

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between: _____

IVAN ISAAC MARKS.....Appellant

and

THE STATE.....Respondent

Coram: Wessels, Muller, JJ.A., et Galgut, A.J.A.

Heard: 16 May 1977

Delivered: 24 May 1977

J U D G M E N T

WESSELS, J.A.:

Appellant was convicted by a regional magistrate on 27 counts of fraud. Counts 1 - 24 were taken as one for the purpose of sentence, and a sentence of two years' imprisonment was imposed in respect thereof. Counts 25 - 27 were similarly dealt with, and a sentence of eighteen months' imprisonment (of which a period of twelve months

was.....2/

was conditionally suspended for three years) was imposed in respect thereof. Appellant unsuccessfully appealed to the Transvaal Provincial Division against his conviction. It appears that an appeal noted by him against the sentence was not persisted in. Appellant's application for leave to appeal to this Court against the dismissal by the Court a quo of his appeal against his conviction was granted.

In so far as counts 1 - 24 are concerned, it was the State's case that on 23 January 1973 appellant committed fraud by making false passport applications. I shall hereinafter refer to these counts as "the passport counts". In so far as counts 25 - 27 are concerned, it was the State's case that on 26 July 1974 appellant committed fraud by selling forged rugby test tickets to several complainants. I shall hereinafter refer to these counts as "the test ticket counts". It is to be noted that the two sets of offences are separated in time by some eighteen months.

For the sake.....3/

For the sake of convenience, I mention that appellant ~~was initially brought to trial~~ in a Johannesburg magistrate's court on the test ticket counts only. For reasons which will become apparent later on in this judgment, it was decided to charge appellant with fraud in connection with the false passport applications as well. The magistrate's court trial was terminated in accordance with the provisions of section 93 bis of the Magistrates' Courts Act, No. 32 of 1944. This led to appellant's appearance before a regional magistrate on the abovementioned 27 counts of fraud.

The principal issue which arises for determination by this Court relates to the identification of appellant as the perpetrator of the fraudulent acts in question. For reasons which will become apparent later in this judgment, it is necessary to refer in some detail to the evidence, and more particularly to that of messrs.

Gideon Fodile.....4/

Gideon Fodile (who testified on the passport counts) and
Joseph Tshabalala (who testified on the test ticket counts).

Fodile stated in evidence that on 22 January 1973
he went to the Labour Bureau in Albert Street, Johannesburg,
to enquire about employment, since he was at the time un-
employed. Whilst he was in the "yard of the pass office",
a white man approached him and offered to employ him. Af-
ter he had accepted the offer, he accompanied his employer
in a car ("one of these small types of cars, white in co-
lour") to a building on the corner of Bree "and either
Simmons or Harrison" streets. It is common cause that
clerks in the employ of the Department of the Interior
who deal with passport applications have offices in that
building. His employer gave him "an envelope with a lot
of papers inside", and instructed him to hand it to the
"European ladies" at the counter where passport applica-
tions are received for attention. He was told that if

papers.....5/

papers were handed over to him, he should proceed to the Trust Bank in Fox Street, where his employer would meet him. It was already in the late afternoon when he took up his position in a queue of persons waiting to be attended to. When he eventually reached the counter, he was told that it was too late to attend to him, and that he should return the next morning. He proceeded to the Trust Bank where he met his employer, who was sitting in his car. He returned the envelope to his employer, who told him that he would meet him at the same spot the following morning. The following morning at about 8 o'clock his employer picked him up at the Trust Bank and conveyed him by car to the aforementioned offices of the Department of the Interior. The envelope with the enclosed papers was once more given to him, and he was told to hand it to a clerk at the counter. It was again arranged that they would meet at the Trust Bank. Fodile said in evidence that he

Handed.....6/

handed the envelope to a clerk and remained at the counter. It is common cause that the envelope contained 24 false applications for passports. It is, further, common cause that, for reasons which need not be canvassed in this judgment, a senior officer of the department suspected that the applications were not in order, and, unbeknown to Fodile, reported the matter to the police, who forthwith came to the building and questioned Fodile. As to this, Fodile testified as follows in his evidence-in-chief:

".....While I was waiting the police came there.....Then the police asked me about these papers. I told them. They left with me there and we waited at the Trust Bank there in Fox Street. And for several days afterwards we went there and never got the accused."

The 24 application forms were handed to a police handwriting expert, who established that 21 of them had been filled in by one and the same person, and that the

remaining.....7/

remaining 3 forms had been filled in by another person:

The forms were also handed to a police fingerprint expert, who established that finger- and palmprints appeared thereon. At that stage, however, neither the handwriting nor the finger- and palmprints furnished any clue as to the identity of the perpetrator of the fraud.

The matter rested there until 3 October 1974, when Fodile was requested to attend an identification parade. It is common cause that appellant was on the parade and that Fodile did not point him out as the person who had given him the envelope in question on 22 January 1973. Before dealing with Fodile's evidence as to what happened at the parade and immediately thereafter, it is necessary to sketch the circumstances which led up to the holding of the abovementioned identification parade. These circumstances appear from evidence led by the State in regard to the test ticket counts.

Tshabalala.....8/

Tshabalala stated in evidence-in-chief that early in the morning of Friday 26 July 1974 he went to the Labour Bureau (pass office) in Albert Street, Johannesburg, to have his "book stamped as a work seeker". After his book had been stamped, he left the office. Later that day whilst he was standing on the pavement outside the office, appellant approached him and offered to employ him. It was agreed that he would be paid R3 per day. The two of them then drove off in a car which the witness described as a white Cortina. The appellant handed Tshabalala an addressed envelope, and instructed him to deliver it, and thereafter to meet appellant at the Trust Bank. The witness said that he delivered the envelope to the addressee, who in turn gave him an envelope to deliver to his employer. He met appellant at the Trust Bank and gave him the envelope he had received from the third party. He was given another envelope to deliver to an

addressee.....9/

addressee on the first floor of the Trust Bank building.

He did so. The addressee questioned him about who his

employer was and where his office was. The addressee

(it appears that he was a Mr. Martindale, who gave evidence on the test ticket counts) requested Tshabalala to

produce his pass book. It appears from Martindale's evidence

that he made a note of Tshabalala's name and his

identity number. He gave the witness an envelope to hand

over to his employer. While the witness was waiting for

appellant outside the building, he was approached by

"another white man", who gave him a piece of paper with

an address written thereon. He was told that appellant

would be at that address, which was an office on the

10th floor of a building in Commissioner Street, Johannesburg,

called Shakespeare House. He went to that building,

and as he got out of the lift on the 10th floor, he

saw appellant and the "other white man". He handed over

the envelope.....10/

the envelope to appellant, who thereupon handed to him another addressed envelope for delivery to the addressee. He did so, and returned to the office in Shakespeare House with an envelope which he handed over to appellant. He delivered several more addressed envelopes and each time returned with an envelope which he handed to appellant. I do not propose to deal in detail with all the deliveries made by Tshabalala. It is common cause that the envelopes handed to the witness for delivery contained forged test match tickets, and that the envelopes which he in turn handed over to appellant contained money in payment thereof. After Tshabalala had made his last delivery, appellant paid him R5, and said that since his regular employee would be returning to his work on the following Monday, he had no further need of Tshabalala's services.

As was.....11/

As was to be expected, the fraud was discovered the following day (Saturday) when the several complainants went to the venue of the test match between the British Lions and the Springboks. Mr. Martindale reported the matter to the police and furnished them with Tshabalala's name and identity number.

The following Thursday or Friday, Tshabalala received a letter requesting him to report to the police at John Vorster Square, Johannesburg. He did so on the following Monday, and was questioned by Detective Sergeant Barnard. He informed Detective Sergeant Barnard of his activities on Friday, 26 July 1974, and told him that he would accompany him to the office on the 10th floor of Shakespeare House, where he had received the various addressed envelopes for delivery to the several addressees. He did so. When they entered the office in question he saw appellant, who was the only person therein, sitting at a desk. Tshabalala identified appellant as the person

who.....12/

who had employed him to deliver envelopes to various addressees on 26 July 1974. Appellant denied that he had in any way been concerned in the sale of forged test tickets. He denied, furthermore, that there had at any time been any association whatsoever between him and Tshabalala. Appellant was detained and taken to John Vorster Square for further interrogation. Subsequently appellant appeared before a magistrate on a charge alleging three counts of fraud - the test ticket counts. The proceedings were reported in the press. An alert police officer, Captain van Niekerk (who was the investigating officer in regard to the fraud committed by the making of the abovementioned false passport applications) read the abovementioned press report. He decided to investigate the possibility that appellant might have been concerned in the false passport applications fraud. At the hearing before the magistrate on the test tickets fraud,

appellant's.....13/

appellant's fingerprint had been taken for the purpose of obtaining his record. These fingerprints together with photocopies of the fingerprints found on the 24 false passport applications were submitted to a police fingerprint expert, who positively identified a fingerprint (right thumb) of appellant on the first page of 6 of the 24 false application forms.

By reason of appellant's fingerprint appearing on 6 of the 24 applications, it was decided to hold the abovementioned identification parade on 3 October 1974 in order to determine whether Fodile could identify and point out the person who had handed him the envelope containing the applications during January 1973. Twelve persons, including appellant, took part in the parade. It is of some importance to mention that appellant ordinarily wears dark framed spectacles. When he took up his position in the parade, however, he had on spectacles with a light metallic frame ("ligte goueraambril"). As to this,

Warrant Officer.....14/

Warrant Officer Prinsloo, who was in charge of the parade, stated in evidence that appellant had requested permission to exchange spectacles with Sergeant Horak, who was a member of the parade. He permitted appellant to do so. It was put to Warrant Officer Prinsloo in cross-examination that his recollection of the incident was at fault, and that it was he, and not appellant, who suggested the exchange of spectacles. The witness denied that it was so. Of the 12 persons on the parade, 3 were without spectacles, 4 had dark framed spectacles on and 5 (including appellant) light framed spectacles. Fodile was brought to the room where the parade was held. He did not point out anybody. Sergeant Magoba, who acted as interpreter at the parade, stated in his evidence-in-chief that after the parade, Fodile "explained that the person had changed something with which he would have been able to identify him". Appellant's attorney objected to this evidence, and the prosecutor agreed that it was not admissible. Sergeant Magoba gave his evidence.....15/

his evidence before Fodile was called as a witness.

It is a convenient stage to refer to Fodile's evidence as to what happened at the identification parade and immediately thereafter. He stated that he did in fact recognise appellant on the parade, but did not point him out because he was "beaten" by the fact that the person whom he recognised as the one who had employed him during January 1973 wore light framed and not dark framed spectacles. In his evidence-in-chief he stated:

1." And did you see the person in the line or not? --- I saw somebody like him but that person had another type of spectacles on.

What kind of spectacles did this man have on? --- When I saw him the man had fine spectacles, the frame on the side were fine, whereas the man I knew had black spectacles on.

Were there other people on the parade with dark spectacles on? Dark framed spectacles? --- There were others with black framed spectacles.

Did you point out anyone at the parade? --- I pointed nobody out because I was not sure what this man looked like, the person.

Did any.....16/

Did any of the people with the dark spectacles on resemble the accused? --- No the others did not look like the person I was looking for. Only this particular person but he had another type of spectacles on.

When you could not point anyone out on the parade were you then taken away from the parade? --- Yes."

2." When you saw the accused with other spectacles on at the parade, did you not think of telling the policeman on the parade about it or not? --- I wanted to be sure that I pointed out the right man but the spectacles put me off.

Did you explain your position to anyone else after the parade? --- I told the police when I was going off that day that I am beaten by this pair of spectacles."

Under cross-examination he said that he recognised appellant in the dock - appellant then had on his dark framed spectacles. As to this, his evidence reads as follows:

" You came into Court here this morning on two occasions at least on two occasions didn't you? _ _ _

BY THE COURT: Do you now refer to the two occasions on which the witness was called into Court by the Prosecutor to be identified by another witness?

MR. ROSEN: Yes? --- Yes.

You saw the accused in the deck? ---
Yes.

As soon as you saw the accused in the
dock this morning were you able to identi-
fy the accused? --- I recognised him when
I came in."

Fodile was extensively cross-examined in connection
with his evidence explaining why he did not point out ap-
pellant at the parade. His evidence reads as follows:

1." It is common cause that you saw him,
we all know that you saw him, because he
was standing on the parade with other
people and you were asked especially to
look at all the people, so obviously you
saw him. I want you to answer my question.
I do not want you to evade the question.
The question is did you recognise him? ---
Yes I recognised him. But I did not point
him out because of the spectacles.

You say you recognised him is that cor-
rect? --- I saw him but I could not recog-
nise him -

Oh, you could not recognise him is that
the answer? --- Yes I saw him.

I want you to give a direct answer, did
you or did you not recognise him? --- Yes
I recognised him, I saw him and recognised
him.

You saw him.....18/

You saw him and you recognised him? ---
I saw him.

What does that mean you saw him? --- I --
saw him as being the owner of the papers.

Did you recognise him as being the owner
of the papers?

PROSECUTOR: Your Worship I think it is a
question of terminology here, he said I
saw him as the owner of the papers. I do
not know what the word or the meaning is
in the language which is being translated.

BY THE COURT: How was it translated Mr.
Mahonke by means of one word only?

INTERPRETER: Yes.

BY THE COURT: Recognised? Recognised im-
plies that you see a person and that you
know him to be a person that you have seen
before, that is recognised?

INTERPRETER: In the language you say you
saw him and know who it was.

BY THE COURT: So you can't put it over by
means of one word, you have got to explain
to him. Yes.

MR. ROSEN: Let us have the answer, did you
or did you not recognise the accused? ---
Yes I knew who it was.

You knew you were on the parade for the
purpose of pointing out the person, whom
you recognised as being the owner of those
papers? --- Yes.

And if you recognised that person to
point him out? --- Yes.

Why then did you not point him out? ---
The pair of spectacles put me off.

Do I understand.....19/

Do I understand you now to say that because of the spectacles you could not recognise him? --- I was not too certain about that pair of spectacles.

I am not talking about the spectacles I am talking about the person, as far as the person of the accused is concerned do you say you could not recognise him, because of his spectacles? --- When I looked at the glasses I saw that they did not belong to the owner of the papers."

2.* You know very well that if you could point out the person who owned those papers, if you could recognise the person who owned those papers you should point him out? --- Yes it is so.

But you did not point anybody out? --- No, I did not point anybody out.

Was that because you did not recognise him or was that because you were being dishonest? --- I failed to know him as the owner of the papers.

That is the point, you failed to know him as the owner of the papers. In other words you did not recognise him as the owner of the papers? --- Yes because of those spectacles."

After an unsuccessful application for his discharge at the end of the case for the prosecution, appellant gave evidence.

At the time.....20/

At the time of the trial appellant was married and the father of one child. He was a B.Com. graduate of the Witwatersrand University, and a final year B. Proc. student at the University of South Africa. He was a director and full-time employee of Intercontinental Travels (Pty) Ltd., a company carrying on business as a travel consultant. He had been in the travel business since 1968. He denied being in any way associated either with the making of the false passport applications or the sale of forged test tickets. He knew neither Fodile nor Tshabalala and had never employed them. The appellant sought to explain how his fingerprint came to be on 6 of the 24 false passport applications. He said that he handled many of these application forms in the course of his business as a travel consultant. No particular value was attached to them, and they would be handed to any person who might ask for one or more forms. It was suggested that

appellant's.....21/

appellant's fingerprint could have been left on forms handed by him to the person or persons in question. He said that he was unable to identify the handwriting on the 24 application forms in question. He pointed to the fact that some of the applications had not been properly filled in, and he doubted whether passports would have been issued in respect thereof without further enquiry. He admitted that at all material times he owned a white Cortina motorcar. He admitted, further, that during July 1974 he had offices on the 10th floor of Shakespeare House. The number of his office was 191. In regard to what had happened at the identification parade, appellant stated that he had changed spectacles with Sergeant Horak because he had been invited to do so. He was asked in cross-examination why he had accepted the invitation to change spectacles. He replied:

"Primarily.....22/

"Primarily because it was made to me and also because there appeared to be more people wearing that particular type of spectacles than the type I was wearing, and I thought that it would be correct for me to be dressed in a manner similar to the majority of the people on the parade."

After the case for the State and that of appellant had been closed, several witnesses were recalled, one (Magoma) at the instance of the regional magistrate and others (including Tshabalala) at the instance of the defence.

In so far as Magoma was concerned, the regional magistrate intimated that his evidence as to what Fodile had told him immediately after the holding of the identification parade was relevant to Fodile's credibility and, therefore, admissible on that issue. After having been reminded of the evidence he gave when he was first called to testify, Magoma said the following in response to questions put by the regional magistrate:

"Now you.....23/

Now you will also remember that Mr. Rosen who then appeared for the accused objected, quite correctly - and the Prosecutor agreed with him. But after yourself the court also heard the witness Fodile and Fodile also told the court that he had told the police something when he got of the parade. Now my question to you is this, do you know to which policeman or policemen he told something? --- He told that to me.

When did he tell you that exactly? --- It was after the parade as we were going up the stairs.

Was that immediately you left the parade? --- Yes, immediately after we left the parade, the place where the parade was held, we were walking in front of those who were on parade.

Now, you were walking away and you went up the stairs? --- Yes.

When he told you this thing that he said? --- That is when he told me that.

Did you make conversation before he told you that, or did he start saying something? --- I had not said a thing to him, he started it.

Now I want to know, Mr. Zwarenstein, what was said by the witness, because this has now become relevant, to my mind.

MR. ZWARENSTEIN: I intended asking him the same question myself. ---

BY THE COURT: I want to know exactly what the witness told you? --- The witness said,

I have.....24/

I have seen that man on parade, but I was afraid to point him out because he had changed his spectacles.

Were those his very words? --- Yes, that is how he spoke."

I should mention that after appellant had testified, counsel (messrs. F. Zwargenstein S.C. and M. Hondes) were briefed to appear on appellant's behalf. Under cross-examination, Magoma said that immediately after Fodile had spoken to him, he took him to the office of Detective Warrant Officer Bouwer, who took a statement from Fodile. Magoma acted as interpreter.

On being recalled by the defence, Tshabalala admitted under cross-examination that he had been convicted of theft and assault and that evidence which he had given in his defence had been rejected as false. He said that he had committed these crimes when he was a "minor", in the sense that he was then a bachelor and "did not know what (he) was doing". He was also cross-examined in regard to his evidence given at the first trial in which he had stated

that.....25/

that appellant conveyed him in a white Peugeot motorcar,
which contradicted his evidence given in the regional
court that the motorcar in question was a white Cortina.

This concludes the summary of the evidence led on
behalf of the State and the defence respectively.

I refer briefly to the findings made by the regional
magistrate in regard to the demeanour and credibility of
Fodile, Tshabalala and appellant. In so far as Fodile is
concerned, he held that as a witness he "left an impression
of some solidness and reliability on the court". The re-
gional magistrate did not in terms refer to the demeanour
of Fodile, but it is, in my opinion, to be inferred at
least that it called for no adverse comment. Fodile gave
evidence through an interpreter, a circumstance which
militates against any reasonably accurate assessment of
demeanour. As to the witness Tshabalala, the regional ma-
gistrate said in his judgment that he "had all appearances
of a bona fide witness". He was held to be a credible

witness.....26/

witness, notwithstanding certain inconsistencies in his evidence and the fact that he was found to have been untruthful in one respect, i.e., in his evidence relating to the make of the car in which he was conveyed. In so far as appellant is concerned, the regional magistrate did not comment on his demeanour. It is to be inferred that appellant's demeanour in the witness-box did not call for any adverse comment. On my understanding of the regional magistrate's judgment, he had regard to the totality of the evidence, the probabilities arising therefrom and the cogency of the evidence led on behalf of the State and concluded that appellant's guilt had been established beyond any reasonable doubt. I am not overlooking the fact that the regional magistrate had misdirected himself in certain respects.

On appeal before this Court, appellant's counsel submitted that on the passport counts there was a single

witness.....27/

witness, Fodile, who did not point out the appellant at an identification parade, but later stated in evidence at the trial that he had recognised him on the parade, but failed to point him out for the reasons he gave in his evidence both in chief and under cross-examination.

In my opinion, however, Fodile cannot properly be regarded as a single witness on the issue of identification.

The police fingerprint expert stated in evidence, which was not disputed, that on each of 6 of the 24 false application forms handed to Fodile, there appeared the right thumb print of the appellant. This is independent testimony of an identificatory nature, and could by itself have implicated appellant in the perpetration of the fraud in the absence of any innocent explanation for the appearance of his fingerprint on the forms in question which might reasonably possibly be true. The remarks of De

Villiers, J.P., in R. v. Mokoena, 1932 O.P.D. 78 at p. 80

in regard.....28/

in regard to the circumstances in which the provisions of section 284 of Act No. 31 of 1917 (section 256 is the corresponding section in Act No. 56 of 1955) ought to be relied upon are, in my opinion, not apposite to the facts of the present matter. In any event, as to the approach to the evidence of a single witness, I would refer to what was stated by Holmes, J.A., in S. v. Artman and Another, 1968(3) S.A. 339 (A.D.) at p. 341 A - C, viz.:

" She was, however, a single witness in the implication of the appellants. That fact, however, does not require the existence of implicatory corroboration: indeed, in that event she would not be a single witness. What was required was that her testimony should be clear and satisfactory in all material respects: see R. v. Mokoena, 1956(3) S.A. 81 (A.D.) at pp. 85 - 6. The trial Court unanimously found that her evidence passed this test. I would add that, while there is always need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense

see.....29/

see the remarks of MACDONALD, A.J.P., in the Rhodesian Appellate Division case of R. v. J., 1966(1) S.A. 88 (S.R.) at p. 90, as referred to by this Court in S. v. Snyman, 18 March 1968."

(The judgment in Snyman's case is reported in 1968(2) S.A. 582.)

In my opinion, however, ordinary common sense required that Fodile's evidence be approached with a degree of caution, since the identification parade was held some 18 months after the occurrence of the events deposed to by him in his evidence. The regional magistrate adopted a cautious approach and determined, as I have already indicated, that Fodile was an honest witness. It was not contended by appellant's counsel on appeal before this Court that his credibility was suspect. As I understand counsel's submission it is this, namely, that it is reasonably possible that it is a case of honest but mistaken identification. It was submitted that Fodile's

identification.....30/

identification of appellant at the trial may possibly have been influenced by what the police told him after the parade and by photographs which they had shown him. Apart from the fact that it would have been most improper for the police to have influenced Fodile in any way, the submission is contrary to his evidence, which was accepted by the regional magistrate. On a proper reading of his evidence it is abundantly clear, in my opinion, that the effect of his evidence is that he recognised appellant at the parade, but did not point him out for the reasons already referred to above. When he was called into court in order to be identified by certain State witnesses, he saw the same person in the dock, and noted that he was now wearing dark framed spectacles. This was, therefore, not a typical case of "dock identification", which is, generally speaking, not regarded as a reliable form of identification. It was submitted on appellant's behalf that the fact that Fodile

failed.....31/

failed to identify appellant on the parade was not given proper weight in assessing the reliability of Fodile's identification. If Fodile's evidence that he recognised appellant at the parade and his explanation for not pointing him out are accepted as truthful, counsel's submission is, in my opinion, devoid of any real substance.

From what has been set out earlier in this judgment, it is clear that Fodile had an adequate opportunity of observing appellant on more than one occasion on two consecutive days and, moreover, good reason to remember his association with him by reason of the unexpected appearance of the police on the scene on the second day.

It was submitted on appellant's behalf that, in admitting the evidence given by both Magoba and Fodile as to what took place immediately after the identification parade, the regional magistrate committed a gross irregularity which prejudiced appellant. The circumstances which led to the recalling of Magoba to testify about what Fodile

had.....32/

had told him on the occasion in question appear to be the following. Appellant's attorney cross-examined Fodile as to the number of occasions the police interviewed him. In the course of this cross-examination, Fodile said that at one of these interviews the police took a statement from him. Appellant's attorney then asked him: "What was in that statement? What statement did they take from you?" As to what happened thereafter, the record reads as follows:

*PROSECUTOR: That is a question of a privileged document and I do not think that is admissible.

BY THE COURT: What do you mean by the question?

MR. ROSEN: Your Worship these are peculiar circumstances a witness who could not identify at an identification parade is asked to make a statement. After having looked at photographs after the parade.

BY THE COURT: But not a photograph of the accused, photographs in newspapers, that is the evidence of the witness.

I do not know what -

MR. ROSEN: Your Worship I hardly find it credible that this witness was called

merely.....33/

merely to give evidence of the fact that he could not identify anybody at the parade.

And then it is hardly coincidental that he should come into the witness box to-day and immediately make a positive identification of the accused. To me it is incredible.*

It appears to me that the regional magistrate interpreted Mr. Rosen's remarks as conveying an imputation that Fodile's evidence that he had recognised appellant at the parade was a fabrication, and determined that Magoba's evidence was relevant and admissible to rebut the suggestion of recent fabrication on Fodile's part. In this regard I refer to the remarks of Rumpff, C.J., in S. v. Bergh, 1976(4) S.A. 857 (A.D.) at p. 868 D. viz:

"Die begrip 'onlangse versinsel' is nie 'n omlynde begrip nie en dit is die plig van 'n hof, by 'n probleem van hierdie aard, om vas te stel of die aanval op die getuie se getuienis wesenlik neerkom op 'n suggestie, uitdruklik of implisiet, dat vir doeleindes van die saak hy iets as 'n feit beweer wat tydens die aflê van sy getuienis 'n versinsel is of in sy verbeelding bestaan.*

In my opinion.....34/

In my opinion, it would seem that the evidence objected to may very well be regarded as admissible. I will, however, disregard the evidence in question in deciding the ultimate question, namely, whether the totality of evidence justified a finding that appellant's guilt was proved beyond any reasonable doubt. In view of the fact that Fodile's credibility as a witness is no longer in issue, I am of the opinion that evidence regarding what took place between Fodile and Magoba is not of any particular significance.

The crucial question regarding Fodile's evidence is whether, accepting the truthfulness of his evidence that he recognised appellant at the parade, the identification was in all the circumstances sufficiently reliable to justify a finding that appellant's guilt had been established beyond any reasonable doubt. I might add that even if Fodile were to have pointed appellant out at the parade, the same question would have arisen.

Appellant's.....35/

Appellant's counsel referred to the fact that some of the application forms had not been properly filled in, and that it was, therefore, highly unlikely that appellant, who was an experienced travel consultant, was concerned in the perpetration of the fraud. There is substance in this submission. On the other hand, as the evidence revealed, the application forms were not filled in by appellant but by two other persons, who were possibly not as attentive to detail as he would have been if he were to have filled in the forms himself.

Since I do not propose to give any weight to the fact that appellant changed spectacles at the identification parade, it is unnecessary to determine whether the version of the State or that of appellant in regard to that incident is the truth.

I next.....36/

I next deal with the fingerprint evidence. I do not, however, propose to deal at length with the detailed submissions made by appellant's counsel. Considered in isolation, the fingerprint evidence is, in my opinion, not of such weight as to justify a conclusion that it establishes appellant's guilt beyond any reasonable doubt. It is, however, not the correct approach to consider the evidence piecemeal. Ultimately the question is whether the totality of the evidence establishes beyond any reasonable doubt that the version deposed to by the State witnesses is true and that the denial thereof by the appellant is false.

In my opinion, the totality of the evidence establishes appellant's guilt on the passport counts beyond any reasonable doubt. There is, firstly, the evidence of Fodile whose credibility is not in issue on appeal. He stated that he had recognised appellant on the parade, but did not

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point him out because of the reasons referred to in his evidence. Accepting the truthfulness of his explanation for not pointing appellant out at the parade, his failure to do so becomes a matter of no real significance. I emphasise that it was not his evidence that appellant was so effectively disguised that he could not recognise him at the parade, but was able to do so when he saw him in the dock wearing dark framed spectacles. Such an explanation would clearly have been wholly untenable. Fodile's evidence is inconsistent with the possibility that a fading memory may have been revived after the identification parade as a result of police prodding or being shown a photograph of appellant. In my opinion, the following features afford some circumstantial support for Fodile's identification of appellant as the person who had employed him on 22 January 1973. According to Fodile the person concerned wore dark framed spectacles. It is common cause that, except when he was on the identification parade, appellant

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wore such spectacles. The person concerned conveyed Fodile in a white car. It is common cause that at the relevant time appellant owned such a car. It is in addition reasonable to suppose that the perpetrator of the crime had some knowledge of the procedure to be followed in obtaining passports and of the situation of the offices of the Department of the Interior. Appellant is such a person. I am mindful of the possibility of honest but mistaken identification, particularly where identification takes place some eighteen months after the events giving rise to the prosecution of the suspect. I have approached Fodile's evidence with the requisite degree of caution. I am convinced not only that he was an honest witness but also that his evidence on the issue of identification is reliable. In these circumstances the fact that appellant's fingerprint appeared on 6 of 24 application forms handed to Fodile assumes a degree of importance far greater than it would have had if the fingerprint evidence were to have been the only evidence on the issue of identification.

In my opinion.....39/

In my opinion, the totality of the evidence negatives the reasonable possibility that Fodile's identification, though honest, was nevertheless mistaken. In my opinion, therefore, the appeal by appellant against his conviction on the passport counts cannot succeed.

I next deal with appellant's appeal against his conviction on the test ticket counts. The Court a quo dealt with this part of appellant's appeal on the footing that Tshabalala's evidence implicating appellant was by itself not sufficiently reliable to justify a conviction. In dismissing appellant's appeal, the Court a quo relied in addition on similar facts evidence. It was held that there was a sufficient link between the proved modus operandi of appellant in the commission of the passport applications fraud and that of the perpetrator of the test tickets fraud to render evidence of the first-mentioned modus operandi relevant to the issue of the identity of the perpetrator of

the test.....40/

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the test tickets fraud. On that basis it held that appellant's guilt had been established beyond any reasonable doubt. On appeal before this Court, counsel for the State conceded that by reason of justified criticism of some aspects of Tshabalala's evidence, that evidence by itself did not justify appellant's conviction on the test ticket counts. Both counsel referred to Tshabalala as a single witness on the issue of the identity of the perpetrator of the test tickets fraud. In my opinion, however, this approach is not correct if the similar facts evidence was correctly held to be admissible. If the similar facts evidence was correctly admitted, Tshabalala was not, in my opinion, a single witness implicating appellant as the perpetrator of the fraud in question. I come to this conclusion for the same reasons which led me to conclude that Fodile was not to be dealt with as a single witness. However, in view of Tshabalala's defects as a witness, I

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will approach his evidence with the requisite degree of caution. It must, however, be borne in mind that Tshabalala's evidence that he was recruited at the pass office by a white man who conveyed him in a white car and instructed him to deliver envelopes to various addressees was not disputed. Neither was it disputed that he in turn delivered envelopes which the addressees gave him to his employer. The only question is whether Tshabalala's evidence that he had dealings with appellant in his office on the 10th floor of Shakespeare House was true and the latter's denial thereof, false beyond any reasonable doubt.

I proceed to consider whether the similar facts evidence was correctly admitted as being relevant to the issue of identity. If so relevant, it would be admissible. See, e.g., The State v. Green, 1962(3) S.A. 886 (A.D.) at p. 894 D - F. Proved similar facts would ordinarily be relevant.....42/

relevant to a fact in issue if from their existence in-
ferences may properly be drawn as to the existence of
the fact in issue. In the judgment in Green's case, in
the passage referred to, Ogilvie Thompson, J.A., refers
with approval to the following passage in the judgment
of Lawrence, J., in R. v. Bond (1906) 2 K.B. at p. 424:

" In all cases in order to make evidence
of this class admissible there must be
some connection between the facts of the
crime charged in the indictment and the
facts proved in evidence. In proximity
of time, in method, or in circumstance
there must be a nexus between the two sets
of facts, otherwise no inference can be
safely deduced therefrom."

The basis on which the similar facts evidence was
said to be relevant to the issue of identity can be sum-
marised as follows:

1. In each case a white man offered employment to a
black man at the pass office.
2. The casual employment was effected without any for-
mality and clearly for one purpose only; in the case of

Fodile to hand in the false passport applications at the

~~offices of the Department of the Interior and in the case~~

of Tshabalala to effect delivery of forged test tickets to various addressees.

3. In each case the employer conveyed the employees in a white car.

4. In each case the selected modus operandi obviated direct contact between the perpetrator and his victims, thereby rendering virtually impossible identification of him by them.

5. The employment was to be terminated after each employee had completed the work he was engaged to perform.

It was, therefore, highly unlikely that Fodile and Tshabalala would have been traced so as to establish a link between the perpetrator and the delivery of the various falsified documents.

6. In each.....44/

6. In each case it was arranged that the parties would meet at the Trust Bank in Fox Street.

It appears that appellant would probably never have been brought to trial but for the fact that Martindale had noted down Tshabalala's name and identity number and that Captain van Niekerk had a hunch that appellant might possibly have been the perpetrator of the false passport applications fraud.

I am conscious of the fact that if the similar facts relied upon merely tend to create suspicion, evidence thereof should not be admitted. In the present case, however, I am of the opinion that, notwithstanding the absence of the element of proximity in time between the commission of the two sets of offences, the correspondence between the method employed in their commission is such that an inference may properly be drawn therefrom regarding the identity of the perpetrator of the test tickets fraud. It follows that the similar facts evidence was

relevant.....45/

relevant to the issue of identity and, therefore, admissible. The weight to be given to such evidence fails to be determined at the end of the trial, when the ultimate question is asked, namely, whether the totality of the evidence establishes guilt beyond any reasonable doubt.

Tshabalala was held to be a credible witness, notwithstanding justified criticism of certain aspects of his evidence. Because of his previous convictions, it was necessary to approach his evidence with caution. I observe that in his case it is highly improbable that his identification of appellant was, though honest, nevertheless mistaken. He had an adequate opportunity of observing appellant during the afternoon in question, and, identified him in the office on the 10th floor of Shakespeare House shortly thereafter. The evidence does not disclose any motive on Tshabalala's part to resort to false implication of appellant. There are no inherent improbabilities in his evidence. If, in addition, regard is had to the

similar.....46/

similar facts evidence, which, though not in itself giving

rise to an inference of guilt beyond any reasonable doubt,

nevertheless gives rise to an inference that the two sets

of offences were probably committed by the same person, I

am satisfied that the totality of the evidence justifies

the finding that appellant's guilt has been established

beyond any reasonable doubt on the test ticket counts.

In the result, the appeal is dismissed.

P.J. Macleod

Muller, J.A. } concur
Galgut, A.J.A. }