IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

CASE NO. CA&R 175/2021

In the matter between:

NDINANI PETER FIRST APPELLANT

UNATHI NYAMEKAZI SECOND APPELLANT

and

THE STATE RESPONDENT

JUDGMENT ON APPEAL

Rugunanan J

[1] The first and second appellants were among four accused persons who appeared before a magistrate in the Regional Court, Gqeberha as accused number one and accused number three respectively. They were charged with robbery with aggravating circumstances read with the provisions of section

51(2) of the Criminal Law Amendment Act 105 of 1997 – the allegation being that on 23 October 2014, and acting in pursuance of a common purpose, the appellants assaulted an employee of a 'Tops' liquor store located in Rink Street in Central, threatened her with a firearm and made off with cash to the value of R1 000 and liquor valued at R3 496.91.

[2] Both appellants were legally represented during trial. They pleaded not guilty to the charge and upon testifying, raised alibi defences indicating that they were at their places of employment at a construction site on the day in question.

[3] Following their convictions on 27 February 2020, the appellants were each sentenced to a term of 12 years' imprisonment, six years of which were suspended for a period of five years on condition that they were not convicted of robbery with aggravating circumstances during the period of suspension. The present appeal, with leave having been granted by the trial court on 28 September 2020, is directed against each appellant's conviction and sentence.

[4] The appeal turns on the reliability of identification evidence.

[5] Four witnesses testified for the State, namely: Kereniah Cephas, an employee at the liquor store; Sinawo Zinco who testified under section 204 of the Criminal Procedure Act 51 of 1977; Sergeant John Leppan, the investigating officer; and Captain Rio Kriel who recorded a confession from accused number four. Barring the appellants, the confession is admissible only against accused number four[1] and the evidence of the witness Kriel assumes no relevance in this appeal.

[1] *S v Serobe* 1968 (4) SA 420 (A) at 425F-G.

[6] To begin with, Cephas, who was the first witness to testify for the State, stated that the robbery occurred at about 13h55 when five men wearing woollen caps entered the store. Save for having noted that one of them wore a pink t-shirt and a brown trouser she was unable to identify the appellants as among the perpetrators involved in the commission of the robbery, nor could she proffer detail of any significant physical features of the remaining perpetrators. She stated that the men retrieved bottled liquor from the shelves and placed the items into a brown bag. She was threatened with a firearm and cash was removed from the checkpoint.

[7] Cognisant that the evidence by Cephas did not take the matter any further on the identity issue the magistrate pillared his judgment on the evidence of Zinco and Sergeant Lepan whose testimonies read persuasively with him in convicting the appellants. From what follows it will be demonstrated that the conviction for each appellant cannot be supported on the evidence.

[8] Lepan was tasked with the investigation of the robbery on the day of its occurrence. He had no previous encounter with the appellants nor did he have any prior knowledge of their identity. He arrested them with the collaboration of Zinco, who he located and arrested the same day after acquiring the registration details of a Toyota motor vehicle that was used in the commission of the offence. The vehicle belonged to the father of a friend of Zinco. The registration details of the vehicle were given to Lepan by a car guard in Rink Street. Tracking the ownership details of the vehicle to a house in Motherwell, Lepan encountered Zinco and was able to establish that Zinco had borrowed the vehicle from the friend’s father on the day of the robbery.

[9] Zinco testified that he procured the vehicle at the instance of the third appellant. Zinco was the driver of the vehicle. He conveyed five male

persons (among them the appellants), and was directed to the liquor store in Rink Street. On arrival the appellants including the others alighted from the vehicle. They were carrying an empty brown leather bag and entered the store. After approximately ten minutes they returned with the bag. It was filled with bottles of liquor and some of the men carried bottles of liquor in their hands. They drove off from the scene. He was paid an amount of R250 by the second appellant, who he at some stage observed handing over a firearm to one of the backseat occupants.

[10] On the identity issue Zinco's evidence implicates the appellants. The reliability of his evidence, however, is tenuous. He had never known or encountered the first appellant prior to the date of the robbery but identified him in court. The record reflects that Zinco testified on 30 May 2018, some three years and seven months after his encounter with the first appellant. He offered no verbal description of any physical characteristics that prompted his identification of the first appellant. The State did not adduce evidence indicating that Zinco's identification could be sourced in an independent preceding identification procedure. In circumstances where the timespan in the evidence is so manifestly patent the dock identification of the first appellant, in my view, carries little weight.[2]

[11] As for the second appellant, it is common cause that he and Zinco had grown up and lived in the same community. Zinco left the area roundabout 2013-2014 at the age of ten. The hiccup with this evidence is that he could not seriously be considered to have been the driver of a getaway vehicle when the robbery was committed in 2014. In cross-examination he struggled to give clear evidence about whether and how he maintained contact with the third appellant in the interval since leaving the community until date of commission of the

[2] *S v Mdlongwa* [2010] ZASCA 82; 2010 (2) SACR 419 (SCA) para 10.

offence. No re-examination followed, hence this rift in his evidence remained manifest.

[12] The issues arising from Zinco's testimony concerning both appellants bedevilled the case for the State. In my view there was a duty on the State to have drawn them to the magistrate's attention[3] – they affected the merits of the witness and whether he answered 'frankly and honestly' in satisfaction of the conditions necessary for acquiring indemnity under section 204. Zinco is an accomplice, no doubt seeking the indulgence of a discharge from prosecution. His evidence ought to have been subjected to close and careful scrutiny. He testified in some length about his collaboration with the police but lacked the candour for revealing his motive for doing so.

[13] The magistrate ruled that Zinco answered 'frankly and honestly' and discharged him from prosecution. The discharge did not occur at the end of the trial once all the witnesses testified and argument had been heard but followed immediately upon conclusion of his testimony during presentation of the State's case. In this regard it is worth reiterating the explanation in *S v Mnyamana*[4] with which I am unreservedly in agreement:

'Ultimately the Court has to determine whether, on all the evidence, a conviction of the accused is justified. By granting a discharge to an accomplice at the completion of his evidence, the Court not only gives the wrong impression to the accused who might feel that the Court is prejudging the issue, but granting a discharge at that early stage without a proper evaluation of the witness's evidence in the light of all the other evidence that might be adduced, could well have a detrimental effect on the Court's own thinking.

The fact that [section 204 of the Criminal Procedure Act] makes no provision for the withdrawal of a discharge, once it has been granted by the court, is an indication that it was not contemplated that it should be given until the end of the case.'

[3] Du Toit et al *Commentary of the Criminal Procedure Act* (Service 60, 2018) at 23-50G.
[4] *S v Mnyamana* 1990 (1) SACR 137 (A) at 141*b-c*.

[14] A discharge of a witness from prosecution before the conclusion of the case amounts to an irregularity.[5] In argument, counsel for the respondent correctly conceded this. While I do not consider the irregularity in the discharge of the witness Zinco as one that can be categorised as fatal, the rifts and anomalies in his evidence are such as to lead me to conclude that his evidence is unreliable. In these circumstances an appeal court will decide for itself whether, on the evidence and the findings unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt.[6] In keeping with this approach, and in support of the appellants' convictions, respondent's counsel steered clear from relying on the evidence of Zinco and laid emphasis rather on the evidence of Sergeant Lepan and the doctrine of recent possession.

[15] On being tasked with the investigation of the robbery, Lepan interviewed Cephas and viewed video footage of the robbery that had been captured by CCTV cameras installed in the liquor store. Lepan testified on 20 June 2018. He dock identified the appellants. This occurred some three years and eight months after having viewed the footage. Nowhere in his evidence does he mention any special features or matching characteristics arising from the video footage with the presentation and appearance of the appellants in the dock. The appellants were unknown to him. Put otherwise, they were individuals not previously encountered. Lepan's ability to distinguish their faces and dock identify them falters if one considers that they wore headgear and that his identification was based on a replay of footage last seen on the date of the robbery. On the identity issue Lepan's evidence is the product of a subjective inference unsupported by objective facts or evidence. Moreover, Cephas's description of the attire worn by one of the perpetrators is not borne from the description of the attire worn by the perpetrators which Lepan extracted from the footage when he testified.

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[5] *S v Mnyamana* 1990 (1) SACR 137 (A) at 140*i* – whether such an irregularity constitutes a failure of justice, however, depends on the facts of each case – see *S v Mnyamana* at 141*e-i*; also Du Toit et al *Commentary of the Criminal Procedure Act* at 23-50I.

[6] *S v Mnyamana* supra at 141*f*.

[16] Evident from the magistrate's judgment is that Lepan's evidence was not subjected to the degree of scrutiny that postulated applying caution and testing its reliability.

[17] A reading of Lepan's evidence indicates that he was focussed, clear and verbally expressive. One may readily conclude that he made for a good witness who exemplified attributes of honesty and integrity.

[18] Our courts, however, have emphasised time and again that such attributes and a witness's subjective assurance are not enough. There must be certainty beyond reasonable doubt that the identification is reliable – there must be an appreciation that the evidence of identification based on the witness's recollection of the appearance of a suspect can be 'dangerously unreliable', and must of necessity be approached with caution.[7]

[19] The magistrate had no regard to the significant lapse in time since the date of the robbery and the date on which the abovementioned witnesses testified. This is a crucial factor which underscores the necessity for a cautionary approach to their evidence.

[20] Turning to the doctrine of recent possession. It is a common-sense observation on the proof of facts by inference. It supports an inference being drawn that the possessor of recently stolen property stole the property. It may be relied on where he cannot give an innocent explanation for his possession and the inference that he stole the property is the only reasonable inference that can be drawn from such possession.[8]

[21] In *S v Parrow*,[9] Holmes JA stated the following:

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[7] *S v Charzen and Another* [2006] ZASCA 147; [2006] 2 All SA 371 (SCA) at 147*i-j*.
[8] *Sijadu v S* [2013] ZAECGHC 116 para 14.
[9] *S v Parrow* 1973 (1) SA 603 (A) at 604C.

'I pause here to refer briefly to the so-called doctrine of recent possession of stolen property. In so far as here relevant, it usually takes of this form: on proof of possession by the accused of recently stolen property, the Court may (not must) convict him of theft in the absence of an innocent explanation which might reasonably be true. This is an epigrammatic way of saying that the Court should think its way through the totality of the facts of each particular case, and must acquit the accused unless it can infer, as the only reasonable inference, that he stole the property. . . . The onus of proof remains on the State throughout. Hence, even if, after closing of the cases for the State and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless the only reasonable inference is that he did so; for the law demands proof beyond reasonable doubt.'

[22] The above *dictum* evinces that it is a requirement for the application of the doctrine of recent possession that the property of which the accused was found in possession was stolen.

[23] Significantly, the limitation in the State's case is that it did not adduce evidence of the brand names and the exact number of items of bottled liquor that were stolen during the robbery.

[24] Lepan testified that he located (without specifying the date) the second appellant in a shack in Motherwell and arrested him. In the shack he found liquor that he confiscated. No attempt was made to elicit evidence from Lepan as to the number of items of liquor that were confiscated, nor was evidence of their brand names elicited. Tellingly, the State did not adduce evidence that the liquor confiscated by Lepan was identified as merchandise stolen from the liquor store during the robbery.

[25] Where there is no proof that the liquor found in the possession of the second appellant was identified as stolen property, the doctrine of recent possession (by the dictate of common-sense), does not apply.

[26] Cephas stated that she was called to the police station on 27 July 2015. This approximates to a period of nine months after the robbery. She was shown a brown bag and identified it as the bag that was used in the commission of the offence. That it was indeed the bag remains doubtful in the absence of evidence indicating its distinctive physical features and dimensions. Lepan's evidence suffers from the same deficiency when he testified that a big brown leather bag was spotted next to the first appellant who had been consuming liquor in the company of other males at the time of his arrest. Cephas was also shown bottles of liquor that were claimed to have been recovered. There is an obvious yawning chasm between Lepan's evidence of what he claims was confiscated and what Cephas was shown. In either instance there is no evidence as to the number of items taken from the liquor store and the number of items allegedly recovered and shown to Cephas, and whether the recovered items indeed belonged to the store.

[27] To sum up – and for reasons mentioned – neither Zinco's evidence nor that of Lepan is of assistance to the State for justifying a defensible conclusion on the merits of the appellants' convictions. In the lapse of time since the commission of the offence the State adduced no physical evidence: not a fingerprint, not any evidence of a formal identification parade, not any still photographs of the video footage which may have shed more light on the identity of the perpetrators. On this Court's assessment of the evidence there is nothing to link the appellants to the commission of the crime and thus provide a measure of assurance against the drawbacks of subjective identification. In the words of Cameron JA in *S v Charzen and Another*:[10]

> 'The greatest assurance of guilt must lie in such evidence, rather than identification on its own, which, as this case shows can be beset by . . . doubt, in which case, possibly and even presumably, guilty persons must walk free.'

[10] *S v Charzen and Another* [2006] ZASCA 147; [2006] 2 All SA 371 (SCA) at 149*h*.

[28] A final aspect of the matter requires comment. The second appellant's explanation for the liquor found in his possession was that he intended hosting a traditional ceremony in preparation for becoming a sangoma. Furthermore, both appellants maintained that they were at their places of employment on the day of the robbery. In as much as the magistrate was critical of their versions, nothing displaces the evidence by their witness Aynada Peter. Although he was unable to state that he had first-hand knowledge that the appellants were at their workplace, he could not, with a measure of certainty, state that they were not at their place of employment on the day in question. The effect of this evidence is that the State did not discharge the onus of proving the falsity of the appellants' alibis.[11]

[29] To sum up, although in argument the appellants were rightly criticised as poor witnesses there was no obligation on them to have convinced the magistrate of the truth of their versions.

[30] In the result, the following order will issue:

1. The appeal is upheld.

2. The conviction and sentence for each appellant is set aside.

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M S RUGUNANAN

JUDGE OF THE HIGH COURT

[11] *S v Shabalala* [1986] ZASCA 84; [1986] 4 All SA 551 (AD); 1986 (4) SA 734 (A) at 736B-C.

I agree.

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R E GRIFFITHS

JUDGE OF THE HIGH COURT

APPEARANCES:

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