

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LULAMA LIVINGSTONE NTONGANA ... First Appellant

ZANELE MAPANDILE Second ~~Appellant~~

and

THE STATE Respondent

CORAM : E M GROSSKOPF, KUMLEBEN JJA et
FRIEDMAN AJA

HEARD : 20 AUGUST 1990

DELIVERED : 3 SEPTEMBER 1990

J U D G E M E N T

KUMLEBEN JA:/...

KUMLEBEN JA :

The two appellants were convicted in the regional court of robbery and each was sentenced to 6 years' imprisonment. Their appeal against conviction and sentence to the Cape Provincial Division of the Supreme Court failed, though leave was granted to prosecute a further appeal in this court.

The robbery took place on Friday 9 March 1984 at Brackenfell on the Northern outskirts of Cape Town. The two complainants, Mr Moolman and Mr Errera, were in the office of their firm when two black men entered. The weekly wages to be paid to the staff had just been fetched. The money, R8 112,04, was on the table in the office. One of the men produced a revolver and pointed it at Errera, demanding money. The other took the money, which was in a carrier bag, and both left the

office. The armed one before leaving fired a shot from the revolver which struck a wall in the office.

On the night of 16/17 March 1984 W/O Fouche was in charge of a road block set up near De Doorns. A Kombi motor vehicle was stopped. The first appellant was the driver and the second appellant, Mr Daniso and Mr Liwaene were passengers. Money was found in the vehicle. It was initially counted on the spot and thought to total R3 770,00. In the early hours of Saturday 17 March 1984 the money and the appellants were handed over to W/O Barkhuizen at Worcester. He became the investigating officer in the case. The appellants were taken by him to the Brackenfell police station. On a recount there the total amount of money turned out to be R4 388,50. On the same day the appellants were transferred to the Bishop Lavis police station. The next day, the Sunday, an identification

parade was held in a large prison cell at the Guguletu police station.

The above facts were common cause. The sole issue was one of identity: the defence was an alibi. The determination of this issue turns, on the one hand, on the acceptability and strength of the identifying evidence and, on the other, on the credibility and reliability of the testimony of the two appellants and the witnesses called by them.

The trial court discounted any possibility of the two complainants being dishonest witnesses who had deliberately and falsely implicated the appellants. There are simply no grounds for any such conclusion. It also held that their evidence identifying the appellants was reliable. The incident took place in broad daylight in a well-lit office and was of more

than brief duration. The complainants and the intruders were virtually face to face when the latter spoke, took the money, fired the shot and left. Some ten days later the identification parade was held. Moolman pointed out the first appellant. Errera pointed out the second appellant and, with a reservation, incorrectly identified another man as his partner in crime.

Mr Uijs, who appeared for both appellants before us, strenuously argued that the identification might well have been faulty on the following grounds (with my comment in parenthesis).

Counsel relied upon the fact that each complainant only pointed out one of the appellants. (But, as was said in the judgment of the court a quo:

"Each witness may have had his own reasons for

focussing more intently upon one person than another.")

It was argued that the selection of the other persons to attend the parade, sixteen of them, gave the exercise a bias against the appellants in that there were a limited number of men of approximately the same age and build as the appellants, only some of whom were bearded. (W/O Schilder, who conducted the parade, said that as far as he could recollect the persons at the parade were of more or less the same length. He was not challenged on this. Moreover, neither in cross-examination nor in the evidence of the appellants was there any suggestion that the composition of the parade rendered it in any way unfair or unreliable.) Moolman said that the first appellant wore a beard at the time of the robbery and, one assumes, this was the case at the time of the identification parade. There were "several" others in the line with beards. It was contended as a point of criticism that this fact

narrowed the range of selection. (Bearing in mind that a beard is not a permanent appendage and that the second appellant was also involved, the procedure adopted of having some with beards appears to me to have been a reasonable and sensible one.) Errera was criticised for having unsuccessfully attempted to point out the other robber. (But, as mentioned, he did so with the explicit reservation that he was uncertain: by contrast his identification of the second appellant was done with assurance.) Errera was taxed in cross-examination with this mistake. The man he incorrectly pointed out was in fact bigger than the first appellant. His explanation was in effect that looking into the barrel of a gun makes its holder appear larger than life. (Whether or not this somewhat imaginative explanation is convincing, there is no suggestion that it was not honestly given and it therefore cannot in any way detract from Errera's identification of the

second appellant.) The fact that he at the trial pointed out the first appellant in the dock as the other robber was also relied upon to question the reliability of his identification of the second appellant. (But this likewise has no real bearing on his accurate identification of this appellant.) Finally, Mr Uijs sought to cast doubt upon the evidence of the complainants and to suggest that they were not observant because there were some - not as many as submitted - contradictions in the account each gave of the sequence of events during the robbery and because they were unable to give details of the clothing or head-gear, if any, worn by those who robbed them. (As to the former, the discrepancies are of an order one would expect in the circumstances: as to the latter, the appellants would have naturally concentrated on, and taken in, facial features, rather than details of clothing.)

It is common cause that the appellants were friends and business associates and, as we know, were found together in the Kombi a week later. The trial court regarded this as significant confirmation of the identification on the part of each complainant. In my view it was fully entitled to do so. Mr. Uijls attempted to counter this by pointing out that a friend of the second appellant, the said Liwaene, was also one of those in the line. Had he been mistakenly pointed out with the second appellant, the fact of their friendship, so it was submitted, would have similarly carried weight but would have been erroneously relied upon. This is as may be, but is not an satisfactory answer: that there was a friendship connection amongst three of the eighteen does increase the chances of coincidence marginally but the fact that the two people who were pointed out turned out to be friends remains a cogent one.

In the result there are strong grounds for concluding, as the trial court did, that the identification by these two witnesses was accurate.

As mentioned, each appellant raised an alibi defence. The first appellant said that he was at the time playing golf at the Metropolitan Golf Course with a friend, Mr Cecil Macani. For the past four years it had been their regular practice to play eighteen holes there every Wednesday and Friday. The assistant professional at the course was Mr Izak Mtunta. After their round, which ended about 4.30 pm, the first appellant gave these two men a lift home. Later, some time after 6 pm, he took some children by car to the Clarence Carter show at a venue called "Three Arts". (The reference to this event was no doubt intended to identify this particular Friday, 9 March, as the day on which he had been playing golf at the time the robbery

was committed.) The second appellant alleged that at the relevant time he was drinking at a shebeen called "Fraser's Place". Later he dressed for the Clarence Carter show, a musical of some sort featuring the singer Clarence Carter, and attended it. As he left Fraser's place he happened to see the first appellant as he came from golf.

A great deal of evidence was devoted to the question whether some or all of the money found in the Kombi was the stolen money. I find it unnecessary to canvas this issue: I am prepared to accept in the appellants' favour that there may have been an innocent, or at least some other, explanation for its presence there. The significance of the evidence of their being found in the Kombi with the money, lies in the fact that their credibility is tainted by the conflicting explanations they gave in this regard. At

the road block the first appellant told W/O Fouche that the money (R3 700,00 as then was thought) belonged to him, but he could not say how much there was. He first said that they were going to a funeral in Bloemfontein and on further questioning changed the destination to East London or a place near East London. When he was handed over to Barkhuizen, the first appellant was again uncertain of their destination, first saying it was Bloemfontein then Ntanzani, near East London. When giving evidence in court, the first appellant said R1 600,00 had been given to him by one David Vundla and a further R2 000,00 had been collected from contributors: the latter amount being a contribution to defray funeral expenses. However, when questioned by Barkhuizen on the Saturday morning, both appellants said at that stage that they were dagga dealers and that the money was to be used for purchasing dagga in the Transkei. The appellants also said, when giving

evidence, that the two complainants had been seen by them at close quarters at the Bishop Lavis and Brackenfell police stations before the identification parade was held. A wealth of evidence refutes this. This story was plainly a conspired attempt on their part to discredit what took place at that parade. In these respects the appellants were shown to be unreliable and untruthful witnesses. (I shall return to the question of their credibility when examining more closely how the Clarence Carter show features in this case.)

Five witnesses testified for the defence. One of them, Mr Davidson Vundla, was called to explain the origin of the money found in the Kombi and to confirm that its occupants were on their way to a funeral near East London. In the light of the assumption in this regard in favour of the appellants, his evidence need not be considered.

Three witnesses, the said Mtunta, Mr Eric Jones and the said Cecil Macani sought to confirm the evidence of the first appellant that he was playing golf that afternoon.

Mtunta said that he remembered that particular Friday because the first appellant gave him a lift home and a meeting was to take place at his (Mtunta's) house that evening. However, further questioning revealed that the first appellant played golf regularly on Fridays, always gave him a lift home and that every Friday a meeting was held at his house. Moreover, when he was telephoned by the first appellant's attorney on 20 March to find out whether the first appellant had played golf on 9 March he was unsure and had to ask Jones before replying affirmatively. And at a later stage when Barkhuizen showed him a photograph of the first appellant, his

answer to him was that the first appellant had not played golf at the Metropolitan course on that Friday.

The evidence of Jones, the caddy master, was that the first appellant did play golf on that day. But when questioned about the previous Friday (2 March) and the subsequent Friday (16 March) he was shown to have no independent or reliable recollection of the particular Fridays when he had seen the first appellant at the course. As to the first date, he said that the first appellant played in a four-ball game but could not remember any of the other players - and a string of unsatisfactory and evasive answers followed. As to the second date, he said that he could not say whether the first appellant had played because he may have been off duty when he teed off. When asked whether he might not have been similarly off duty at that time on 9 March, and therefore not able to say

whether or not first appellant played that afternoon, he said he could still see the players starting off from where he relaxed when off duty during his lunch break. He, like Vundla, was quite unable to confirm the alibi. Mr Uijs conceded that they were both "poor witnesses". On my reading of the record this appraisal is fully borne out and is, if anything, rather charitable.

The witness Macani fared no better. He was the first appellant's regular golfing partner on Wednesdays and Fridays: in fact he said that they had not missed a round together on these days over the past four years. When asked whether he had played golf with him on the following Friday (16 March) he said that he had gone to the first appellant's home that morning to make arrangements for the game that afternoon, but was informed by the first appellant's

sister that he had been arrested that morning. On being told that the arrest only took place in the early hours of the following day, he was at a loss to explain what was obviously false evidence given by him. He maintained that he remembered that particular Friday because the Clarence Carter show was on that evening. He did not attend it. When cross-examined in this regard it was plain that he knew nothing about Clarence Carter and took no interest in singing or musical shows. There was thus no reason why he should have remembered 9 March, or a round of golf on that day, in relation to this event. He also stated that when the first appellant dropped him off at his house, he (the first appellant) said that he was going to the Clarence Carter show that evening. (One recollects in passing, that according to the first appellant he was simply to transport some children to the show which they were to attend.)

Mr Uijs pointed out that a number of witnesses had come forward to support this alibi and submitted that, though unsatisfactory in many respects, some weight should be attached to their testimony. As counsel put it in his written heads of argument, "it is highly improbable that a large number of otherwise uninvolved witnesses would perjure themselves in evidence on behalf of the Appellants and that, accordingly, a reasonable possibility exists that the evidence of these witnesses, supportive of the Appellants' alibis, was true." But quantity as such can never be a substitute for quality. There were, as I trust I have indicated, sound reasons for rejecting the evidence of each in so far as he sought to support the alibi evidence of the first appellant. Cumulatively their evidence cannot therefore amount to anything.

The last witness, Liwaene, who was also

arrested at the road block, was called to confirm the (false) evidence that the complainants had seen the appellants at close quarters on two occasions before the identification parade. He too was a most unsatisfactory witness. Under cross-examination he said for the first time that he had been drinking with the second appellant on that Friday afternoon and thus purported to support his alibi. He first said that they had been drinking at a shebeen called "Sana's place" all afternoon, from 1 pm to 6 pm. When "Frazer's place" was mentioned to him, he altered his evidence to say that they did go there during the afternoon to buy some liquor but returned to "Sana's place" to prepare for the show at the Three Arts. He gave patently contradictory accounts of where they were and what they did that afternoon and by way of explanation said that his recollection was faulty because he was "a little drunk".

Reverting to the Clarence Carter show one notices that whenever it is raised by an appellant or a defence witness such evidence has a particularly false ring. The first appellant described in detail the clothing he wore at golf on that Friday but was unable to say what he wore on certain other days. It is in this connection that the Clarence Carter show is artificially introduced by him, as appears from the following extract from his evidence under cross-examination:

"Wat se klere het jy verlede week aangehad, Maandag --- Ek kan nie meer onthou nie.

Nou hoekom onthou jy die 9de Maart so goed? --- Edelagbare, Clarence Carter skou, ons sou by 'Three Arts' gespeel het, so ek onthou die klere wat ek daar al die tyd gehad het om daardie gebeurtenis.

Die eerste keer wat jy na die 'Three Arts' toe gegaan het? --- Nee, ekself was nie daar nie, maar ek onthou Clarence toe ek daar gespeel het.

Nou hoekom wat laat dit nou jou klere onthou? Die

Vol. 2
Bll. 160

'show' wat nou aan is? --- Ek weet dat ek die betrokke dag by die gholfbaan was, Edelaagbare, so ek kan goed onthou hoe ek die dag aangetrek was.

Nou wat het Clarence Carter se 'show' daarmee te doen? 'n Vertoning waarnatoe jy nie eers was nie? --- Ek moes mense vervoer het soontoe omstreeks sesuur, maar ek was laat."

The second appellant's evidence on this topic was as unconvincing. It was the only show of that kind that he had ever attended: he had never in his life gone to listen to any other singer. I have referred to the particularly poor quality the evidence of Macani and Liwaene in this regard. The inference is a strong one that the introduction of the Clarence Carter show was schemed and intended to lend credence to a false alibi.

Thus on the totality of the evidence it can in no way be said that the trial court was wrong in holding that the appellants were proved beyond reasonable doubt to have committed the robbery.

On the question of sentence, Mr Uijs submitted that the trial court misdirected itself in two respects: by over-emphasizing the seriousness of the offence and under-emphasizing the consideration that the first appellant had no previous convictions and that the second appellant's previous conviction was not one involving violence or dishonesty. I am not certain whether the emphasis placed on or evaluation of a factor, properly taken into account by the court, ought to be regarded as a "misdirection". Be that as it may, there are no grounds for concluding that these considerations were not properly taken into account in deciding on an appropriate sentence. To rob persons of a considerable amount of money at gun point remains a very serious offence. The first appellant demonstrated that the revolver was loaded and, had either of the

complainants resisted, it is reasonable to assume that it would have been more effectively used. Even if both appellants are taken to be first offenders, the sentence imposed does not appear to me to be disturbingly inappropriate or indeed unreasonable.

The appeal of each appellant against conviction and sentence is dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

E M GROSSKOPF
FRIEDMAN

JA)
AJA) - agree