

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 Nr: CA&R 39/2013
Case Heard: 02/12/2013
Date delivered: 06 /12/20123**

In the matter between:

**LONDON KHUMALO
KINGSTON KHUMALO**

**1st APPELLANT
2nd APPELLANT**

and

THE STATE

RESPONDENT

Coram: OLIVIER J et LEVER AJ

JUDGMENT

Olivier J:

- [1]. The appellants, the brothers Mr London and Mr Kingston Khumalo, were convicted of robbery with aggravating circumstances and sentenced to 7 years imprisonment each. This appeal is against their convictions.

- [2]. It was common cause that the complainant had been robbed and that he had in the process sustained serious injuries.

- [3]. Both appellants pleaded not guilty and denied having being present on the scene of the crime. The issue was therefore

identity and it is trite that evidence about identity should be approached with caution and that the question is not only whether the identification is credible, but also whether it was in the prevailing circumstances reliable.

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities;...”¹

- [4]. The complainant was in any event a single witness as far as the robbery and the issue of identity are concerned and his evidence would for this reason in any event have had to be treated with caution.

¹ **S v Mthetwa** 1972 (3) SA 766 (A) at 768B-C

- [5]. The complainant was intoxicated. It was raining, although not heavily. The only light on the scene was from a flood light about 3 streets away. According to the complainant it was dark and he described the light as *“not good”*. He conceded that he had not even been able to see what the attackers were wearing. The complainant was also repeatedly stabbed during the incident, which left him confused.
- [6]. The circumstances were therefore far from ideal for reliable identification.
- [7]. The regional magistrate found corroboration for the complainant’s identification of the first appellant in the following considerations:
- [7.1] The first appellant admitted that it had indeed, as testified by the complainant, been drizzling.
- [7.2] The regional magistrate found that the first appellant did *“to a certain extent confirm a prior knowledge of the complainant by sight”*.
- [7.3] The regional magistrate found that the first appellant *“corroborates the complainant around his arrest”*.
- [7.4] Lastly the regional magistrate found corroboration in the appellant’s evidence that *“he (had) heard a rumour from the people that he and his brother robbed the old man”*.

- [8]. It is trite that for evidence to serve as corroboration it must pertain to an issue in dispute². It was not in dispute that it had been drizzling.
- [9]. That the first appellant may have known the complainant “*by sight*” could not have taken the matter further. The question was whether the complainant had prior knowledge of the first appellant, and not the other way around.
- [10]. The first appellant did in fact not agree with the complainant’s evidence regarding the circumstances of his arrest. According to the complainant he had about two days after the incident pointed out the first appellant to the police when he recognised and identified him at a “*drinking place*”. The first appellant denied this. His version was that the complainant did not know him and that he had in fact been pointed out by a person named Nose when the complainant was trying to find out who the second appellant’s brother was.
- [11]. According to the first appellant the police official who arrested him would, from where he had been standing at the time, have been able to see the first appellant where he had been sitting when Nose according to him identified him as the second appellant’s brother.

² **S v Scott-Crossley** 2008 (1) SACR 223 (SCA) para [8]

- [12]. The police official, Constable G Peko, denied this and an inspection *in loco* was then conducted at the particular house. It was found that it was indeed possible to see the backyard when standing at the front door, as the first appellant said.
- [13]. On the basis of what and unidentified “*lady occupant of the house*” had apparently said during the inspection, the regional magistrate concluded that the situation had however been different at the time of the arrest and that the view at that stage would have been obstructed or compromised by a fridge. The “*lady occupant*” was, however, never called as witness, neither was the person named Nose.
- [14]. Even if the first appellant had however agreed with the complainant’s evidence about the circumstances of his arrest some time after the incident, this fact could never have served as corroboration for the complainant’s evidence regarding the identity of his attacker/s at an earlier time and at a different location.
- [15]. How a “*rumour from the people*” could ever serve as corroborations is, with respect, beyond me.
- [16]. The fact that a suspect had been known to a witness prior to the incident would substantially reduce the risk of a wrong identification³.

³ **R v Dladla and Others** 1962 (1) SA 307 (A) at 310D; **S v Jochems** 1991 (1) SACR 208 (A) at 212 a - e

[17]. The regional magistrate found that there was prior knowledge of, *inter alia*, the first appellant by the complainant. This finding was on the evidence quite simply not justified.

[18]. The complainant's evidence was initially that he knew only "*one of (the attackers)*", namely the second appellant. When asked whether he knew the first appellant, he answered "*It is only now that I know him. I only hear people say that he is the brother of Cane⁴*".

[19]. This was followed by contradictory evidence about how long the complainant had known the first appellant:

*"How long do you know him? --- I think I believe it is about two to three months that I know him **now**.*

It is now two to three months before the incident or two to three months after the incident? --- Before the incident."

(My emphasis)

[20]. The complainant was never asked to elaborate on his last answer and to explain how and where he had come to know the first appellant in the period of two to three months preceding the incident. Where a witness claims to have had prior knowledge of

⁴ The nickname of the second appellant.

an attacker “*it is necessary to focus on the degree of prior knowledge*”⁵.

[21]. The evidence of the first appellant that he had only been released⁶ approximately one month⁷ before the incident was never challenged and on that evidence it would in any event not have been possible for the complainant to have seen the first appellant in the streets or at any particular place outside of prison before then.

[22]. The first appellant’s version and evidence was that he had on the particular day helped his friend Mr Clifton Monyobo to fix the leaking roof of his house and that, when it became dark, he spent the night there. This was in all material respects corroborated by Monyobo.

[23]. The regional magistrate nevertheless rejected specifically Monyobo’s evidence, and indeed on the following grounds:

[23.1] The regional Magistrate apparently found that it would not have been “*possible to repair a roof in the darkness in a drizzling weather*”.

⁵ **S v Zitha** 1993 (1) SACR 718 (A) at 721 d – e; See also **S v Mehlape** 1963 (2) SA 29 (AD) at 32H – 33A

⁶ Presumably from prison.

⁷ And therefore less than the period of two to three months referred to by the complainant in one of his versions.

Apart from the fact that there was no evidence that this would not in fact have been achievable, the evidence was that the first appellant and Monyobo had started with the repairs before it started raining and long before darkness caught up with them.

The first appellant's evidence was that they had decided, and had begun, to fix the roof because it was cloudy, and therefore clearly because they expected rain. His evidence was:

"..... then whilst we were fixing the shack it started drizzling and then he said let us rather finish fixing the roof"⁸.

His evidence was further that, after they had put the roof back on the shack, *"the night time was then falling"* and that Monyobo then suggested that he stay over.

The evidence of Monyobo was also that the *"weather caused me to go look for somebody to come and assist me with roofing, because it was looking like the rain was going to fall. It was cloudy weather"*.

⁸ Obviously referring to what Monyobo had said.

Monyobo's evidence was that they started fixing the roof around "*four to five in the afternoon*" and that they finished "*around past eight to nine*".

- [23.2] The regional magistrate's second ground for the rejection of Monyobo's corroboration of the first appellant's alibi was formulated as follows:

"How is it possible that London Khumalo is seen by the complainant and is involved in the robbery, and yet he is in the same time busy with the roof structure? Is it not so that no one individual can be in two places at the same time?"

It would obviously have been wrong to reject Monyobo's evidence that the first appellant was at his house simply because the complainant's evidence was that the appellant was on the scene of the robbery. It is for obvious reasons highly unlikely that an alibi witness and a complainant will ever agree on where an accused was when the crime was committed.

- [23.3] The regional magistrate found that Monyobo was "*one of these clearly manufactured witnesses while incarcerated*". The fact that Monyobo had been in custody, awaiting trial in an unrelated matter, with the appellants would of

course not have constituted a ground for the rejection of his evidence.

On the approach that the regional magistrate seems to have adopted in this regard, the question would arise why Monyobo would not have included the second appellant in his fabrication.

- [24]. The fact that the second appellant may have admitted that the complainant had known him prior to the robbery could of course not have served as corroboration for the complainant's identification of the first appellant.
- [25]. In my view the reasonable possibility that the first appellant had not been involved in the robbery, and that he may have been with Monyobo, was not excluded by the evidence. That he is the brother of the second appellant would of course not justify the inference, as the only reasonable inference, that he had been with the second appellant at the time of the robbery. The first appellant's evidence regarding the circumstances of his arrest suggested that he may have been erroneously implicated because of his relationship with the second appellant.
- [26]. The situation is completely different when it comes to the second appellant. It was common cause that the complainant had known him well. The risk of the complainant having mistaken somebody

else for the second appellant was to a large extent eliminated by this fact.

[27]. This is probably why the second appellant found it necessary to say that the complainant had a motive to implicate him falsely. The problem is that the second appellant's evidence in this regard, and specifically regarding the reason why the the complainant would falsely incriminate him, differed completely from what his legal representative had put to the complainant.

[28]. Unlike the first appellant, the second appellant had no corroboration for his version that he had been at home at the time of the robbery.

[29]. In my view there is no basis for interfering with the conviction of the second appellant. That the complainant would then, on the evidence, have been correct in his identification of the second appellant as one of the two attackers, would of course not justify the inference, as the only reasonable inference, that he would also have been correct in his identification of the first appellant.

[30]. The following orders are therefore made:

- 1. The first appellant's appeal succeeds and his conviction and sentence are set aside.**

2. The second appellant's appeal fails and his conviction is confirmed.

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I agree:

L LEVER
ACTING JUDGE
NORTHERN CAPE DIVISION

For the Appellants:	Mr A van Tonder
On behalf of:	Justice Centre, KIMBERLEY
For the Respondent:	Adv M Makhaga
On behalf of:	The Director of Public Prosecutions, KIMBERLEY