IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE CASE NO. A1047/06

In the matter between: DATE: 2/7/2007

BAFANA LUCAS MABENA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

[1] The appellant in this appeal was charged in the Regional Court for the Regional Division of Northern Transvaal, with one count of armed robbery with aggravating circumstances, in that on or about 2 December 2004 and at or near Botleng, Delmas the appellant did wrongfully assault Matshidiso Queen Zwane and with force remove the amount of R500,00 cash from the complainant. It is also alleged that aggravating circumstances were present in that the appellant acted in concert with another male person and that he was armed with a firearm which he used to threaten the complainant.

[2] The appellant pleaded not guilty and stated in his explanation of plea that he denied all the allegations levelled against him.

[3] During the trial in the Regional Court the appellant was represented by an attorney, namely: Ms Serite.

[4] The appellant was sentenced in the Regional Court to 15 years imprisonment.

[5] The appellant has now appealed against both the conviction and sentence.

[6] With reference to the conviction the only question to be determined is the identity of the complainant's assailants. The appellant's case is that of mistaken identity, in other words that the complainant had mistakenly identified the appellant as the perpetrator of the crime. It is trite law that the burden of proof is on the State to prove the appellant's guilt beyond a reasonable doubt. (See: **Ntsele v S [1998]3 ALL SA 517** (A)).

[7] Consequently, the question of identification has become very important. The question which must be decided is whether the State witness, that is the complainant, identified the appellant as the perpetrator of the crime levelled against him. The question of identity has been dealt with in many cases, and I am of the view that the leading case in this regard is the Appellate Division's decision of S v

Mthetwa 1972(3) SA 766 (AD) where the following was said at **768 A:**

> "Because of the fallibility of human observation. evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lightning, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build and dress; the result of identification parades, if any; and of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities." (My emphasis).

(See also: S v **Nkosi 1978(1) SA 548 (T)** and S v **Khumalo and another 1991 (4) SA 310** (AD).)

[8] In S v **Mehlape 1963(2) SA 29 (A)** the following was said at **32** F – G:

> "The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger or error in such

evidence.
".

[9] In R v Shekelele 1953(1) SA 636 (T) the following was said at 638 H:

> "Witnesses should be asked by what features, marks or identifications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of a mistake."

[10] In **R v Mputing 1960(1) SA 785 (T)**, Boshoff J made a careful analysis of the points which a Court should consider in assessing the value of identification evidence. The accuracy of such evidence depends, as a learned Judge pointed out, upon the trustworthiness of the witness's observation, recollection and narration.

1 0.1 With reference to "observation" the accuracy of a witness's observation depends firstly, of course, upon his or her eyesight. Secondly, it will be effected by the circumstances in which he or she saw the person in question. He or she may expect people who behave in a particular way, or belong to a certain class, to have certain physical characteristics which he or she will ascribe to such a person without having verified his or her belief by

observation. What is important is that the witness's ability to form an accurate impression will be affected by his or her state of mind. A further factor is the distinctiveness of the person's appearance. The Court will be able to survey whether the accused has any peculiar features, but some people look distinctive to one witness and not to another. A further important feature is whether the witness has known the accused previously.

10.2 With reference to "recollection" this depends upon the strength of the witness's memory. Striking features are more likely to be remembered than ordinary ones. The time lag between the incident and the actual identification is of course very important. Perhaps one of the most crucial aspects is the extent to which the witness's original impression has been overlaid by subsequent suggestion and imagination. If a witness is shown a person who is alleged to have been the criminal, he or she is very likely to make a subconscious substitution of the person's features or those which he or she actually observed.

10.3 A further aspect that is important is the narration of the events. Was the state witness able to give an ungarbled account of the events and how does the accused's version weigh up against the account given by the state witness.

[11] I have already pointed out that the evidence of identification should be approached

with a measure of caution. The purpose of the cautionary rules is to assist a Court in deciding whether or not guilt has been proven beyond a reasonable doubt. The cautionary rules exist to provide guidance in answering this overriding question.

[12] The reliance on the identification of a single witness is always dangerous on account of the special problems involved in such evidence. A Court must be satisfied that the truth has been told. In considering the appellant's version the essential question is whether on all the evidence there is a reasonable possibility of the defence's version being substantially true.

[13] The cautionary rules are satisfied either by some other confirmatory evidence or corroboration. When one considers corroboration, corroboration is independent evidence which confirms the testimony of a witness. Corroboration may also be found in the accused's failure to testify, the accused's false statements or similar conduct by the accused.

[14] What must be borne in mind in this specific case is that two cautionary rules are applicable. A Court must apply the cautionary rule relating to identification and the cautionary rule relating to a single witness. Hoexter AJA said the following in S **v Abrahams 1979(1) SA 203 (AD) at 205 F:**

> "Hier ter sprake is 'n skuldigbevinding wat op die getuienis van 'n enkelgetuie

steun. In sy uitspraak het die Verhoorhof dan ook melding gemaak van die toepaslike veiligheidsreëls. Die Landdros het eerstens besef dat omdat Boards 'n enkelgetuie is sy getuienis met omsigtigheid benader moet word; en tweedens het die Landdros die bekende gevare wat in uitkenningsgetuienis skuil voor oë gehou. Wat laasgenoemde betref het die Verhoorhof duidelik ingesien dat dit om die aspek van die betroubaarheid van Boards se waarneming nie minder as om sy eerlikheid as getuie gaan nie."

[15] On considering the above principles I have to consider the evidence deposed to on behalf of the State and the accused's evidence, namely:

15.1 The complainant's evidence can briefly be summarised as follows:

15.1.1 The incident took place on the evening of 2 December 2004 at approximately quarter-past-ten at the complainant's tuckshop in the Botleng area.

15.1.2 It was not dark and there were street lights. The complainant testified that there was a street light approximately 4 to 6 metres from where the incident took place.

15.1.3 It was raining lightly during that evening.

15.1.4 The appellant was alleged to be in possession of a firearm and he pointed the firearm at the complainant and searched the complainant for the money. At the stage when the complainant saw the firearm, the appellant was obviously very close to her.

15.1.5 With reference to the clothes which the appellant was wearing, the complainant stated that the appellant was wearing a floral like shirt, brown in colour, the trousers looked like the shirt, the shirt looked brown at night and he was wearing "tekkies".

15.1.6 The complainant also gave a description of the Appellant as follows:

"What can you tell us about the face of the person that you say had the firearm and were (sic) searching you? - Big nose, big lips. He was wearing dreads.
"

15.1.7 On a question put by the prosecutor in regard to whether there was anything specific that the complainant recognised about the appellant, the complainant testified as follows:

"His face, I looked nicely to his face so that I could recognise him should I see him again."

Further on the complainant testified as follows:

"His nose, mouth, everything, his eyes."

15.1.8 As stated the incident is alleged to have taken place on 2 December 2004, being a Thursday. The complainant reported the matter to the police on the following Monday.

Approximately a month later on 8 January 2005 the complainant allegedly saw the appellant sitting on a stone when she recognised his face and the clothes he was wearing. She telephoned the police but the police did not arrive on that day. Approximately two days later she saw the appellant again on a bicycle, she then telephoned the police and two police officers came to arrest the appellant. At the time of the arrest he still was wearing "dread locks".

15.1.9 Under cross-examination the complainant stated that the incident must have lasted about 5 minutes. She conceded on giving a description of the appellant that she did not observe any scars and that she was scared during the incident.

15.1.10 Under cross-examination the complainant contradicted herself in regard to the colour of the shirt the appellant was wearing. Her evidence was that she remembered that he was wearing a white shirt with buttons and flower patterns on it.

15.1.11 Under cross-examination the complainant corrected her description of the assailant's nose by saying that the appellant had a sharp-pointed nose.

15.1.12 The complainant conceded that when the appellant was arrested, she could not remember clearly what clothes he was wearing.

15.1.13 The complainant persisted in her description of the appellant in stating that she recognised him by his nose, his lips, and that he had "dread locks".

15.2 The State also called the two arresting officers as witnesses. The first was Elijah Mnguni who testified that when he arrested the Appellant, he had "dread locks". He testified that the appellant's hair was long. This was vehemently denied by the Appellant during the trial. The second arresting officer was Bongani Makawana, who testified that the Appellant had "dread locks" when he was arrested and that he was the accused before the Court.

This witness was uncertain about the complainant's name and could not remember the length of the "dread locks".

15.3 The aforesaid evidence concluded the evidence for the State.

15.4 The appellant testified in his own defence. His defence was a denial of the incident. The appellant denied that at the time of his arrest he had "dread locks". He testified that he had a short brush hairstyle.

15.5 The appellant called his girlfriend, Ms Sonto Ngobeni, to testify about the period relating to the incident. Ms Ngobeni testified as follows:

15.5.1 That she had lived with the appellant as from 30 November to 15 December.

15.5.2 That the appellant did not wear "dread locks" during that period and that he had a shaved or "brush" hairstyle.

15.5.3 That during that period the appellant may have gone out during the day, that he would normally return at approximately five in the afternoon and that he did not go out late in the evenings.

[16] In weighing up the evidence I must also take into account that the appellant bears

no burden of proof. The appellant's version must be reasonably possibly true. (**Rex v M 1946 AD 1023 at 1026**).

[17] In considering the principles set out in the judgments which I have referred to above, I come to the following conclusions:

17.1 No evidence was led in regard to the complainant's eyesight. Taking into account the circumstances of the crime I believe that it was imperative that the State should have led evidence in regard to her eyesight.

17.2 The complainant conceded that she was scared during the incident. I would have been surprised if her testimony was to the contrary. However, one must take into account that she conducted her observation when she was extremely frightened.

17.3 The one factor that stands out in regard to the complainant's testimony, is the allegation that the assailant had "dread locks". This was the decisive factor in the complainant's testimony. What must be borne in mind is that nowadays many people wear dread locks. The question that had to be answered was why was the appellant's appearance different from any other person having dread locks.

17.4 The description given by the complainant of the appellant would fit most males who had dread locks. There was no distinguishing features relating to the appellant.

17.5 Of paramount importance is the time lag which occurred between the incident and the actual identification of the appellant. The incident took place on 2 December 2004 and the actual recognition took place on 8 January 2005. Prior to the incident the complainant did not know her assailant. More than a month had elapsed to the date of identification and the danger arises that the complainant may have made a subconscience substitution of the appellant for her assailant.

17.6 Although the account given by the complainant seems to be acceptable, one must bear in mind that she in fact contradicted herself in regard to the colour of the shirt and the description of her assailant's nose.

17.7 I am of the view that the evidence of the arresting officers does not take the State's case any further. Their evidence is not corrobative evidence. It is not independent evidence implicating the appellant. The arresting officers identified the appellant as the person arrested not as the assailant.

[18] Having regard to the various considerations I have mentioned, and bearing in mind the cautionary rules applicable to single-witness convictions and to questions of

identity, I come to the conclusion that the possibilities of error in complainant's identification of the appellant are too great to justify the view taken by the learned Regional Court Magistrate.

[19] In the result, the learned Regional Court Magistrate should have entertained a reasonable doubt as to the correctness of the complainant's identification of the appellant and should have discharged the appellant.

[20] The appeal is accordingly allowed and the conviction and sentence is set aside.

I concur,

DA SILVA, AJ

RAATH, AJ

ACTING JUDGES OF THE HIGH COURT

(TRANSVAAL PROVINCIAL DIVISION)