

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A144/2012

In the appeal between:

ZEFANIAS ZULULA

Appellant

and

THE STATE

Respondent

CORAM: RAMPAL, AJP *et* MOCUMIE, J *et* JORDAAN, J

JUDGEMENT: RAMPAL, J

HEARD ON: 29 APRIL 2013

DELIVERED ON: 30 MAY 2013

[1] This was an appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977. It was heard by the full bench. The appellant was convicted in connection with two of the three charges and sentenced to an effective term of 24 (twenty four) years imprisonment. He came to us with the leave to appeal against his conviction granted by the court *a quo*.

[2] The appellant was tried in the Virginia Circuit Court by an acting judge. His trial commenced on 21 May 2012 and endured until 25 May 2012. He was legally represented by

advocate K. Pretorius. Advocate R. Hoffman appeared for the State at the trial.

- [3] Notwithstanding his plea to the contrary, the appellant was found guilty of housebreaking with intent to steal and theft as well as rape being the first and the second charges respectively. He was acquitted in respect of the third charge of attempted rape.

- [4] Following his conviction, the appellant was sentenced to 18 (eighteen) years imprisonment in respect of the housebreaking charge and 12 (twelve) years imprisonment in respect of the rape charge. The court *a quo* directed in terms of section 280 of Act No 51 of 1977 that a six year part of the rape sentence should run concurrently with the burglary sentence. That direction meant that the effective sentence imposed on the appellant was 24 (twenty four) years imprisonment.

- [5] The grounds of the appellant's appeal were couched as follows:

“AD SKULDIGBEVINDING

- 1. Dat die Agbare Hof verkeerdelik bevind het dat die getuienis van die klaagster Elizabeth Viljoen (ten aansien van aanklag 2) genoegsaam betroubaar was ten einde bo redelike twyfel te kon bevind dat die Applikant een van die rowers was.
 Feitlik geen basis vir sodanige uitkenning bestaan en skiet dit met eerbied vêr te kort gemeet aan riglyne neergelê in relevante regspraak.

2. Dat die Agbare Hof fouteer het deur te bevind dat daar voldoende getuienis rakende die eienaarskap van bewysstuk 1 (Nokia selfoon) was en deur te bevind dat dit inderdaad aan Mnr de Beer behoort het en aldus van hom op die betrokke datum geroof is.
3. Dat die Agbare Hof fouteer het deur die weergawe van die Applikant rakende bewysstuk 1 te verwerp as nie redelik moontlik waar, sowel as sy alibi getuienis.”

[6] The particulars of the first charge were that the appellant and his alleged unidentified cohorts broke into the house commonly known as 18 Tana Street, Doorn, Welkom on Tuesday 5 October 2010 where certain specified goods, the property of the De Beers, their daughter, their son-in-law and their grandchildren were stolen. The particulars of the second charge were that at the same place and time their visiting daughter was vaginally raped by the appellant.

[7] The version of the prosecution was narrated by eight witnesses, namely:

- Mr W.J. de Beer, the homeowner,
- Ms P.A. de Beer, the homeowner's wife,
- Ms E. Viljoen, the couple's daughter, aka Zelda
- Ms P. Lubbe, the couple's granddaughter, aka Lalla
- Constable L.S. Sinxedi, member of the task team unit,
- Constable W. Letsie, member of the task team unit,
- Warrant Officer I.A. Fick, police officer in charge of the identification parade, and
- Warrant Officer A. Tait, the investigating officer.

- [8] On Sunday 5 August 2010 the four civilian witnesses were at 18 Tana Street, Doorn in Welkom. Between 18:30 and 19:00 that residential dwelling was under attack. A group of three or so men broke into the house. The members of the group were armed with an assortment of weapons, among others, they had a gun, a panga, a bottle, vuvuzelas and cables. The group gained entry into the house through the sliding door of the lounge.
- [9] The members of the group attacked and assaulted inmates of the house. They demanded money, guns, jewellery and car key. They ordered the victims to remain quiet and not to dare look at them in the face. Mr De Beer was surprised in the study, detained there, forced to lie facing down on the floor, tied with cables around his neck, his forward stretched arms were fastened together behind his head, they were then tied to his neck, his body was covered with a duvet and he was guarded by an armed burglar.
- [10] Ms De Beer was surprised in the kitchen. She was marched from there to the study. She and two of her four grandchildren were deposited into the study. There they were thrown on the bed and covered with blankets.
- [11] The couple's daughter, Ms Viljoen, and their son-in-law, a certain Mr Dave Marais, arrived on the scene from Rustenburg. They had come to visit. As fate would have it, they unsuspectingly stumbled upon a robbery in progress. The burglars ambushed them at the main door. They too

were attacked, assaulted and also deposited into the study where the rest of the victims were. The unconscious Mr Marais was also put on the floor and covered with a duvet, together with his father-in-law, but Ms Viljoen was thrown on the bed and covered with blankets, together with the rest of the female victims.

[12] One by one the victims were then taken out of the study to one or other room elsewhere in the house in search of money. After every outing, the victim was returned to the detention centre, in other words, the study. Ms Viljoen was shuttled to and from the study on no less than five occasions. During those innings and outings she was slapped now and then at the slightest attempt she made to lift her head up. The repeated assaults were frequent reminders or stern warnings that she was not supposed to look the burglars in the face. During her last outing she was raped in her parents' main bedroom. She was lying down and in a state of unconsciousness at the time she was sexually violated. The burglars thoroughly ransacked the house. They left no stone unturned. The loot included, among others, twelve cellular mobile phones, R15 500,00 cash and a VW Jetta. They eventually vanished from the scene leaving all the victims behind in the study.

[13] On the same day the car was recovered. The very next day, on 6 August 2010 to be precise, the appellant and another man were arrested at the notorious G Hostel in Thabong. They were arrested as suspects. The two men were

arrested on the strength of some confidential information obtained from the police informer, as well as the police informer's pointing out of the two men as suspects. They were arrested by constable Sinxedi and his colleague constable Letsie. The police seized the two cellular mobile phones allegedly found in the appellant's possession when he was later searched at the Welkom Police Station.

- [14] Still on Monday, 6 August 2010, constable Sinxedi took the two mobile cellular phones to the investigating officer Warrant Officer Tait. She in turn took them to the complainants who positively identified them as theirs. By then the list of the stolen goods had not yet been drawn up and finalised.
- [15] On Thursday, 13 September 2010, an identification parade was held at the offices of the detective branch in Welkom. Warrant Officer Fick was in charge of the proceedings. In the parade there were two suspects – the appellant and his fellow arrestee, a certain Mr John Novela. There were three witnesses, namely Ms De Beer, her daughter and granddaughter, namely Ms Viljoen aka Zelda and Petronella Lubbe also known as Lalla. Ms De Beer pointed nobody out. Petronella pointed two participants out, but none of them was a suspect. Ms Viljoen pointed one participant out – participant number 5 – Zefanias Zulula, in other words, the appellant. No witness identified Mr John Novela – participant number 2 – the second suspect.

[16] This then completes my summary of the undisputed facts as well as some facts which, though denied, could not be seriously disputed. The summary represents a collective overview of the testimonies of the various prosecution witnesses.

[17] The version of the defence was narrated by one witness only, namely Mr Z. Zukula, in other words, the appellant himself.

[18] Briefly stated the version of the appellant was:

- that he stayed at 4064 Las Vegas;
- that he was there and not at Doorn on Sunday, 5 August 2010 at the time of the incident;
- that a Nokia with a silver trimming – exhibit 1 – was his lawful property;
- that he was arrested by an informer called Sonnyboy and not any of the constables;
- that the two constables were, however, present at the time Sonnyboy arrested him;
- that the allegation that he was a member of the criminal gang involved was untrue;
- that he was not the one who raped Ms Viljoen;
- that he robbed none of the victims of their belongings; and
- that he was found in possession of no cellular phone stolen from the victims.

[19] The crisp issue in the appeal was whether the evidence of Ms Viljoen, the one and only witness who identified the appellant as one of the attackers, was reliable in all material respects or not. The identity of the rapist was the only bone of contention in the appeal before us.

[20] Mr Pretorius submitted that the answer to that question was negative and that the court *a quo* erred in finding otherwise. However, Mr Hoffman submitted that the answer to that question had to be in the affirmative. He added, therefore, that the court *a quo* correctly found the evidence of the aforesaid witness credible and reliable.

[21] In convicting the appellant, the court *a quo* underlined the foundation of its conclusion as follows:

“In my view the involvement of the accused as one of the assailants in respect of charges 1 and 2 has been clearly established on the basis of the evidence of the identifying witness and the relevant cellphones.”

[22] In **S v Mthetwa** 1972 (3) SA 766 (A) at 768A – C the following was said by Holmes JA:

“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.”

[23] The first encounter: Ms Viljoen's first physical encounter with the burglars was in the lounge. She and her brother-in-law, Mr Dave Marais, arrived on the scene where she first met the robbers. Her companion entered the house first through the sliding door of the lounge. He was immediately struck on the head and overpowered by two men. Ms Viljoen was on the verge of entering the house when she witnesses the attack on her companion. She had no chance to retreat or to escape. The third attacker, to whom I shall refer as Z, whose face she saw, swiftly pounced upon her, pulled her inside towards him, quickly turned her around and held her arms behind her back. This was how she put it:

“Die een wat my getrek het, het my dadelik na hom toe geruk en my omgedraai en my arms agter my rug vasgehou.”

[24] There were certain favourable features of the identifying witness' evidence in respect of the first encounter. She followed her companion into the house and perhaps had a slightly better opportunity for observation than he had. She saw that there were three attackers in the lounge, X, Y and Z. Moreover, she saw the face of one of the three attackers, Z. She was in closest proximity of Z than any of the attackers. The attackers apparently were wearing no balaclavas.

[25] There were also unfavourable features of the identifying witness' evidence in respect of the first encounter. The attack was totally unexpected, very sudden, and very violent. Although she saw the two companions of Z, she did not see

their faces at all. Therefore she could give no description whatsoever of X and Y. She saw the face of Z and nothing more. About that peculiar face she saw nothing else. The high watermark of her observation was that she fleetingly had a glimpse of his face.

[26] It was crystally clear to me that whatever she saw did not meaningfully register on her mind. That was so because Z gave her no adequate opportunity of making proper observation. He immediately turned her 180 degree. The whole idea was to deny her such an opportunity. He did not want her to see any of their faces. That much he told her in no uncertain terms. He certainly succeeded. The witness had virtually no prior knowledge of Z. He was a total stranger to her. [The scene was very active and mobile.]

[27] The second encounter: From the first scene in the lounge Ms Viljoen was taken to the second scene, the study. Together she and Z walked to the study. She did not normally walk while she was in transit. She was awkwardly marched to the study. She was made to bend forward. She was forced to walk facing down. Her hands were held behind her back. The idea was obvious – to prevent her from seeing the uncovered faces of the attackers, that of Z in particular.

[28] Z deposited her in the study.

“Hy het my onder die kombers ingedruk waar ek my kinders, my ma en my sussie se kinders gesien lê het.”

It was significant to note that in the study, unlike in the lounge, she did not see the face of Z at all. She and the rest of her family were covered. Those on the bed were placed under the blankets and those on the floor under a duvet.

[29] There were certain favourable features of the identifying witness' evidence. In the study she could see her father's feet on the floor next to the bed before she was covered. She could also see members of her family on the bed. It seemed, therefore, that there was some sort of visibility in there.

[30] There were also unfavourable features of the witness' evidence. However, visibility or no visibility, it did not really matter. The hard fact of the matter was that she saw nothing of importance in the study that she could cling onto for later identification of Z. The witness must have been frightened. Seemingly she did not see an attacker who was deployed in the study to guard the captives. While she was under the blanket she became aware that the attackers were kicking her father and heard that they were demanding money. In a desperate attempt to save him, she told the attackers that she knew where the money was.

[31] The third encounter: The witness was then taken out of the study. The third scene was the homeshop – the so-called tuckshop. There she opened the till, but found very little amount of R20,00 plus a few coins.

- [32] There was again nothing positive about her observation in the homeshop. There were no favourable features worth commenting on, save that she was very close to Z.
- [33] The witness was vigilantly guarded by Z. He was still holding her hands behind her back during her forward outings from and her return innings to the study. She did not have the opportunity of freely walking. Z was still very close behind her all the time in the homeshop. He assaulted her again in the tuckshop. He demanded more money than the trivial cash that she had found in the cash register. Once again she did not see his face. It was clear to me that the witness did not have any opportune moment of making proper observation in the tuckshop. The prevailing circumstances were not conducive for proper observation.
- [34] Back in the study she was placed under the blankets one more time. She did not see the face of Z in there. The assault on her father was continuing. She was very concerned about him. Again she volunteered to show the attackers where the money was. She did so in the hope that they would stop assaulting her helpless father.
- [35] The fourth encounter: The witness was again taken out of the study. Together with Z she walked out again. On that occasion she was taken to the main bedroom to look for more money.

Z was still holding her hands behind her back on their way to the fourth scene. His companion walked in front of the witness and he behind her. She looked for money in the drawer of the dressing table. Regrettably she found none. She then lifted her head, but Z immediately slapped her. He reminded her that she was not supposed to look at him in the face.

[36] It may well be that in the bedroom the witness managed, for the second time, to see Z's face. It remains a debatable point, though, as to whether she did or did not. But even if it is accepted that she did, no-one knows what she really saw, because she did not say. That been the case, it is not unfair to assume that she did not have adequate opportunity for proper observation before she was slapped. By then she knew all too well that the slightest attempt to glance at the face of Z infuriated him and that her glance would be violently repelled.

[37] Soon thereafter she received a blow which knocked her unconscious. When she regained her mental state of consciousness, she noticed that Z was busy belting up his pair of trousers. His companion called her a dirty bitch and inserted something in her vagina. Later the doctor ascertained that toilet paper had been stuffed into her vagina. The witness gave no description whatsoever of that abusive man, the companion of Z. I have to stress that the abusive man was standing right in front of her. I say so because he physically lifted her head up as he hurled those

hurtful and contumelious words at her. To rub salt into the wound, he fiddled with her vagina. Notwithstanding such close proximity, her evidence disclosed no description of the abuser she actually observed at such close range.

- [38] After her sexually degrading encounter, the abuser stepped back, so it appeared, and Z stepped forward closer to the victim's back. He pecked her in the neck and said to her:

"Don't worry, we will not kill you."

- [39] Thereupon the witness turned around to look at him. The reaction of Z was consistently predictable. He wasted no time. Once again he violently slapped her and gave her the warning she had become accustomed to:

"Don't look at my face."

- [40] Notwithstanding her very close proximity, I could not ascertain any useful details of her observation. She did not volunteer to describe it. It was not clear to me why she failed to describe the two attackers who violated her in the main bedroom. Perhaps poor visibility or inadequate illumination had to do with it. But one thing is certain, the prevailing circumstances in the main bedroom were not conducive. They were the worst to her. They deprived her of an opportunity for proper observation. It must also be remembered that she was recovering from a state of unconsciousness. Perhaps she was still very dizzy after the

blow and the rape. Those two agonising incidents probably impaired her mental faculties to properly observe her abusers.

[41] From the horror she had to endure in the main bedroom, she was taken back to the study. Her hands were still undoubtedly held behind her back by her unwanted bodyguard, Z. He did not just deposit her into the study and leave her there. He placed her yet again under the blankets. He then demanded the car key. He was told where to find the bunch of keys. He fetched them and returned to the study. He must have carefully and slightly opened the blanket and called upon the witness' mother to identify the car key for the VW Jetta. It was not the witness' evidence that she saw his face on that occasion. Shortly after that the attackers vanished from the scene.

[42] An examination of the foregoing account of events reveals that the witness was thrice taken to and twice from the study. During each one of those journeys her hands were firmly gripped together behind her back by Z whenever they went. Therefore, it can be reasonably deduced that Z must have been directly or slightly behind the witness throughout those various innings and outings. Obviously Z maintained that strategic position for a reason.

It must also be accepted that the very active and very mobile scene to some extent hampered her chances to properly observe Z, even though she was in his close proximity in the

lounge, the study, the homeshop and the main bedroom.

- [43] The most favourable factor of Ms Viljoen's evidence was the result of the identification parade. She pointed out one of the two suspects in the parade. The participant she pointed out was the appellant.
- [44] Notwithstanding such a positive factor, there were many factors which highlighted the unfavourable features of Ms Viljoen's evidence. Her testimony was deficient as regards factors such as lighting and visibility in the house in general and in the lounge, study, homeshop or main bedroom in particular. Whether there was light or darkness in any of those rooms was never canvassed. To say visibility must have been good in any of those rooms, because she was instructed to look for money, guns or jewellery, was unconvincing.
- [45] Similarly, the argument that it was visible in the study, because she was able to see her father's feet and the unconscious Mr Dave Marais, was guesswork. The fact of the matter was plain and simple. There was no mention of any source of light. How good or poor her eyesight was, remained anybody's guess. We know she did not have a good opportunity for observation. She was immediately slapped every time she tried to lift up her head. As a result of such repeated assault, she could not at all see or properly see the particular burglar. The only place where she pertinently said she saw his face was in the lounge. But

even there it was obvious that she must have fleetingly seen his face, which was why she could hardly describe the particular burglar's facial features. Nothing is known about the burglar's beard, moustache, goatie, hairstyle, skinhead, hair, facial scars, complexion, physique, gait, dress or whichever features enabled her to recognise him at the identification parade. She had no prior knowledge of the appellant.

[46] The circumstances that were prevailing at the door of the lounge were not conducive for proper observation. She and Mr Dave Marais were ambushed there. Out of the blue her companion was viciously chopped with a panga. Before she could precisely figure out who was doing what, she was quickly pulled into the lounge, quickly turned around and commanded to look down and specifically warned not to look at the faces of the burglars. She was certainly caught up in a nightmarish situation. The scene was not only highly mobile, but chaotic, brutal and horrific.

[47] It also emerged from the witness' account that Z angrily smacked her on no less than four different occasions every time he supposed or suspected that she wanted to take a look at his face. When she failed for the first time to find money in the homeshop, Z slapped her. When she failed for the second time to find money in the main bedroom she knew she was in big trouble. The impression I gained was that she turned her head and lifted it up, not because she wanted to identify Z but rather to plead with him not to harm

her again. But Z misconstrued her innocent intention and struck her so hard that she fainted.

[48] The witness had three brief episodes of respite when she was detained in the study. On those three occasions when she was not walking in the shadow of her violent escort, Z, she was placed under the blanket. In there she could hear that her father was repeatedly been assaulted. She heard the robbers threatening to kill him and his family.

[49] It follows from the foregoing examination of the witness' evidence that the robbers went to great length to ensure that the victims, in particular Ms Viljoen, did not have an opportunity of looking at their faces in order to identify them later. The criminal plan strategically worked out very well. The inability of all but two witnesses to point out anyone was proof of that success.

[50] Although at the subsequent police identification parade Ms Viljoen pointed out the appellant as Z – her identification was extremely unreliable, in my view. She was very very hesitant. She took five minutes to do so. While she was still so doubtful and before she had finally made up her mind, the officer in charge of the identification parade then ordered the appellant to step forward. We can never tell how the witness interpreted that order. What we do know, is that immediately after Z was ordered to move out of line, the witness suddenly became certain that he was one of the attackers.

- [51] The witness' pointing out of the appellant must be considered against the backdrop that her father, Mr De Beer, did not even participate at the police identification parade, because he would not have been able to identify anyone. The same applied to her brother-in-law, so it seemed to me. He neither participated in the police identification parade proceedings nor in the court trial proceedings.
- [52] The witness' mother, Ms De Beer participated at the police identification parade and court trial proceedings. Unlike her daughter, she could not point the appellant or anyone out. The witness' niece, Petronella Lubbe, also known as Lalla, pointed two participants out but not the appellant. Those two were not even suspects. The appellant's co-suspects was hardly pointed out by any witness.
- [53] All those omissions and failures were not without significance. They cast some doubt on the reliability of the one and only witness who positively identified the appellant as Z, one of the robbers. It is so that she spent most of the time with Z than any other witness. But that alone does not reliably validate her pointing the appellant out and equating him to Z. Quite apart from the omissions, failures and errors attributable to the other witnesses, her own evidence was bedevilled by extreme shortcomings of identificative substance. In my view such material deficiencies of the single identifying witness, substantially diminished the evidentiary value of the results of her identification. I say positive result in a narrow sense that she, unlike the other

victims, managed to point out one of the two suspects on the parade but not necessarily to mean that he was the actual culprit.

[54] The decision in **R v Shekeleke & Another** 1953 (1) SA 636 (T) at 638F – G reminds us that looks can deceive; that honest witnesses frequently but mistakenly identify saints as villains; that an identifying witness should be asked appropriate questions to explore the foundation of the mental recognition that precedes the actual fingering out of a person as a culprit; and that great care should be taken to test the evidence in order to determine whether it is beyond reasonable doubt reliable to sustain conviction.

[55] In my view this appeal is a classic example of a case where appropriate questions were never asked to sustain the witness' evidence pertaining to her identifying of the appellant. We were urged, as the court *a quo* certainly was, to accept a bold statement that the appellant was involved because one of the four eyewitnesses said he was involved. I am not convinced that such a statement – uninvestigated, unexplored, unquestioned and untested was materially reliable for us to endorse on appeal as the court *a quo* did.

[56] In a string of decisions the highest court of appeal in our land has, time after time, stressed the nature of the appropriate approach to cases where identity of a perpetrator is an issue. According to those authoritative decisions the identity inquiry has two distinct, autonomous and disjunctive dimensions.

The one has to do with credibility aspects of the evidence of an identifying witness. The other has to do with reliability aspects thereof. Each of the two legs is an exclusively independent dimension of the inquiry.

[57] In **R v Masemang** 1950 (2) SA 488 (A) on page 493 Van den Heever JA:

“The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence. The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence.”

[58] In **R v Dladla** 1962 (1) SA 307 (AD) at 310C:

“One of the factors which in our view is of the greatest importance in a case of identification, is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased. Even in the case when a witness has some difficulty in the witness-box in giving an accurate description of the facial characteristics and clothes of the person whom he has identified, the very fact that he knows him provides him with a picture of the person in the round which is a summary of all his observations of the person's physiognomy, physique and gait, and this fact will greatly heighten the probability of an accurate identification . . .”

[59] In **S v Mthethwa** 1972 (3) SA 766 (AD) at 768A-C Holmes JA said:

“It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested.”

[60] In **S v MLATI** 1984 (4) SA 629 (AD) at 632H – I Botha JA said:

“Juis die klaagster se ooglopende eerlikheid en haar eie vaste oortuiging van die korrektheid van haar uitkenning maan 'n mens egter tot groot versigtigheid by oorweging van die vraag of haar uitkenning met veiligheid as betroubaar aanvaar kan word, want in 'n saak soos die huidige mag die klaagster se eerlikheid en eie oortuiging nooit toegelaat word om die afsonderlike ondersoek na die betroubaarheid van haar uitkenning te vertroebel nie. Waar die Staat se saak teen 'n beskuldigde in sy kern uitsluitlik berus op die uitkenning deur 'n enkele getuie van die beskuldigde as die misdadiger, lê die gevaar van 'n verkeerde skuldigbevinding juis opgesluit in die altoos aanwesige moontlikheid dat die getuie 'n eerlike fout begaan in die identifikasie van die beskuldigde as die misdadiger.”

[61] In **S v Khumalo en Andere** 1991 (4) SA 310 (AD) at 328C – H, Grosskopf, Smalberger, et Nienaber AJJ said:

“Die Hof moet tevrede wees dat die uitkennende getuie nie net eerlik is nie, maar ook betroubaar (*S v Mthethwa* 1972 (3) SA 766 (A) op 768A-B). Eerlikheid op sigself is geen waarborg van betroubaarheid nie. In dié verband merk Van den Heever AR in *R v Masemang* 1950 (2) SA 488 (A) op 493 tereg op:

'The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence.'

Gevolgtlik mag 'n getuie 'se eerlikheid en eie oortuiging nooit toegelaat word om die afsonderlike ondersoek na die betroubaarheid van (sy) uitkenning te vertroebel nie' (*S v Mlati* 1984 (4) SA 629 (A) op 632H-I). Daar is 'n menigte faktore wat 'n getuie se uitkenningsvermoë kan beïnvloed en wat in gedagte gehou moet word wanneer die betroubaarheid van sy uitkenning oorweeg word. Verskeie van hierdie faktore word na verwys in *S v Mthetwa* (*supra* op 768A-C). (Sien ook in dié verband die onlangse uitspraak van die Geheime Raad in *Junior Reid v The Queen* [1989] 3 WLR 771 (PC) op 777-9.) Die waarskynlikheid dat 'n uitkenning betroubaar is, word verhoog waar die persoon wat uitgeken is voorheen aan die getuie bekend was (*R v Dladla and Others* 1962 (1) SA 307 (A) op 310C). Maar selfs dan moet daar noukeurig gelet word op die geleentheid wat die getuie gehad het om in die heersende omstandighede 'n korrekte uitkenning te maak (*R v Dladla and Others* (*supra* op 310 (E))). Op die ou end bly die toets of daar bewys van skuld bo alle redelike twyfel is, gesien die getuienis in sy geheel, insluitende die feit dat 'n beskuldigde òf nie getuienis afgelê het nie (vgl *S v Mthetwa* (*supra* op 769A-E)) òf 'n valse alibi geopper het (wat oor dieselfde kam geskeer word as 'n versuim om te getuig - sien *S v Nkombani and Another* 1963 (4) SA 877 (A) op 893G)."

[62] In **S v Charzen and Another** [2006] 2 ALL SA 371 (SCA) at

[11] Cameron JA said:

"[11] But, as our courts have emphasised again and again, in matters of identification honesty and sincerity and subjective assurance are simply not enough. There must

in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance can be 'dangerously unreliable', and must be approached with caution. This case illustrates the risks."

[63] *In casu* the court *a quo* considered the evidence of Ms Viljoen as an identifying witness. It reasoned as follows:

"In the present matter the court never got the impression that Elizabeth never had the opportunity to see the perpetrator clearly regard being had to the following among others:

- She early in her evidence in chief clearly testified that she only saw the face of one of the assailants.
- She proceeded to testify, still in chief, that at that stage when they arrived and one of the assailants called her to come in saying "come, come", she was hit on the head and told not to look the person in question in the face. She lifted her head after the accused, as the person holding her hands from behind, had to let go of one of her hands so as to enable her to open the box in search of the money and he slapped her and said she should not look at his face.
- When she regained her consciousness after the blow to the left side of her head she saw the person who had held her hands, busy fastening up his trousers and he threw things at her private parts and pushed them into her private parts.
- The said person came back to the room and asked her mother for specifications of the car keys.
- She further testified that the blow to her head left an impact on her, thus she could not forget the accused's

face.

It can be accepted that there was lighting in the house, as correctly conceded by Mr Pretorius, because it was in the evening and Elizabeth and others were ordered to search around for the money. They could not have been expected to do so if it was dark in the house. This evidence does not suggest that Elizabeth never had an opportunity, nor visibility on her side to see the accused as one of the assailants as she has testified. The truth has been told.”

- [64] On the strength of the aforesaid snippets from the evidence of the identifying witness the court *a quo* implicitly found her evidence reliable. The finding was premised on the conclusion that the witness “had the opportunity to see the perpetrator clearly” because, there was lighting in the house. There was no evidence that the house or any room thereof was lit. The finding was premised on a questionable inference. The court *a quo* believed the witness’ assuring statement that she would never forget the appellant’s face since she saw that face: firstly, in the lounge on her arrival; secondly, in the main bedroom where she was raped; thirdly, in the same bedroom while he was fastening up his trousers and fourthly, in the study when he was talking to her mother about the car-key. I have already critically dealt with the merits and demerits of the witness’ evidence in respect of each of the four aspects of her observations. I found each one of them wanting and thus materially unreliable. Their combination did not produce a stronger cumulative impact than they individually did. The court *a quo* in an uncritical way accepted the witness’ evidence on its cosmetic value.

[65] Indeed she was an honest witness. However, her honesty and subjective conviction should never be allowed to blur the inquiry as regards the reliability of her identification - **S v Mlati**, *supra*. Her positive and emotional assurance that she would never forget the appellant's face did not in itself provide a reliable guarantee that her evidence concerning her identifying of the appellant was beyond reasonable doubt correct - **S v Masemang**, *supra*. As a single witness who identified the appellant, she had to be endorsed, not only as a credible witness, but also as a reliable one – **S v Khumalo**, *supra*. In my view when the witness' evidence is cautiously approached, the fallible symptoms of human observations inherent in her evidence of identification emerge like a colossal on the horizon – **S v Mthethwa**, *supra* and **S v Ntsele** 1998 (2) SACR 178 (SCA) at 187.

[66] In the result I have come to the conclusion that the evidence of that identifying witness could not, without more, be reliably used to sustain the appellant's conviction. This then disposes of the first leg on which the conviction was based.

[67] Because of lack of testimonial corroboration to cure the deficiencies of identification inherent in the evidence of Ms Viljoen, it becomes imperative to determine whether there was any other objectively reliable safeguard to ensure that the identity of the appellant, as a robber, was indeed established beyond reasonable doubt as the court *a quo* found.

[68] Mr Pretorius submitted that the court *a quo* erred in finding that the cellphone (exhibit 1) found in the appellant's possession indeed belonged to the identifying witness' father and not the appellant and that such exhibit served as a guarantee of the reliability which underlined the correctness of the identification by the identifying witness.

[69] Mr Hoffman submitted, contrary to Mr Pretorius' submission, that no error could be found with the finding of the court *a quo*. Counsel submitted that the cellphone(s) in question, with particular emphasis on exhibit 1, formed part and parcel of the loot stolen from the victims. To that issue I now turn.

[70] Indeed it was undisputed that exhibit 1 was seized, by the constables, from the appellant shortly after the time of his arrest. The issue at this junction revolved around the ownership of the particular cellphone.

[71] The prosecution's case was that the silver edged Nokia cellphone belonged to Mr De Beer. Therefore, the cursory exposition and examination of the gentleman's evidence becomes necessary. I have randomly selected portions of the exchange between Mr Pretorius and the witness:

- "Ken u die reeksnommer daarvan? ... Nee, nee, nee."
- "Hoe lank het u daardie foon gehad tot met die tyd dat dit weggeraak het? ... Hoor hier ek is nie seker nie."
- "Het u daardie foon gekoop of waar het u dit gekry? ... Ek is nie doodseker nie. Ek dink ek het hom by Gustav gekoop."

- “U het nie die papiere van daardie foon nie? ... Nee, nee, nee.”
- “En u weet ook met ander woorde nie die reeksnommer of dit ‘n imei-nommer van daardie foon is nie? ... Nee, nee.”
- “Nou u ken daardie foontjie maar uit as u foon aan die algemene voorkoms? ... Ja.”
- “Daardie Nokia waarna u verwys, BEWYSSTUK 1, ek kry nie die indruk dat daardie foon op die lys van gesteelde eiendom is nie? ... Is hy nie hierop nie?”
- “Nou wat spesifiek aan daardie foon maak dat u sê dit is u foon? ... Want myne het so gelyk.”

[72] It was quite apparent that the supposed owner knew absolutely nothing about the cellphone which allegedly belonged to him. No wonder the court *a quo* made no reference to his evidence at all. In my view he dismally failed to identify the cellphone as his property.

[73] The next prosecution witness who testified about exhibit 1 was Ms De Beer. About her evidence the court *a quo* made the following positive comments:

“Mrs De Beer gave the identifying marks of the phone in question and her evidence was not challenged, save for the statement with which she agreed to the effect that such wear and tear marks resulted from the general use of the phone and could have been present even on the accused’s phone. She however – that is now Mrs De Beer - remarked that it would be a strange coincidence that such marks would be on the same places in both cellphones.”

- [74] During her examination, Mr Hoffman, counsel for the State, asked Ms De Beer about her stolen cellphone.

“Watter foon van u self was dan nog ook gesteel op daardie aand, behalwe die Samsung foon waaroor u nou gepraat het? ... So silwer Nokia foon wat ek vir my man gegee het. Dit is eintlik syne en so ‘n swartetjie.”

- [75] The silver Nokia she was talking about was, of cause exhibit 1. Like her husband she did not know the serial number or the imei-number of the cellphone and she did not have cellular documents relative to the purchase of the cellphone. Unlike her husband she testified that she was the previous owner thereof; that it was given to her by her daughter and that she later gave it to her husband.

- [76] The witness materially contradicted her husband as regards the origin of the cellphone in dispute. According to her, she acquired it from her unnamed daughter. According to him, he acquired it from his friend Gustav. That material contradiction was telling against the prosecution’s case. However, it was overlooked. Her husband was supposed to know it better, not only because he was allegedly the owner, but because he was ordinarily the user thereof at the time it was stolen and had been such for some time before the robbers dispossessed him. Ms De Beer had not been using that phone for quite some time at the time it was stolen.

- [77] The court *a quo* was satisfied that the lady had reliably identified the cellphone by means of the wear and tear

marks somewhere at the top of its face. The manner in which the witness was asked to identify the cellphone was disturbingly irregular. Mr Hoffman:

“As ek nou die hofordonnans vra om net die foon vir u te gee, as u miskien net so ‘n aanduiding kan gee van hierdie gekrap bokant, aan die bokant van die foon want u sê die swart merkies is daar. Kan u net vir die hof wys waar is daardie merkies? Inspekteur, asseblief.”

Ms De Beer:

“Nie swart nie, silwer, *sorry*. Hy het gekrap, die grys is afgekrap hierso.

Die getuie wys so aan die bokant. Ek sien so bokant van die glas. Nie in die ... (tussenbei) --- Ja, hier bo.”

[78] Ever heard of a dock identification? This was it. The witness did not first describe the nature, extent and location of the alleged identificative marks without looking at the exhibit. She was given an unfair advantage by first inviting her to inspect the exhibit and after inspecting the exhibit asking her to say through which peculiar features she recognised the exhibit. The difficulty I had was simply this: The witness did not describe the exhibit. She merely told the court what she could see on the exhibit in her hands. Any idiot could surely have done precisely the same.

[79] Although the witness was given that good opportunity, her identification of the cellphone was pathetically vague. The following demonstrates such vagueness: Were the marks in

question vertical, horizontal, spherical, diagonal, straight, crooked or indescribable conglomerate network?

[80] The cellphone in dispute was seized from the appellant, handed over to the investigating officer and shown to the witness and her husband a day after the incident. That too was a highly irregular police conduct. A neutral, in other words, an impartial investigator, in the position of the investigator in this matter, would first have obtained a list of the goods stolen from the victims, to ascertain whether the article seized from the suspects were specified or listed as stolen. It was never done in this matter. Notwithstanding the unorthodox method and unfair pre-trial procedure used by warrant officer Tait, the two cellphones – exhibit 1 and exhibit 2 – seized from the appellant, did not appear on the list of the stolen goods – annexure “a” to the written indictment. That list was drawn some time after the phones had been recovered and shown to the witnesses.

[81] During cross-examination of warrant officer Tait by Mr Pretorius, the following exchange was recorded:

- “Ja, en daardie vier verwys na die vier van Marais, die getuie wat hier getuig het. Inteendeel, drie van sy selfone want hy het drie selfone gehad as ons kyk na die dossier. --- Ja, Edelagbare, dit kan wees dat die klaers nie op daardie stadium agtergekom het dat van die eiendom gesteel is nie. Die lys is opgestel. Dit kon wees dat dit dalk nie op die lys gesit is nie.
- Was daar op die 6de al ‘n lys opgestel van die vermiste

goedere? Insluitende dan die selfone. --- U Edele nee, daar was no 'n voorlopige lys of hulle het begin om hom op te stel aangesien die slagoffers my meegedeel het dat dit alles deurmekaar is en dat daar soveel goeters gesteel is. So hy was nog nie volledig opgestel nie.

- En u sal met my saamstem dat daar was en is geen lys van gesteelde goedere waarop daardie twee selfone voorkom nie en waar hulle beskryf word soos wat hulle lyk, een swart kleur en een is 'n silver kleur Nokia 1020 of wat ook al. Daar was geen lys nie wat daardie beskrywing van daardie twee selfone gehad het nie? --- Dit is korrek, u Edele.”

[82] In **S v Nortjé** 1996 (2) SACR 308 (C) the court per Foxcroft J said the following about crime investigatory procedures and police conduct:

“The police procedures in this case were fundamentally unfair and the accused did not have a fair trial. As has been pointed out, it would be farcical to insist on the highest standards of fairness in the courts while at the same time tolerating a low standard of fairness in police procedures which take place before an accused person reaches the court. See, for example, *R v Hackwell and Others* 1965 (2) SA 388 (SRA) at 400E 320d – f.”.

[83] I hold a view, and it is a very firm view, that neither exhibit 1 nor exhibit 2 provided any corroborative and objective safeguards which positively linked the appellant to the scene of the crime. In my view the evidence tendered by the prosecution was materially deficient to determine the issue of ownership in favour of the State against the appellant.

[84] During the course of the judgment the court *a quo* found:

“Even if I am wrong in this finding that Mrs De Beer has managed to prove that Exhibit 1 belonged to her husband, I am satisfied that the issue of the said handset is neutral in so far as she conceded that such marks could have been made on the accused’s phone and as such that phone can reasonably possibly have belonged to the accused and can also reasonably possibly belong to her husband.”

[85] If we accept, and I believe we should, that Ms De Beer’s evidence was irredeemably contaminated by procedural irregularities; that it was substantially unreliable and that she was *strictu sensu* a single witness whose unsatisfactory evidence was materially inconsistent with that of her husband – then there was no objective evidence which corroborated her daughter’s identification of the appellant and undoubtedly rendered it reliable.

[86] The court *a quo* also rejected the explanation of the appellant as to the second cellphone – exhibit 2. His evidence was that the constable seized it from the second suspect, one John Novela. On the contrary, the evidence of the constables was that they seized it as well from the appellant. Perhaps their evidence was correctly accepted as true and his correctly rejected as untrue.

[87] Although the evidence of the appellant was false on that particular aspect relating to the second cellphone in dispute, the unreliable evidence of the De Beer couple was not

thereby rendered reliable. The favourably heavy weight allocated to the evidence of a witness on the credibility scale, cannot be later used to compensate for the unfavourably weak evidence of that witness on the reliability scale. To do otherwise conflates the issues. The danger is that the distinction between the reliability component and the credibility component of the inquiry becomes blurred. In those blind spots between the two disjunctive components, one is destined to go astray and to fall into hazardous pitfalls of error.

[88] The reliability interrogation of the evidence of identification is an independently separate inquiry. It was impermissible to treat the lies of the appellant as a curative remedy for the lack of objective evidence to corroborate the identifying witness. There was no evidence of cellular data led. The forensic evidence – “exhibit d” – exonerated the appellant. Firstly, the vaginal swab excluded him. Secondly, the two vuvuzelas also excluded him. The available and reliable evidence tendered in this case, objectively favoured him.

[89] If the court *a quo* was correct in finding that the evidence concerning the ownership of the handset – exhibit 1 – was neutral, then that should have been the end of the inquiry. The court *a quo* found, and correctly so, that the version of the appellant that the cellphone belonged to him was reasonably possible. Implicit in that finding was the logical conclusion that the State had failed to prove beyond reasonable doubt that such cellphone was Mr De Beer’s

stolen property. It follows, therefore, that the second basis on which the appellant was convicted, could not and cannot sustain the conviction.

[90] I would, therefore, uphold the appellant's grounds of appeal. The court *a quo* materially misdirected itself, with respect. The two principal findings of the court *a quo* are findings which I, sitting as I was in the full appellate mode of this division, could not support.

[91] In the result I make the following order:

91.1 The appeal is upheld.

91.2 The conviction is set aside.

M.H.RAMPAI, AJP

I concur.

B.C. MOCUMIE, J

I concur.

A.F. JORDAAN, J

On behalf of appellant:

Mr K. Pretorius
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv R Hoffman
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

/spieterse