unless it is apparent from the record of the trial that the court *a quo* either materially misdirected itself or erred to the extent that its findings are vitiated and fall to be set aside. Similarly the court of appeal must remain cogniscent that the trial court has the advantage of having observed and heard the witnesses.

[11] The following legal principles ought to inform the evaluation of the evidence in this appeal, as the central issue was identification.

11.1 The well-known principles relating to identification are set out in *S v Mthethwa*², in which the Court pointed out that it is not enough for a identifying witness to be honest but his observation must also be reliable. Further the reliability of identification must be tested in the light of the totality of the evidence and the probabilities.

11.2 The appellant was identified by a single witness. It was held in **Stevens v S 2005 [1] All SA 1 (SCA)** at page 5d-e:

² 1972 (3) SA 786 (A) at 768A-D

'In terms of s 208 of the Criminal Procedure Act, an accused can be convicted of any offence on the single evidence of a competent witness. It is, however, a well established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility. The correct approach to the application of the so-called 'cautionary rule' was set out by Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G³.....'

Judgment of the Court a quo

[12] In my view the learned magistrate properly relied on the identification of the appellant by Ms Shabalala as her testimony about the robbery and her familiarity with the appellant was clear, coherent and consistent and remained uncontroverted under cross-examination. Furthermore, the appellant himself confirmed that they were well known to each other, and had seen each other regularly before the robbery.

[13] Although Weide was not asked when testifying whether there was anyone else present in the shop with him at the time when the robbery took place, this omission, in my view, was not fatal to the state case as it did not undermine the identification of the appellant by Ms Shabalala. I am satisfied that Ms Shabalala was present at the time, together with the Indian customer as her evidence about the robbery is consistent in all material respects bar one, with that of Weide: three men entered the shop; two of them went to Weide and the third went to the counter; the appellant was the tall robber who approached the complainant and carried a knife; a cellphone and money was taken from Weide's pockets.

3 'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 (in *R v Mokoena*), may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded" It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[14] However while Weide testified that the tall robber took his cellphone from his left pocket and the other one took R800 in cash from his right pocket, Ms Shabalala testified that the appellant took a Samsung cellphone and money from Weide. This discrepancy, in my view, does not vitiate the reliability of her identification of the appellant.

[15] However even when Ms Shabalala was standing outside, she remained alert as she observed one of the men (not the appellant) leaving with a bag which had been on sale. Weide testified that the robber at the counter took a bag.

[16] It is also relevant to note that both Shabalala and Weide denied that they had informed the police that one of the robbers had wielded a firearm, as recorded in their respective statements. In any event, Weide explained that his statement had been made through his son and Ms Shabalala testified that she had merely explained what had happened while the police wrote it down, and the statement was not read back to her. But both Weide and Ms Shabalala confirmed that the appellant ('the tall robber' with the gold teeth - according to Weide) carried a knife with which he stabbed Weide. Ms Shabalala described the knife as an okapi knife.

[17] Further although Weide stated that he was attending to the Indian customer, Ms Shabalala stated under cross-examination that she was **also** serving the Indian customer (my emphasis), an indication that she together with Weide served the Indian customer. When questioned by the appellant as to why she was not robbed, Ms Shabalala responded that it was because the appellant himself had told her and the Indian customer to leave the shop while he was 'catching' (searching?) the complainant. She also explained, when asked by the appellant who the complainant was serving, that he was not serving anybody because 'when a customer comes he will just stand and watch and I would serve the customer'. Her response is consistent with Weide's testimony that he was unable to speak English. Therefore he could not himself have assisted the Indian customer, but must have been standing nearby in a supervisory capacity.

[18] There is therefore little reason to doubt that Ms Shabalala had adequate opportunity to observe the appellant clearly during the course of the robbery and

while he was leaving the store and that she identified him immediately because she knew him well. When she testified that she had been at school with the appellant from Grade 1-7 he did not dispute her evidence. But under cross-examination he alleged that he had been in school with her only up to Grade 3. His allegation did not in any way undermine her evidence that she knew him for a long time. More significantly, the appellant admitted that they saw and greeted each other while she was a work for a year.

[19] On the other hand I am satisfied that the version of the appellant as to why Ms Shabalala was falsely implicating him in the commission of the robbery was correctly rejected as false beyond reasonable doubt. Whereas the appellant initially put to Ms Shabalala that she had accused him of robbing her of her cellphone and the friend he had been with, of rape, he failed to sustain this version as he did not mention the allegation of rape when testifying. However even his allegation that she had accused him of robbing her of her cellphone was improbable as even on the appellant's own version, she had only confronted him once and had subsequently greeted him passively when he passed the shop. I therefore agree with the learned magistrate that his version was improbable. Further had there been conflict between them, then the appellant would have anticipated that she would identify him to the police and avoided committing a crime to which she would be a witness. But it would appear that to the contrary, because the appellant knew Ms Shabalala for a long time, he may have thought she would not identify him to the police.

[20] Under cross examination, the appellant pertinently asked Ms Shabalala, "What stopped me from concealing my face well knowing that you also were there and you know me?"

to which she responded pithily,

"I do not know what you thought by coming to commit the offence at the shop well knowing that I know you."

[21] In the premises I am satisfied that the court a quo did not err or misdirect itself in holding that the appellant was identified beyond reasonable doubt as one of the perpetrators of the robbery and in convicting him as charged.

Order

The appeal against the conviction of the appellant on the charge of robbery with aggravating circumstances is dismissed.

Moodley J

Marks AJ

OLSEN J (Dissenting)

[22] This judgment was prepared in advance of the majority judgment, and accordingly contains an account of some facts which have already been mentioned in the majority judgment. In order to avoid the delay which would occur if this judgment were to be recast to suit its role as second-read, it has been left as it was.

[23] It is not disputed that on 23 August 2013 a shopkeeper of Chinese extraction, Mr Chen Weide, was robbed at knife point in his shop in Forbes Street, Ladysmith. A sum of R800,00 in cash, a cell phone and a black bag were taken. Three men were involved. The State alleged that the appellant was one of them. The appellant said he was not. The appellant conducted his own defence at the trial.

[24] Mr Weide gave evidence in his own language with the assistance of an interpreter. He was the first State witness. A Ms Shabalala was the other State witness. It was not disputed that she was employed at the shop Mr Weide ran.

Neither is it disputed that Ms Shabalala and the appellant knew each other and that the appellant knew that Ms Shabalala worked at that shop. They had schooled together and, prior to the incident in question, the appellant had been accustomed to exchange greetings with Ms Shabalala when the former passed by the shop. (The appellant also said that he came across Ms Shabalala at places of entertainment, one specifically mentioned being “The 24” which is apparently a local tavern.) The appellant was convicted because the magistrate accepted Ms Shabalala’s evidence that she was inside the shop when the robbery took place, standing more or less next to Mr Weide, that the three robbers made no attempt to cover their faces, and that she could accordingly identify the appellant by name as the principal knife-wielding participant in the robbery.

[25] It is convenient, before dealing with the State case, to note what the appellant had to say about his activities on the day in question. The appellant lives at a place called Rossborne which, judging by an exchange between the prosecutor and the appellant in cross-examination, is something less than two hours travel (presumably in a taxi) from Ladysmith. The appellant came to Ladysmith on 23 August and was in the town by about 9am. He met and spent time with three people during the day, one Mphe, his girlfriend and finally one Njabulo. His account of what he did that day does not amount to an alibi properly so called, as he did not go so far as to say that he could account for his whereabouts at the time the robbery took place; that being accurately fixed as minutes before 11h07, according to the state case.

[26] Between 4 and 5 o’clock in the afternoon of the day in question the appellant was standing at the queue for taxis going to Rossborne when he was arrested by the police. He was handcuffed and taken to the police station where he was told why he was being arrested. He was questioned about a firearm. He was twice tortured, having what he called a “black plastic”, into which something was sprayed, placed over his head in an effort to get him to disclose information about the firearm and to confess his involvement in the robbery. The appellant says that he told the police that he knew nothing about a firearm and that he was not involved in the robbery.

[27] The only State witnesses were the two I have mentioned. Neither the arresting nor investigating officers were called. Indeed the appellant's account of how he was arrested and what happened after his arrest was not challenged in cross-examination. There is no evidence that upon his arrest the appellant was found with anything which might connect him to the robbery. (The appellant's evidence is that nothing was found to connect him with the robbery.) There was no evidence that a knife (or a firearm for that matter) was found on the appellant. Mr Weide was not able to make a dock identification of the appellant. He was able to say that the robber who wielded the knife (who Ms Shabalala says was the appellant) wore maroon trousers. The State led no evidence as to what the appellant was wearing when he was arrested.

[28] The absence of police evidence means that it is not clear why, or on what information, the police arrested the appellant. It is perhaps too easy to assume that it was on the basis of a report made by Ms Shabalala. If one makes the assumption that the appellant was arrested on information received from Ms Shabalala, it would be wrong to go further and assume that the information she gave was as apparently reliable as, and on all fours with, the evidence she gave at trial. According to the appellant someone else was arrested before the appellant, and questioned at the same time as, but separately from, the appellant. The record of pre-trial appearances shows that there were originally two accused; that an identification parade was held; and that ultimately the State withdrew against the other accused. Nothing was said at the trial by anyone concerning the other accused, or the identification parade.

[29] Mr Weide's evidence was that on the day in question he was serving and attending to an Indian customer when three men entered his store. One, taller than the others, held a knife to Mr Weide's stomach and searched him, taking about R800,00 in cash out of his left pocket. One of the others searched Mr Weide on the other side, and got his cell phone out of Mr Weide's right pocket. The third one was searching a counter, and took a black bag from there. The three then ran away. Mr Weide was scared. He could only say something about the tall one. What he said

was that he was wearing maroon trousers and that he had “special teeth”, having gold on the front teeth. (It is clear on the record that the appellant wears some silver ornamentation on his front teeth. Given the circumstances in which Mr Weide is said to have made his observation, I do not think that the different appearances of gold and silver should be regarded as material.)

[30] When the assailants left Mr Weide shouted out loudly for the police. According to him the first police on the scene did not help. But at some later stage others came and took a statement from Mr Weide.

[31] From this it will be seen that according to Mr Weide’s account of events there were five players involved. They were the three robbers, the customer and Mr Weide himself.

[32] Ms Shabalala’s evidence introduces herself as the sixth player in the events. According to her she was serving the Indian customer, with Mr Weide looking on, when the three robbers entered. Two of them came to where she, Mr Weide and the customer were standing. One robber stood behind Mr Weide and the other pointed a knife at his stomach and took money from his pocket. (In cross-examination she said that the one with the knife, whom she identified as the appellant, also took the cell phone, which is not consistent with Mr Weide’s evidence.)

[33] According to her evidence in chief at that stage she went outside. From there she saw the three emerge, two running off in one direction and one in another. The latter carried a backpack. When she was cross-examined by the appellant this story developed. She said that she left the shop taking the customer with her, because, she said (speaking to the appellant who was cross-examining her)

“you told myself and the Indian person, who was an old man, to go out when you were catching my boss.”

[34] Mr Weide’s evidence is quite silent on what happened to the customer. He certainly did not say that the customer left the store before the robbery was over

(which could not have taken much beyond a minute or so). But of course, of more concern is the fact that Ms Shabalala does not feature at all in Mr Weide's account of events. This was overlooked by the learned magistrate who held in her judgment that the two State witnesses "corroborated each other in respect of what took place on the day in question".

[35] In cross-examining Ms Shabalala the appellant put it to her that she contradicted Mr Weide on the subject of who was serving the customer. Her answer was "the boss was not serving anybody because when a customer comes, he will just stand and watch and I would serve the customer". A discrepancy on the question as to who was serving the customer and who was watching, between two shop assistants standing next to each other, might not be considered particularly important, as long as their evidence coincided on the fact that they were standing together, making a company of three (as Ms Shabalala would have it) with the customer. But the contradiction is not so easily explained in this case; Mr Weide's evidence as to what he was doing when the robbers entered is too explicit.

"I was helping an Indian customer. So I was paying attention to the Indian customer trying to – because he wanted to buy something and I was attending to him."

[36] It is plain from her judgment that the magistrate overlooked the contradiction between the evidence of Mr Weide and Ms Shabalala as to who was serving the customer. But more importantly, as already mentioned, she seems not to have realised that Mr Weide's evidence does not put Ms Shabalala on the scene at all. The magistrate's failure to deal with this aspect of the evidence was a misdirection. The question is as to what we are to make of it at this, the appeal stage. Of course this flaw in the State case must be seen within the greater context of all the evidence before the court. But the difficulty with the flaw is that it relates to a crucial aspect of the case. If Ms Shabalala was inside the shop, standing in a small group with Mr Weide and the customer, Ms Shabalala would have had the opportunity properly to observe the appellant, so that she could thereafter positively identify him by name, because she knew him. If, on the other hand, she was, for instance, outside the

shop at the time (where another of Mr Weide's employees was, whom the appellant says she joined when she exited the shop), then she might only have had a fleeting glance of fleeing robbers; in which case, if she thought one of them was the appellant, her identification of him would have been less reliable. What are we to make of the prosecutor's failure to clear up this aspect of the case when leading Mr Weide's evidence? Was this an instance of an oversight - prosecutorial error? Or was the prosecutor uncertain of the answer he would get if he asked the permissible questions of Mr Weide which would have established Ms Shabalala's presence at or absence from the scene; such uncertainty arising from the fact that the statement off which Mr Weide was being led was as devoid of reference to Ms Shabalala as was Mr Weide's oral evidence? If the latter is true then, in my view, Mr Weide's evidence on its own sounds the death knell of the case for the prosecution. It is difficult to accept the proposition that Mr Weide would have made the same mistake twice.

[37] I now turn to the question of a firearm. It will be recalled that the appellant's evidence was that he was interrogated (to put it at its lowest) by the police on the question of the use of a firearm in the robbery. If, when they arrested the appellant, the police were acting on information which coincided with the State's evidence at trial, then there would have been no reason for the police to investigate the use of a firearm during the robbery. When he was cross-examining the two State witnesses the appellant had what he understood to be the statements made by each of them to the police. When cross-examining Mr Weide he established that whilst Mr Weide was scared and in a state of shock during the course of the robbery, that was not so when he (Mr Weide) made his statement to the police. According to Mr Weide he was "no longer scared, I was like cool". According to Mr Weide "everything I said was under oath was written was correct". (I think that properly punctuated the record should read "everything I said was under oath, was written, was correct.") It was put to Mr Weide that it was recorded in the statement that a firearm had been pointed at him. Mr Weide's answer was that he did not see a firearm. He then backtracked on the quality of his statement, explaining that his English was not good (he could not write English), and that he had the assistance of his son "with his own little English to explain to the policeman who helped us to write".

[38] At that point the magistrate intervened suggesting, in effect, that the appellant should confine himself to questions showing the court that he did not commit the offence. The following exchange ensued.

'ACCUSED I am going there, your Worship, because I am looking at what is recorded there. I want to gauge if whatever is recorded there, was mentioned by the witness because when I look at what is recorded in the statement and from what the witness has explained in his evidence, it seems like the statement was not made by the witness.

COURT Mr Khumalo, the first I said when the proceedings started is you must listen carefully to the evidence. If you were listening carefully you would have understood that you were not implicated, they are talking about the tall guy. They have not said who was the tall guy on the day in question."

The accused immediately stopped his cross-examination.

[39] It is the duty of a presiding officer when confronted with an unrepresented accused both to inform the accused of procedural rights and to assist in the exercise of them. (See, for instance, *S v Ndou* 2006 (2) SACR 497 (T), and the selected list of duties set out at pages 499 to 500; and *Sithole v The State* (604/12) [2013] ZASCA 55 (4 April 2013), and, with specific reference to the subject at hand, subparagraph (b) of paragraph [8] of that judgment.) Here the appellant was armed with a statement apparently made by Mr Weide in which there is some reference to a firearm being used in the course of the robbery. Whilst the magistrate was concerned to ensure that the appellant asked no questions which would upset Mr Weide's failure to identify the appellant, the effect of her intervention was to obstruct an attempt by the appellant to establish a material contradiction between Mr Weide's statement to the police and his evidence in court. In my view the magistrate had a duty to explain to the appellant how the statement with which he had been furnished could be admitted in evidence; and at the same time also to explain to the appellant

that the admission of the document in evidence could have effects which might be both beneficial and detrimental to the appellant's defence.

[40] Unfortunately the same thing happened when Ms Shabalala was cross-examined by the appellant. It appears that the appellant made a lengthy statement to the interpreter which the interpreter was unable to frame as a question for Ms Shabalala, whereafter the following ensued.

“INTERPRETER Your Worship, it seems like the witness has said a lot of – the accused has said a lot of things. He spoke about the investigating officer, what was written in the statement and the firearm.

COURT Try to make your statements questions so that the interpreter will be able to interpret everything.

ACCUSED I want to know was the statement written by you? --- Yes ... [answering in English].

Why are you denying that there was a firearm involved during the robbery?

COURT Ma'am, did you write in your statement that there was a firearm involved? --- No

ACCUSED I do not know whether this is your statement but I would have to enquire from the investigating officer, but it is recorded in the statement. --- ... [answer not interpreted]

COURT You can move to another question sir.”

The appellant then asked another question of Ms Shabalala, again derived from her statement, and concerning a claim that she could identify someone else involved in the robbery; this generated a further intervention from the court, saying that the case did not concern anybody else but the appellant. This passage then follows.

"ACCUSED I am asking these questions because it seems that this statement was not written by her because there are things that I have explained there that she has not mentioned.

COURT Mr Khumalo, you have asked the same question three times. I have allowed you to ask. This witness confirmed that she wrote the statement. If there are things contained in the statement you can put it to the witness for her comment, but if you keep on repeating the same question, I will have to stop you."

The appellants cross-examination came to an abrupt end 12 lines later in the record. Nothing more was said about the firearm.

[41] Only one issue was raised with Ms Shabalala by the prosecutor in re-examination. It concerned her statement. The prosecutor asked whether she wrote it down or whether she narrated it to a police officer. The answer was "I explained and the police officer wrote it down". She was then asked whether the statement was read back to her and she replied in the negative. Those questions were wholly unnecessary in re-examination unless the truth of the matter is that the prosecutor was aware of a discrepancy, or discrepancies, between the statement Ms Shabalala had made to the police and her evidence before the court. It is plain that the appellant was cross-examining both Mr Weide and Ms Shabalala with statements in his hands recording that a firearm was involved in the robbery. In his application for leave to appeal one of his grounds was that he held such statements in which they said that a gun was involved. He went on to state that most of his key questions directed to both of the witnesses "were withdrawn by the Honourable Judge". These matters were mentioned by the learned magistrate as reasons justifying her grant of leave to appeal.

[42] In my view the issue of the witnesses' mention of a firearm in their statements is of substantial importance. It was not considered at all by the magistrate in her judgment. Discrepancies between witness statements and the evidence they give in court are often of minor consequence. But here one cannot but proceed upon the

assumption that each of Mr Weide and Ms Shabalala knows the difference between a knife and a gun. And it is remarkable that the same error (if it was an error) was made in each statement, given that the one witness was having his statement translated from a Chinese language into English, and the other from (presumably) Zulu into English. If the appellant put these questions regarding a firearm to the two State witnesses because of some misreading of the statements, or perhaps dishonestly, the prosecutor would have been entitled to prove the statements in order to correct the false impression concerning the credibility of the State witnesses which the appellant was trying to create. The prosecutor failed to exercise that right.

[43] Like most accused persons confronted with evidence such as Ms Shabalala's identification of the appellant in this case, the appellant felt it necessary to deal with the question as to why Ms Shabalala would falsely implicate him. He put it to Ms Shabalala that she drank alcohol, but she denied it. He put it to her that on an occasion in July (i.e. the month before the robbery) at The 24 there was an occasion when her blackberry cell phone was taken and she was raped; (elsewhere he put it that the person he was with on that occasion had sexual intercourse with Ms Shabalala); she denied that. The appellant put it to Ms Shabalala that the next day, while he was playing dice at the local rank, she came to him and accused him of having taken her cell phone; which she also denied. In his own evidence he said that after that there was no mutual greeting when he walked past the shop where she worked. The learned magistrate accepted Ms Shabalala's version concerning these issues, asking why Ms Shabalala would keep quiet because she seemed to be a confident woman, a person who "will be able to report if there is an incident especially happening to her". (The appellant confirmed in evidence that if a complaint had been made to the police following this event at The 24, it had not resulted in him being arrested or charged.) The magistrate rejected the evidence of the accused saying that "it seems to be fabricated". She found that he was not a good witness and suggested that he kept on evading questions, "coming up with long stories when he was asked to clarify his evidence". In my view a reading of the record suggests that the criticism of him that he was evasive and came up with "long stories" is not justified.

[44] The magistrate held that the accused's version was improbable. If what she had in mind was the dispute between the appellant and Ms Shabalala over the incident in July, which, the appellant suggested, gave her motive falsely to implicate the appellant, then, if that was her view, the magistrate was entitled to say that it struck her as improbable. But I see nothing else in the defence version which she could brand improbable. If the magistrate had it in mind that his treatment at the hands of the police immediately after his arrest was improbable, and that his interrogation on the subject of a firearm was improbable, then she misdirected herself. That aspect of his evidence was not challenged at all; let alone contradicted by State evidence.

[45] Insofar as probabilities are concerned, the magistrate failed to deal at all with the question as to why the appellant would have participated in a robbery at Mr Weide's store without making any attempt whatsoever to disguise himself, when he knew that Ms Shabalala worked there and would be able to identify him if she was inside the store. When cross-examining Ms Shabalala the appellant put this problem to her and she responded by saying that she did not know what he thought he was doing by coming to commit the offence at a shop where she worked. She offered no suggestion as to why the appellant might think that she would not identify him to the police. The magistrate misdirected herself in her assessment of the overall probabilities by failing to bring this factor to account.

[46] The magistrate rejected the evidence of the appellant with few words in her judgment by way of explanation for having done so. She appears to have been favourably impressed with the manner in which Ms Shabalala gave her evidence, and took the view that it was important that she maintained her story through cross-examination. But the magistrate overlooked that she had herself obstructed cross-examination more than once, and the fact that the cross-examination was that of an unrepresented accused person. The appellant received no assistance from the magistrate with cross-examination. The only question put to Ms Shabalala by the magistrate was the direct question already mentioned, as to whether the witness had

written in her statement that there was a firearm involved. That was not designed to assist the appellant. It was designed to terminate cross-examination on that issue.

[47] By virtue of the misdirections already mentioned it is necessary for us to decide on the record as to whether the conviction of the appellant can be maintained. In my view the State's case falls short of proof beyond a reasonable doubt. The identification of the appellant rests upon the proposition that Ms Shabalala was inside the store when the robbery occurred. Why did the State not clear up Mr Weide's failure to give an account of events which includes Ms Shabalala as a participant in them? Why, if events were as simple as the respective versions of Mr Weide and Ms Shabalala make them out to be, was the accused cross-examining those witnesses with statements in his hands which said something about a firearm being involved in the robbery? If they had been told the same version of the robbery as was given in court by the witnesses, why would the police have interrogated the appellant on the subject of a firearm being involved in the robbery. In my view the fact that these questions remain unanswered, coupled with the other matters to which I have referred earlier, leads to the conclusion that the conviction in this matter was not safe. I would have upheld the appeal. As this is a dissenting judgment, no order flows from the views I have expressed.

OLSEN J

Date of Hearing: TUESDAY, 08 DECEMBER 2015
(COURT CONSTITUTED IN TERMS OF
SECTION 14(3) OF THE SUPERIOR COURTS
ACT)

Date of Judgment: : TUESDAY, 09 FEBRUARY 2016

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