

10/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 5/94

P RADEBE

APPELLANT

VERSUS

THE STATE

RESPONDENT

CORAM: HEFER, EKSTEEN JJA et NICHOLAS AJA

DATE HEARD: 24 FEBRUARY 1995

DATE DELIVERED: 10 MARCH 1995

NICHOLAS AJA

J U D G M E N T

NICHOLAS AJA:

After argument was heard in this matter, the court made an order allowing the appeal and setting aside the accused's convictions and sentences, and indicated that reasons would be filed later. The following are the reasons.

The appellant Peter Radebe was convicted by the regional court sitting in Johannesburg on two counts: (1) attempted robbery from a person unknown, in respect of which he was sentenced to imprisonment for 5 years; (2) unlawful possession of 9 a mm Astra pistol, in respect of which he was sentenced to imprisonment for 18 months. In pursuance

of a judge's certificate he appealed to the full court of the Witwatersrand Local Division which dismissed the appeal by a majority and granted leave to appeal to this court. At the request of the full court pro deo counsel was appointed to argue the appeal on behalf of Radebe, a task which was ably performed by Adv. Miss Borchers.

The charge arose out of an event which took place at about 10 pm on the evening of 4 September 1992 in the vicinity of the Carlton Centre in Commissioner St Johannesburg. Four witnesses gave evidence for the state: Dirk and Jaco Raats ("Dirk" and "Jaco") who are brothers and who witnessed the robbery; and W/O Sypel and Cst Hough, members of the Flying Squad who were patrolling the area at the time and who arrested Radebe at about 10.30 p.m.

Dirk said that he and his brother were uniformed security guards. They had been appointed to perform security duties at Dobson's, a clothing store in President St Johannesburg. The shop was not yet open when they arrived there at about 10 p m on 4 September 1992, and so they took a stroll through the Carlton Centre. They emerged at the back and walked up Delwers St which bounds the Carlton Centre on its eastern side. At the intersection of Delwers St with Commissioner St (which bounds the Carlton Centre on its northern side) they saw a black man and a white man standing together. The white man's clothing was covered in blood. The black man was wearing " 'n geel baadjie, 'n bruin broek en 'n wit hemp en hy het 'n paar bruin skoene aangehad." They saw the black man take a pistol from a holster on his right side and point

it at the white man and demand the purse of the latter. This was produced and as the black man took it he turned his head and, seeing the Raats brothers in uniform, he took to his heels. Dirk and Jaco pursued him, but at a distance because they were not armed. They followed him along President St but when he turned into Troy St they lost sight of him and broke off the chase. They walked back along President St. to Dobson's. When they got there they saw that a police vehicle was parked "anderkant", two blocks away. Dirk and Jaco went to the vehicle and identified a black man, whom the police had detained, as the man they had pursued. The following is an extract from the record of Dirk's evidence in chief.

"En u sê u het hom geïdentifiseer? .. Dit is reg ja.

Op wat, waarom? .. Op sy kleredrag wat hy aangehad het.

Het u sy gesig nie onthou nie? .. Nee ek het sy gesig het ek ook onthou.

Hoekom het jy sy gesig onthou? .. Want daar waar hy die wit ou beroof het was dit helder gewees want ek kon sy gesig duidelik gesien het dit is hoekom ek hom geïdentifiseer het."

He also identified the firearm:

"En die vuurwapen? .. Die vuurwapen het die polisie by hom gekry.

Maar het u dit gesien weer, die vuurwapen of nie? .. Ja die man wat die geel baadjie en bruin broek en wit hemp aangehad het, dit was hy wat die vuurwapen by hom gehad het.

Ja maar het u dit gesien toe die polisie hom het, het u die vuurwapen gesien? .. Ja ja ek het die vuurwapen weer gesien.

Waar het u dit gesien? .. Een van die polisiemanne het die vuurwapen in sy hande gehad dit was binne 'n holster gewees.

Is u in staat om te sê of dit nou enigsins dieselfde vuurwapen was of gelyk soos dit of is dit heeltemal 'n ander

vuurwapen wat u gesien het? .. Nee dit was presies dieselfde vuurwapen gewees.

Weet jy watter tipe dit was? .. Nee ek weet glad nie."

Dirk said that the man detained by the police had on a yellow jacket, brown trousers, a white shirt and brown shoes.

The evidence of Jaco Raats was generally along the same lines.

He referred however to one feature not mentioned by his brother. He said that the white man's assailant "het hom 'n paar klappe gegee".

W/O Sypel said that on the evening of 4 September 1992 he was on patrol in a police vehicle together with Cst Hough, when he received a radio call to keep a look-out for a black man, wearing a yellow jacket and carrying a firearm, who had robbed a person. In the course of his patrol he saw a black man with a yellow jacket standing at

the corner of Delwers and Commissioner Sts. In order to achieve surprise he circled the block and when he returned along Delwers St, he shone his headlights on the man who was still standing at the corner, and whom he identified as the accused Radebe. He stopped the vehicle and Cst Hough leapt out.

Hough in his evidence said that he approached Radebe and searched him but found nothing. Next to him he saw a carton, in which there were rubbish bags and rubbish, and among them he found a 9 mm Astra pistol in a leather holster. Jaco and Dirk Raats then arrived and identified the man as the robber.

In his judgment convicting Radebe the magistrate said that the state witnesses gave their evidence in a satisfactory manner; the court

could not find that any of the witnesses was guilty of adaptation or improvisation in their accounts; there was no reason why the state witnesses should testify falsely against the accused; they at no stage contradicted each another but where that was possible, they corroborated each other; and there were no inherent improbabilities in their stories.

The accused's evidence on the other hand was so shot through with improbabilities that it could not reasonably possibly be true.

The trial court made the following findings of fact on the evidence.

Firstly, that Dirk and Jaco Raats saw the accused when he slapped an unknown white man; that the accused then took out a firearm and pressed it against that person; that that person produced a purse which he handed over to the accused, whereupon the latter took to his heels;

that the only reasonable inference was that the accused forcibly took the purse from the victim; and that the court accepted the evidence of the Raats brothers that the firearm which was found in the carton was the firearm which was used in the robbery. The magistrate accordingly convicted the accused of attempted robbery (although the complete crime was proved) and unlawful possession of the pistol.

It is not correct that Dirk saw the assailant slap the white man. Only Jaco gave that evidence. The important question however is whether the magistrate was right in finding that it was the accused who was the assailant. The issue is one of identification: the identification of the accused as the perpetrator of the robbery, and the identification of the pistol found in the carton as the pistol employed in the robbery. The

magistrate recognized in his judgment that caution was called for in the assessment of evidence of identification. He considered however that the account of the state witnesses could be accepted as that of good and credible witnesses. I do not agree.

The identifying evidence was that of Dirk and Jaco Raats and I do not think that their evidence was of such a nature or quality that a conviction of the accused could safely be based upon it.

The magistrate said in his judgment -

"Al vier die getuies staaf mekaar op die kleredrag
wat beskuldigde aangehad het."

Although the evidence of Dirk (and of Jaco) was that

"... die kleredrag wat [die beskuldigde] aangehad het was 'n geel
baadjie gewees, 'n bruin broek en 'n wit hemp en hy het 'n paar

bruin skoene aangehad."

Sypel said only that he was wearing a "geel baadjie". Hough said that the description they got by radio was that of

"'n swart persoon met 'n geel baadjie, 'n geel oorbaadjie aan met 'n ligkleurige broek."

and that that description fitted the accused. Neither of the policeman mentioned that the accused was wearing brown trousers, a white shirt or brown shoes.

The magistrate then said -

"Dit is nooit betwis dat die toneel waar die roof sou plaasgevind het, sodanig verlig was dat die staatsgetuies in staat was om beskuldigde goed en duidelik te kon sien nie."

Regardless of the lightning conditions, I am not persuaded that the circumstances were such that Dirk and Jaco were in a position to identify

the assailant except by his yellow jacket. Jaco said in his evidence -

"nadat ... hy die vuurwapen op hom gerig het, toe het hy omgekyk en het hy gesien my en my broer kom aan. En met die tyd toe hy ons sien toe het hy omgedraai en gehardloop. Hy het afgehardloop in Presidentstraat. Hy het twee blokke afgehardloop en hy het in Troystraat het hy afgedraai, regs afgedraai in Troystraat. En hy was ongeveer 20 meter voor ons gewees. En nadat hy gehardloop het toe het ons hom, toe het hy net verdwyn. Toe het ons hom nie weer gekry nie."

From this it appears that Dirk and Jaco could only have had a fleeting frontal view of the assailant. When he was first asked how he identified the assailant as the accused Dirk said "Op sy kleredrag". It was only in answer to a leading question that he said that he also remembered the assailant's face. It appears from the judgment that the magistrate, quite rightly, did not attach any importance to this last piece of evidence,

because he next said -

"Alhoewel daar geen uitstaande kenmerke oor getuig is waaraan beskuldigde uitgeken is nie, is die hof van oordeel dat die kleredrag voldoende getuienis daarstel om te kan bevind dat beskuldigde dieselfde persoon is wat deur die polisie gearresteer was."

(My emphasis). I do not agree that the accused's "geel baadjie" was sufficient to justify a finding that he and the assailant were the same person. It may be that a yellow jacket is unusual, but there is no reason to think that it was unique to the assailant.

The magistrate said in regard to the firearm -

"Op die tweede aanklag bevind die hof dan dat die vuurwapen langs beskuldigde in 'n kartondoos gevind is. Die hof aanvaar op die getuienis van die eerste twee staatsgetuies dat dit dieselfde vuurwapen is wat ten tyde van die roof gebruik was. Die

hof is daarom ook tevrede dat die staat bewys het dat beskuldigde hierdie vuurwapen besit het."

I do not think that this finding was justified. The witnesses had scant opportunity of observing the pistol at the time of the robbery. They were some 20 paces away. The pistol was in a holster which appears to have been located on the assailant's right side towards the back. When he took it out, he pointed it at the victim and presumably most of it was then largely covered by his hand. And when Dirk and Jaco joined the policemen, they do not seem to have examined the pistol at all closely - it does not even appear that the pistol was removed from the holster.

Dirk said in his evidence -

"Die vuurwapen het die polisie by hom gekry ... Een van die polisiemanne het die vuurwapen in sy hande gehad dit was binne 'n holster gewees."

The record continues -

"Is u in staat om te sê of dit nou enigsins dieselfde vuurwapen was of gelyk soos dit of is dit heeltemal 'n ander vuurwapen wat u gesien het? ... Nee dit was presies dieselfde vuurwapen gewees."

Jaco's evidence in regard to the firearm was this -

"En het u die vuurwapen weer gesien? ... Ja toe die polisie het die vuurwapen by hom gekry en ons het die vuurwapen weer gesien.

Was dit dieselfde vuurwapen? ... Dit was dieselfde vuurwapen.

Weet hy watter vuurwapen dit was? Of weet jy nie? ... 'Okay' ek weet dit was 'n baie kleinerige pistool gewees.

Was dit net los gewees of was dit in iets gewees? ... Ja hy was in ... (tussenbei)

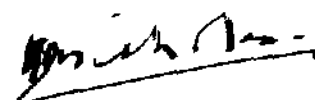
Wat was dit? ... In 'n holster gewees."

The evidence of identification of the pistol is not acceptable. It appears to have been based not on the observations of the witnesses but on an unwarranted inference: the police had detained a man wearing a yellow jacket, and were in possession of a pistol which Dirk and Jaco thought (wrongly) had been found on his person. And the fact that the accused was standing next to the carton in which the pistol was found does not afford proof beyond a reasonable doubt that the accused was then in possession of the pistol.

I agree with the magistrate's view of the evidence of the accused.

But the fact that the accused was a lying witness does not constitute

proof that he was the robber. In my view his guilt was not proved beyond a reasonable doubt.



H C NICHOLAS

ACTING JUDGE OF APPEAL

HEFER JA)
EKSTEEN JA) CONCUR