CASE NO: 498/93
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

LANCE NAIR

and

THE STATE

SMALBERGER, JA

CASE NO: 498/93 N
v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

LANCE NATR

Appellant

and

THE STATE

Respondent

CORAM: SMALBERGER, F H GROSSKOPF

et VAN DEN HEEVER, JJA

HEARD: 15 September 1994

DELIVERED: 20 September 1994

J U D G M E N T

SMALBERGER, JA :

The appellant was charged in the regional court, Port Elizabeth, with robbery with aggravating circumstances (count 1)

and theft (count 2). At the conclusion of the trial he was convicted of theft on both counts. In view of his extensive previous convictions he was declared an habitual criminal. He appealed to the Eastern Cape Division against his convictions and sentence. His appeal was dismissed. That court, however, took the view that he should have been convicted as charged on count 1. It accordingly substituted a conviction of robbery with aggravating circumstances for that of theft. The appellant was subsequently granted leave by the court a quo to appeal to this Court against such conviction only.

The complainant on count 1, a certain Mr D'Oliviera, is the proprietor of a cafe situated in Western Road, Port Elizabeth. He testified that on the morning of Friday 18 August 1991 he went by car to the Rink Street branch of the Standard Bank to draw money for wages for his staff. He drew an amount of R2 275-00. The money was placed in a bank bag. He put the bag on the passenger seat next to him and drove back to his place of business. He parked

his car around the corner. The door on the passenger side suddenly opened. He saw a person, whom he identified as the appellant, standing behind the door. The appellant leant over the door. He had a firearm in his right hand. His left hand was on the door-frame above the window. The appellant said "I'll take that" whereupon he grabbed the bag of money and ran off. He made good his escape in a vehicle driven by a black man. Asked how he reacted D'Oliviera stated: "I just gave him the money because I was insured."

The police later inspected D'Oliviera's vehicle for fingerprints. The appellant's left thumb-print was found on the inside of the window of the door on the passenger's side. The thumb-print was approximately in the middle of the window and pointed upwards. On the outside of the window, near the top, identifiable fingerprints of the appellant's left hand were found. They were pointing downwards.

The appellant denied that he robbed D'Oliviera. He

testified that he regularly used to purchase newspapers and cigarettes at the latter's café. According to him (and this is common cause) D'Oliviera ran a video outlet from his cafe. On the morning of 23 August 1991 he asked D'Oliviera if he was interested in purchasing video recorders through a contact in Durban (apparently at substantially reduced prices). D'Oliviera agreed to purchase three video recorders and a television set for the sum of R2 225-00. He asked the appellant to return at about one o'clock. The appellant came back at approximately 13:15. He then accompanied D'Oliviera in the latter's car to the Standard Bank in Rink Street where D'Oliviera went to draw money to pay for the items he had agreed to purchase. He returned with R2 225-00 which he handed to the appellant. He thereafter dropped the appellant off in Main Street. The appellant further testified that he promised to telephone D'Oliviera that afternoon to advise him when the goods would be delivered. He failed to do so because he was unable to get in touch with his contact in Durban. When he

telephoned D'Oliviera on the Saturday morning to advise him about the arrangements he was told by D'Oliviera that, because he had not telephoned the previous afternoon, as he had promised, he (D'Oliviera) had laid a charge of armed robbery against him. Asked why he had done so D'Oliviera replied: "If I had to tell my insurance company that I gave you money to buy video machines, they won't pay me out, so I had to lay this charge of armed robbery."

The investigating officer, Capt Steyn, testified that he arrested the appellant on the afternoon of 25 August 1991. He informed him of the charge of armed robbery against him, advised him that he (Steyn) was a peace officer and warned him according to the Judges' rules. The appellant's response was as follows: "Hy het vir my gesê ek moenie 'worry' nie, hy ken daardie storie." Shortly afterwards he made the following statement to Steyn:

> "I'll level things with you. D'Oliviera gave me R2 225-00 to get him video machines. He took me to the bank, that's D'Oliviera. I got no guns or a car on Friday. I want my

> lawyer tomorrow. I want everything in the clear. He took me to Main Street, that's D'Oliviera. 1 went upstairs. He waited, that's D'Oliviera, and I disappeared."

The appellant did not dispute having made this statement to Steyn.

The presiding magistrate rejected D'Oliviera's evidence holding, inter alia, that it was inherently improbable. She found it proved, however, on the totality of the evidence, that the appellant had appropriated D'Oliviera's money for his own use and was accordingly guilty of theft. On appeal the court a quo disagreed with the reasons advanced by the magistrate for rejecting D'Oliviera's evidence. It concluded that his evidence should have been accepted and the appellant convicted as charged. In the result it altered the conviction to one of robbery with aggravating circumstances.

In the course of his judgment VAN RENSBURG, J (who delivered the judgment of the court) said the following:

"The crux of the appellant's case is that in terms of their arrangement D'Oliviera handed the money over to him and that it was arranged that the appellant would telephone D'Oliviera at approximately 2:45 p.m. that afternoon. When the appellant failed to telephone him at the appointed time, D'Oliviera, thinking that he had been the subject of a hoax and that the appellant had stolen his money, telephoned the police and laid a charge of armed robbery because he thought if he told his insurers that he had voluntarily handed over the money to the appellant they would not pay him out. The problem with the appellant's case is that Captain Steyn, who created a good impression on the magistrate as a witness, informed the Court that D'Oliviera's complaint had been received by the police at 2:30 p.m. and that they were on the scene by 3:05 p.m. It is also significant that Sergeant Share, the fingerprint expert, arrived on the scene at 3:20 p.m. In other words the complaint had already been received before the time had arrived at which the appellant, on his version, had arranged to telephone D'Oliviera, namely 2:45 p.m.

Once it is accepted, as it must be, that the complaint was received at 2:30 p.m., the appellant's defence goes out of the window. It is inconceivable that D'Oliviera would have laid a false charge of armed robbery for the reasons suggested by the appellant until the appointed time had passed, without the appellant having telephoned him. In fact it is highly probable that D'Oliviera would have waited for a time after 2:45 p.m. before telephoning the police to see whether the

call did not come through."

In my view the court a quo took too narrow a view of the matter. There can be no gainsaying the fact that the appellant lied about his alleged arrangement with D'Oliviera. It does not necessarily follow, however, that he was guilty of robbery (cf S v Mtsweni 1985(1) SA 590(A) at 593I-594E). He may well have lied because he was trying to cover up his unlawful appropriation of D'Oliviera's money. In this respect due regard must be had to his extra-curial statement to Steyn - a statement made with apparent spontaneity shortly after his arrest, and one which coincides with his evidence at the trial concerning the events immediately preceding and following upon his acquisition of the money. It is to the extent that he embroidered on those events and went beyond them in an attempt to exonerate himself that his evidence has been shown to be false. The appellant's statement to Steyn, introduced as part of the State case, forms part of the evidential material on which the appellant's guilt has to be determined. If on a conspectus of all the

evidence it is found to have sufficient cogency, and there is a reasonable possibility that what he said to Steyn could be the truth, the appellant is entitled to the benefit thereof (S v Yelani 1989(2) SA 43(A) at 49H-50F).

The trial magistrate had the advantage of seeing and hearing D'Oliviera testify. She was therefore in the best position to assess his credibility. In order to substitute a conviction for robbery it was necessary for the court a quo to overturn her factual and credibility findings - in itself an unusual course to adopt (cf S v Morgan and Others 1993(2) SACR 134(A) at 162d-f).

In my view the trial magistrate was fully entitled to reject D'Oliviera's evidence. His evidence with regard to the time when the alleged robbery took place was contradictory and unsatisfactory. At various times it was given as "ten", "about twelve in the morning", "late morning", "about half-past-eleven/twelve o'clock" and finally "I can't remember exactly what time. It was late morning." What is clear from his evidence is that it must have

occurred before noon. He further stated that he reported the incident to the police "straight away". Yet it is common cause that the alleged robbery was only reported at 14:30. His evidence does not explain this apparent inconsistency or why there was such a long time-lapse. Furthermore, D'Oliviera's conduct after the alleged robbery is improbable. He never raised any hue and cry, nor did he seek anyone's assistance to prevent his alleged assailant from making good his escape (bearing in mind that the events took place in a built-up and frequented area). He contradicted himself in relation to the appellant's alleged getaway. Initially he stated that he saw a vehicle (a blue Sapphire) drive off and that he "took it for granted" that the appellant was in the vehicle; under cross-examination he claimed that he had seen the appellant jump into the vehicle. Most important, the fingerprints that were found are far more consistent with the appellant's version than that of D' Oliviera. The fingerprints on the outside of the window pointing downwards are difficult to reconcile with D' Oliviera's description of the position

taken up by the appellant. To have caused those prints when standing on the outside of the door leaning over it would have required the appellant to contort his body in an unusual and abnormal way. The prints are, however, entirely consistent with someone holding on to the top of the door when entering or alighting from the vehicle. Equally so the left thumb-print in the middle of the window, on the inside, pointing upwards is far more consistent with having been caused by someone who was inside the vehicle than by someone standing outside behind the door.

In the circumstances there was no justification for the court a quo's acceptance of D' Oliviera's evidence. The reasonable possibility exists, on the evidence as a whole, that the material events took place as related by the appellant to Steyn (and confirmed, to that extent, by the appellant in evidence). An armed robbery was therefore not proved beyond all reasonable doubt. It was not seriously contended that the appellant was not guilty of theft. Indeed the only reasonable inference to be drawn from the

proved facts is that the appellant appropriated D'Oliviera's money for his own use.

We would like to express our appreciation to Mr Paterson, who appeared at the request of the Court, for his assistance in the matter.

In the result the appeal succeeds to the extent that the appellant's conviction of robbery with aggravating circumstances on count 1 is set aside and there is substituted in its stead a conviction of theft.

J W SMALBERGER
JUDGE OF APPEAL

F H GROSSKOPF, JA)
VAN DEN HEEVER, JA ) CONCUR