THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 201/06

In the matter between:

XOLANI NGCINA Appellant

and

THE STATE Respondent

Coram: *Howie P, Navsa et Heher JJA*

Date of hearing: **14 September 2006**
Date of delivery: **22 September 2006**

Summary: Identification of appellant as robber by single witness unreliable – alibi evidence considered – delay of 6 years for finalisation unacceptable – to be brought to attention of relevant authorities.

Neutral citation: This judgment may be referred to as *Ngcina v The State* [2006] SCA 108 (RSA).

JUDGMENT

NAVSA JA

NAVSA JA:

[1] On 19 February 2000 a robbery took place at the Asperanza Café in Sidwell, Port Elizabeth. Subsequently the appellant faced three charges in the regional court in relation to this incident. He also faced a number of charges in relation to a robbery that took place during 1999 at certain business premises in Walmer, Port Elizabeth. He was acquitted on those charges and we need not be concerned with them. In relation to the robbery at the Asperanza Café, the appellant was charged first, with robbery with aggravating circumstances within the meaning of that expression in s 1(1) of the Criminal Procedure Act 51 of 1977, in that he had unlawfully assaulted Martin Maasdorp and had forcibly taken from him a watch, a cell phone and cash. Second, the appellant was charged with unlawful possession of a firearm in contravention of s 2 read with ss 1, 39 and 40 of the Arms and Ammunition Act 75 of 1969. Third, he was charged with unlawful possession of ammunition in contravention of s 36 read with ss 1, 39 and 40 of that Act.

[2] The appellant was convicted on the first two counts and sentenced to twelve years imprisonment on the first count and three years imprisonment on the second. The magistrate ordered two years of the latter sentence to run concurrently with the first. The appellant unsuccessfully appealed against his convictions to the Grahamstown High Court. He now appeals further to this court, with the necessary leave.

[3] The sole issue in this appeal is the adequacy of the evidence concerning the identification of the appellant as the gun-wielding robber. The incident occurred at approximately 06h30 when Mr Maasdorp, the complainant and owner of the café, was reading the morning newspaper when two men entered, one of whom asked for a cool drink and presented payment. As this occurred a third person, wielding a firearm, accosted him, held the firearm against his head, forced him to the ground and demanded money. The other two, who took part in the robbery, searched the premises, including the cash register. The complainant was forced into the café's kitchen where he was made to lie on the floor. A short while later, one of the

complainant's regular customers, one Temba, was brought in by the three men. Temba and the complainant were locked up in a toilet on the premises. During this process the robbers took the complainant's watch which he had inherited from his father, his cell phone, his wallet and approximately R300-00 in cash.

[4] The complainant described the robber with a firearm as someone who was relatively tall (about six feet), and who had short fat fingers ('poffervingers'). He testified that at the time of the robbery he had noticed that this robber had a dark mark on his right index finger ─ when the firearm was pointed at him and the person's index finger was curled around the trigger. He could not say whether this was a permanent mark or a healing wound. The complainant first identified the appellant at an identification parade and later in the dock. Significantly, the appellant was not shown to have been arrested on the strength of a description provided by the complainant. Indeed there is no evidence that the complainant gave the police a description or, if he did, what it was.

[5] In his judgment, the magistrate reminded himself to be cautious in his approach to the evidence concerning identification. He was aware that the evidence should not only be honest but also reliable. The magistrate was of the view that the complainant was honest *and* that his identification evidence was reliable.

[6] Insofar as opportunity for observation was concerned, the complainant stated that he had looked at the armed robber's face when he first entered the café and on a second occasion, when he was forced to the ground. The complainant testified that in total the time he had for observation was between one and two minutes. The first occasion on which he observed the appellant was not one which demanded his attention and the second was fleeting and stressful. The very foundation of the identification must therefore be regarded as shaky.

[7] The complainant's testimony about how he identified the appellant at an identification parade is important. He testified that he saw two tall people at the parade, one of whom was the appellant. The following is a relevant part of is testimony:

'. . . toe lyk [dit] asof die een persoon *dalk* die booswig kon wees, maar toe sien ek heel op die punt regs het ook 'n lang persoon gestaan, toe het ek nou geloop tot op die punt en weer teruggekom en by [die appellant] het ek vasgesteek.'

[8] A short while later he testified as follows:

'Ja, nadat ek nou na [die appellant] gekyk het en gedink het wel dit is die persoon, wou ek baie seker maak en ek het na regs geloop waar ek die ander lang persoon gesien het, toe sien ek hierdie lang persoon op die punt is definitief nie die man nie, toe kom ek terug na [die appellant] toe en toe identifiseer ek hom.'

Almost immediately thereafter he said the following:

'Nadat ek by die laaste lang persoon gewees het, het ek teruggekom weer na sy gesig gekyk en ook na sy hande gekyk.'

The complainant supplied the following reason for returning to look at the appellant's face and hands:

'Dit was omdat ek absoluut seker wou maak, het ek elke persoon deurgekyk en toe teruggekom het en baie deeglik in [die appellant se] gesig gekyk het, was ek al definitief seker maar net om nog 'n honderd persent seker te maak het ek na sy vinger ook gekyk.'

[9] At one stage during his testimony the appellant said that the appellant had two distinguishing features, namely, his 'poffervingers' and ''n redelike groot maag'.

[10] During his testimony at the trial the appellant said the following:

'Edelagbare nadat ek die fotos nou gesien het van die uitkenningsparade en ek na die persoon daar kyk, hoef ek nie, ek kan duidelik sien dit is dieselfde persoon.'

[11] When asked whether the appellant had any distinguishing facial features the complainant replied as follows:

'Nee, niks spesifieks nie . . . Alhoewel ek hom nou sou geken het daarna en ek het hom ook uitgeken.'

When asked a second time which distinguishing features led him to believe that the appellant was the robber, he replied as follows:

'[D]it was vir my baie duidelik dit is dieselfde persoon wat in my winkel gewees het. Ek het spesifiek na sy hande gekyk en dit was vir my baie duidelik dieselfde hande.'

[12] The complainant testified that during the identification parade he saw the mark on the appellant's index finger as described earlier in this judgment. Importantly, when he was asked how the mark he saw on the appellant's index finger compared with the mark he saw on the day of the robbery, he replied as follows:

'[D]it sou miskien 'n bietjie moeilik wees om presies te sê, want daardie man se vinger was om die sneller getrek, so ek het net 'n gedeelte van sy vinger gesien en toe hy gestaan het, was sy hand nou nie meer op 'n sneller nie. Daar was definitief 'n merk.'

Almost immediately thereafter the complainant was adamant that it was a mark on the index finger and that it was on the same place.

[13] Under cross-examination the complainant testified that the mark was not the decisive factor in his identification of the appellant and stated the following:

'Ek het die man se gesig herken, ek het sy maag herken, sy poffervingers en tesame met dit het ek die merk op die vinger gesien.'

[14] The following part of the complainant's testimony is a further cause for concern:

'[E]k het dit gestel vroeër ek kan nie vir u sê dit is 'n geboortemerk of 'n seerplek wat hy gehad het nie. 'n Seerplek kan gesond word, maar dat daar 'n merk aan sy hand was, dit kan selfs ghries gewees het, maar daar was definitief 'n merk aan sy hand. Verskoon tog . . . dit kan nou nie ghries wees nie, want hy het daardie merk toe ek hom geïdentifiseer het ook nog gehad.'

[15] It is common cause that at the trial there was no mark visible on the appellant's index finger. It is to be noted that the identification parade took place approximately nine weeks after the robbery.

[16] The identification of the appellant as the armed robber is based on the evidence of a single witness. As correctly pointed out by DT Zeffertt,

AP Paizes and A St Q Skeen *The South African Law of Evidence* (2003) p 143 appellate courts have frequently remarked upon the danger of relying on the identification of a single witness. The learned authors state the following at 144:

'Lastly it should be stressed that the courts have frequently said that "the positive assurance with which an honest witness will sometimes swear to the identity of an accused person is no guarantee of the correctness of that evidence." '

In this regard the judgment of Van Heerden JA in *R v Magelang* 1950 (2) SA 488 (A) at 493 is relied on as are the following cases: *R v T* 1958 (2) SA 676 (A) at 681, *S v Mlati* 1984 (4) SA 629 (A) at 633A-C and *S v Sithole* 1999 (1) SACR 585 (W) at 591d.

[17] In my view, there is substance to the submissions on behalf of the appellant that the identification by the complainant was not shown to be sufficiently reliable. The complainant was motivated initially by the height of the appellant and at the identification parade sought him out as one of two tall persons. His description of how he identified the appellant at the identification parade is consistent with uncertainty. The identification by the mark on the finger is dangerous. The complainant himself said it was not a decisive factor in the identification. The absence of the mark at the trial and a failure by the complainant to supply any other corroboration for the identification left the trial court with no means of testing the complainant's say-so, which itself depended on the reliability of his observation in the restricted and pressured circumstances referred to earlier.

[18] It is true that the alibi evidence on behalf of the appellant was not satisfactory. As pointed out by Leach J, in his judgment in the High Court, dismissing the appellant's appeal, the appellant and his alibi witness were not convincing. Their evidence on this aspect is subject to criticism. In *The South African Law of Evidence*, supra, p 151, the learned authors correctly point out that courts occasionally fall into the error of treating an alibi defence as a separate issue to the issue of identification. An alibi defence is essentially a denial of the prosecution's case on the issue of identification.

The learned authors state the following:

'As the Appellate Division has said in *R v Hlongwani* and *R v Khumalo en Andere* the correct approach is to consider the alibi in the light of the totality of the evidence and the court's impression of the witnesses. It is sufficient if it might reasonably be true. This does not mean that the court must consider the probability of the alibi in isolation. If someone says that he was in bed at midnight and no other evidence may be considered, it would be difficult to say it could not reasonably be true, but if there is sufficiently strong evidence to show that he was in fact breaking into a shop, the court may consider that his story can safely be rejected.'

[19] The complainant's evidence is not sufficiently strong and it cannot be excluded that the appellant was elsewhere at the time of the robbery. I have no doubt concerning the complainant's honesty. In my view, though, for all the reasons stated earlier, he cannot be said to be a reliable witness on the crucial issue of identification. Counsel representing the State rightly acknowledged that he could not argue the contrary. Considering the totality of the evidence it cannot be said that the appellant's guilt was proved beyond a reasonable doubt.

[20] There is a disturbing aspect of this case that we are constrained to address. The record shows that the appellant's first appearance in the regional court occurred on 19 July 2000. He was convicted on 27 November 2003. It thus took more than 40 months to finalise a criminal case that was uncomplicated. It is true that the matter was postponed during 2000 and the first half of 2001 to enable the appellant to obtain legal representation. At one stage the appellant changed his legal representative. There is no ostensible reason for further delays. It is now more than six years since the appellant's first appearance. He has been in custody for all of that time. Counsel for the State was himself troubled by this state of affairs. He stated that such delays have become commonplace due to a variety of reasons. He explained that there were massive police investigation backlogs in the Eastern Cape and that the rate at which they were being addressed indicated that the problem would be exacerbated. The problem became more acute because there were not enough police. Counsel for the State submitted that training of new recruits had to be urgently addressed. He described how regional courts in certain areas did not have sufficient magistrates. He was

concerned that the measures to address the backlog of court cases were such that the backlog was likely to increase. It appears that there were bureaucratic delays in the transmission of the record, both in the first and present appeal.

[21] Counsel for the State rightly accepted that it was outrageous that in a constitutional state such as ours persons who might ultimately be acquitted would have spent many years in jail awaiting finalisation of their cases. It makes a mockery of the constitutional rights of detained and accused persons.

[22] In *S v Liebenberg* 2005 (2) SACR 355 (SCA), this court stated that the period of almost ten years that it took for an appeal to be finalised was an unacceptable delay. In that case the appellant was tried within a reasonable time from the date on which the offences were committed. He was, however, in custody pending finalisation of his appeal.

[23] The delays in this case are a serious cause for concern. The issues set out in para [20] must be addressed urgently in the interests of the proper administration of justice. The Registrar is instructed to bring this judgment to the attention of the Ministry of Justice and the National Director of Public Prosecutions.

[24] The appeal succeeds and the appellant's convictions and related sentences are set aside.

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

HOWIE P
HEHER JA