

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SANDILE GWENXA First Appellant

CLEMENT SENGO Second Appellant

and

THE STATE Respondent

CORAM : E M GROSSKOPF, SMALBERGER et
KUMLEBEN JJA

HEARD : 13 MARCH 1990

DELIVERED : 26 MARCH 1990

J U D G M E N T

KUMLEBEN JA/...

KUMLEBEN JA

The appellants were two of three accused who stood trial in the regional court on a charge of theft. They featured as accused nos 2 and 3 and I shall continue to refer to them as such. The charge alleged that they stole cash and notes totalling R1 662,44. They pleaded not guilty but were nonetheless convicted. Accused nos 2 and 3 were each sentenced to 5 years' imprisonment. Their appeal to the Cape of Good Hope Provincial Division against the conviction and sentence in each case failed, as did that of accused no 1. However, that court granted accused nos 2 and 3 leave to prosecute this further appeal.

The evidence of the State witnesses is not contradicted by any defence evidence, the accused

having elected not to testify or call any witnesses.

The evidence on which the State relied, in chronological order, was to the following effect.

On Friday, 2 May 1986 at about 10 am, Mr Joubert went to the Goodwood branch of Barclays Bank in Voortrekker Street, Goodwood, to draw some money. As he parked his car in front of the bank, he saw three Black men standing on the opposite side of the street, two of whom he identified as accused nos 2 and 3. On more than one occasion within a matter of weeks before this day, when drawing the weekly wages at the bank, he had seen accused no 3 in the vicinity in the company of two other men. (The witness refers to "them" without making it quite clear whether he at that stage identified accused no 2 as well.) On one such occasion "they" followed him by car to his place of employment.

On this account he was concerned at their presence across the street on this Friday and took particular note of them. He entered the bank and, while standing in the queue to be served by the teller, he noticed accused no 3 standing a few places behind him in the same queue. After he had been given his money in a canvas bank bag, he saw that accused no 3 was no longer in the queue or in the bank. On emerging from the building, he saw accused nos 2 and 3 standing next to a mustard-coloured Colt Galant motor car. The car was parked on the opposite side of the street with a third person seated behind the steering wheel. The two men, accused nos 2 and 3, entered the car which drove off and promptly made a U-turn. This confirmed his suspicion that he might be the object of their attention. He turned on his heel and re-entered the bank. After he had unsuccessfully attempted to enlist

the help of the flying squad, he left the bank again. Before doing so he substituted a bank bag containing paper for the one with the money. At this stage the Colt Galant was parked about a block away. Accused no 3 was standing close by looking at a shop window. Joubert returned to the bank and telephoned his assistant at his place of work. He re-emerged from the bank, this time apparently without either of the bags. At this point he recorded the registration number of the colt Galant, CA 115478. When his assistant arrived he was given the money and left. The Colt Galant again drove off and stopped a short distance away in such a position that its occupants could see Joubert and the entrance to the bank. At this stage a traffic officer, Mr de Goede, arrived on the scene. Joubert told him what had happened. Joubert saw the car drive off, presumably because its occupants had seen him talking

to a traffic officer in uniform. De Goede also took note of the car, which he described as a "mustard-coloured Colt", and before it drove off he saw that three Black men were seated in it. De Goede set off after it. He also, by radio broadcast, gave a description of the car and its registration number to all traffic officers on duty at the time, one of whom was the witness, Mr Spence.

Later that same day the complainant, Mr Pienaar, went by car to the Parow branch of Barclays Bank in Voortrekker Street to collect the weekly wages to be paid to employees of his firm. The money, consisting of coins and bank notes and totalling R1 662,44, was handed to him in a canvas bank bag. This he locked in the boot of his car. On his way back, at about 2 pm that afternoon, he parked his car

to make a purchase. Whilst he was away the lock of the boot was removed and the money stolen from the boot.

Mr Louw, another State witness, told the complainant what he had seen. He and his wife were seated in their car in a parking area close to where Pienaar had parked his. Louw saw three Black men tampering with the boot of the car. They opened it and took what he described as a "yellow packet" from it. They then dispersed. One of them walked to a Colt Galant motor car, which Louw described as beige, yellow or mustard-coloured, and drove off in it. At the time he told Pienaar what had happened he handed him a piece of paper on which Louw had recorded the registration number of the Colt Galant. Pienaar said in evidence that as far as he could recollect the registration number given to him was 11576, but he was not certain

of the last few digits.

Pienaar, on his return to his firm, reported the matter to one of his colleagues, Mrs Spence. By strange coincidence she was the wife of Spence, the traffic officer who had received de Goede's radio message. On receiving this information from Mr Pienaar, she telephoned her husband at the traffic police depot at about 3 pm saying that the wages had been stolen and furnishing him with the registration number "CA 15478" together with a description of the car as given to her by Pienaar. Spence checked the number on the computer and found that no such number had been designated to any vehicle. He, however, linked this number to the registration number broadcast in the radio message (CA 115478) and deduced that this was probably the car involved.

At about 4 pm that afternoon he spotted and stopped a Colt Galant with such a registration number. Accused no 1 was the driver, accused no 2 was next to him and accused no 3 was seated at the back. At that stage another traffic officer, Mr de Villiers, arrived on the scene. Spence saw him pull out "some bank bags" from underneath the passenger seat of the car. The three accused were conveyed by Spence in a patrol car to the Goodwood police station, accompanied by de Villiers and another traffic officer on motor cycles as outriders. On their way to the police station de Villiers signalled to him to stop the car. When the car had come to a standstill, de Villiers opened the door and pulled from the trouser leg of one of the accused - Spence could not say which - a length of wire that he had been trying to secrete or replace in his trouser leg. (De Villiers, who could no doubt have

said which accused did this, was not called as a witness.)

On reaching the police station the accused were handed over to a detective, Sgt Swiegers. Earlier that afternoon Pienaar had reported the theft to him. Swiegers found a palm print on the boot of Pienaar's car which turned out to be that of accused no 1.

The evidence on the amount of money found in the car and on each accused was not all that explicit. When Spence spoke of "bank bags" taken from the car it is not clear whether he was referring to more than one canvas bag or to the small plastic bags in which notes and coins of the same denomination were contained. The accused were searched before they reached the Parow

police station, where they and the exhibits, including the money, were handed over to Swiegers. He made the necessary entries in an exhibit register. This register or extracts from it were produced in court. Details of certain of those entries were elicited and placed on record during the cross-examination of Swiegers. According to these entries: R114,75 was found in the bank bag; R197,08 on accused no 1; R528,21 on accused no 2; and R238,87 on accused no 3. The evidence of what was reflected in these entries, though elicited by the defence, is hearsay since Swiegers was not present when the search took place or when the money was taken from the car and from each accused. Be that as it may, it appears to have been common cause that a bank bag containing a large amount of money was found in the car, that each of the accused had money in his possession and that the total amount of money found

was considerably less than the sum stolen - in fact about half the amount.

The State sought to prove that each accused committed the theft by relying on direct identification on the part of the two witnesses, Louw and Joubert, and on certain circumstantial evidence.

Louw's evidence on identification need not detain one. He was unable to point out any of the accused at the identification parade. Before us counsel for the respondent did not seek to rely on the evidence of this witness for identification purposes. However, there are no grounds for rejecting his statement that he saw three Black men committing the theft in the manner described by him.

Joubert's evidence on identification is another matter. In his evidence-in-chief he described how he observed both accused on more than one occasion when they were in the street outside the bank and he in addition saw accused no 3 inside the bank building. He too attended the parade held on 12 May 1986 where he pointed out accused nos 2 and 3 by placing his hand on the shoulder of each one of them. He was standing approximately opposite the middle point of the line before doing so. No 2 accused was more or less opposite him and accused no 3 was on his far right hand side as he faced them. He does not know what notes of the proceedings were recorded. As he put it, he simply did as he was told and pointed out these two persons.

Sgt Cockerell conducted the identification parade and had no other interest in the investigation

of the case. He recorded the proceedings on the form (SAP 329) used for this purpose. This was handed in as an exhibit. According to this form there were 16 men on parade. Though they bore no numbers, those in the line were allocated, for record purposes, numbers from 1 to 16 from left to right as one faces them and their names were entered on the form against the appropriate number. According to this form, accused nos 1, 2 and 3 were in positions 4, 9 and 14 respectively. As regards the pointing out by Joubert, the form reads: "Wys No 9 sonder versuim uit" but there is no reference to his identifying accused no 3. The evidence of Cockerell accords with what appears on the form, namely, that Joubert pointed out one person only: accused no 2. The witness was not asked by the prosecutor whether this assertion was based solely on what is stated in the form or whether he had in

addition an independent recollection of what took place. Predictably such question was not put in cross-examination. Instead he was asked: "En as mnr Joubert enige ander persone uitgewys het, sou u natuurlik dit aangeteken het op daardie vorm, korrek?" The witness, not surprisingly, answered this question affirmatively and the matter was left at that.

This is a rather perplexing contradiction. The trial court remarked on it, did not attempt to resolve it and, one infers, did not rely on Joubert's identification of accused no 3 in convicting him. After discussing the contradiction and the evidence of Joubert, the judgment reads: "Die hof laat dit daar, want hy het eintlik volgens die vorm net beskuldigde 2 uitgewys." The court a quo accepted Joubert's version of what took place by concluding that Cockerell was

relying on his (incorrect) notes because he "clearly" had no independent recollection of what took place. But, as has been pointed out, this question was not canvassed in evidence.

On an appraisal of all the evidence in this regard I consider that Joubert's testimony can be confidently accepted in preference to that of Cockerell for a number of reasons.

Joubert's evidence on his pointing out at the parade of accused no 3 - and no 2 for that matter - was positive and reads convincingly. One has the firm impression that he was recounting what he vividly remembered - to the extent of recalling where the two persons were standing in the line opposite. And, one notes, his recollection in this regard corresponds with

the positions these two men had in fact taken up. It can hardly be disputed that Joubert pointed out two men. Had he pointed out but one, it is highly unlikely that he would have dishonestly claimed to have identified a further person, accused no 3, in order to implicate him, in the knowledge that a number of people had witnessed his identification (and probably in the knowledge - or perhaps one should say on the assumption - that the proceedings were being accurately recorded). Moreover, if this evidence were fabricated, it is most unlikely that he would have by coincidence placed accused no 2 in his correct position in the line. It is every bit as unlikely that he could have mistakenly thought that he had identified a second person, whether it be accused no 3 or anybody else. It is in this regard significant that in his statement subsequently made to the police he is recorded as

having said that two persons were identified by him at the identification parade.

There are other considerations which lend credence to his evidence on what he did at the parade. He had ample opportunity to take a hard look at accused no 3 and every reason for doing so. He was, as I have said, suspicious of the conduct of the three men he had seen and had reason to suspect that he might be their target. He saw accused no 3 at close quarters at the bank. Joubert had, as he put it, "eye contact" with him and was able to notice that the outer rims of his eyes were inflamed. It is noteworthy that Joubert was able to point out accused no 2 "without hesitation" ("sonder versuim") although he had considerably less opportunity of taking note of him than of accused no 3. During cross-examination Joubert said that he suspected

that accused no 1 was also at the parade and standing in the line to his (Joubert's) left (where in fact we know he was positioned) but that he did not point him out because he was not 100% certain of his identification of this accused. This shows that his approach was a cautious one and points to his being certain of his identification of the other two. Finally one must refer to the fact that during cross-examination on behalf of accused no 3 it was put to Joubert that this accused would say that he was in fact not pointed out by Joubert at the identification parade. However, accused no 3 did not take the witness stand to contradict Joubert's evidence and confirm that of Cockerell.

Taking all these considerations into account the inference is inescapable that Joubert's evidence is

correct and acceptable and that Cockerell is mistaken and his notes inaccurate.

On this finding the circumstantial evidence against accused nos 2 and 3 is substantial. The evidence on the make of the car and its registration number irrefutably proves that it was seen by Joubert at 10 am, by Louw at about 2 pm and that it was the car in which the three accused were travelling at about 4 pm when it was stopped by Spence. It is true that Pienaar was vague and wrong in his recollection of the registration number as given to him by Louw. It must have been CA 15478 or CA 115478. It was the former number that Pienaar in turn conveyed to Mrs Spence. Obviously one digit of the registration number came to be omitted by Louw or Pienaar and this is how the discrepancy is to be explained. It is

fanciful to suggest that another car of similar make and colour, bearing (illegally) the registration CA 15478 was used in the actual theft.

Against the background of these facts it is on the face of it beyond the range of realistic coincidence that, after accused nos 2 and 3, as members of the group of three, were behaving suspiciously when seen by Joubert, they were replaced by two other men for the theft itself but were nevertheless shortly afterwards found in this car and in the company of accused no 1, whose palm print established that he was a party to the theft. In the circumstances, if in fact either of them was absent during this intervening period when the offence was committed, they were plainly under a duty to testify and explain how this came about. In the

absence of any such explanation the strong prima facie case becomes proof beyond reasonable doubt.

The application for leave to appeal has not been included in the record before us. For this reason it is not clear whether leave to appeal against the sentence was in fact granted. Be that as it may, Mr Fischer, who appeared on behalf of the appellants, candidly - and in my view correctly - conceded that, in the light of the previous convictions of each of these accused, he was unable to advance any reasons why their sentences should be reduced.

The appeals of both appellants are dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

E M GROSSKOPF JA)
SMALBERGER JA) - Agree