REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

19 MAY 2014 **TV RATSHIBVUMO**

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A505/2013

In the matter between:

LINOS LIHLONONO KHUNJWA **APPELLANT**

and

THE STATE **RESPONDENT**

Criminal law and Procedure – Evidence – Appeal against conviction on robbery with aggravating circumstances – sole issue identification of appellant - appellant pointed out on identification parade by two witnesses – objections as to incompleteness of standard form used - appellant represented by counsel at parade who raised no objections – objections dismissed - argument that appellant was ill-represented during trial rejected – arresting officer questioning the appellant without warning or caution in terms of Judges' rules – appellant's response to questioning inadmissible – held however that the remainder of the evidence proved appellant's guilt beyond reasonable doubt – appeal dismissed.

J U D G M E N T

RATSHIBVUMO AJ:

1. Mr. Khunjwa, the appellant, was sentenced to 12 years imprisonment on 25 June 2013 following a conviction at the Westonaria Regional Court on a charge of robbery with aggravating circumstances. He was granted bail pending appeal on 19 August 2013. He appeals against the conviction with leave of the trial court.

2. The facts that gave rise to the conviction are the following. It was common cause that on the 28th August 2011, seven men arrived at a tavern belonging to Ms. K. at Zuurbekom, Westonaria, driving a Ford Bantam, and robbed her of R10 000.00 in cash, a Colt motor vehicle, 4 cell phones, a printer, a pair of shoes, alcohol and cigarettes at gunpoint. The tavern was operated from her residence and her son, Mr. K. was playing snooker with the customers, while occasionally selling them beer when the robbery occurred.

3. It was part of the uncontested version of the State that the seven men who committed the robbery are the same men Mr. K. had been

attending to as his customers, selling them beer while also playing snooker with them. Their true colours for being there were shown when Mr K., the family driver and a gardener were ordered to lie down, tied and guarded by a gunman, while Ms K. was ushered into the main house by other robbers and R10 000.00 taken from her. Mr K. was in the course of the events stabbed on his thigh, with a screwdriver while a customer who arrived while the robbery was in progress, was stabbed with a bottle on his face. Car keys were taken from the family driver before the robbers sped off in Ms K.'s motor vehicle, a white Colt bakkie.

4. Both Mr K. and his mother testified that the appellant was one of the seven robbers and that he too was armed with a firearm. According to Mr K., the appellant had been there a day before the robbery in the company of three other men and he spent about 4 hours at the tavern. On that day, the 27th August 2011, they had arrived in a white Colt bakkie. He added that the appellant left saying he was going to watch a soccer game. It was the first time he saw the appellant that day. It was the first time for his mother to see the appellant the following day, when the robbery occurred. They both testified that they noticed that the appellant had a gold tooth in his mouth at the time of the robbery. The appellant denied having been one of the robbers or that he was there on the date of the robbery or the day before. He also denied having ever had a gold tooth. He however confirms that he owns a Colt bakkie.

5. The complainant's motor vehicle was recovered abandoned in the veld in Annerdale. The police officers from Annerdale police station contacted Warrant Officer Mojapelo, the investigation officer in this

case and following further information furnished to them, he proceeded to the appellant's home. The appellant denied having robbed the complainant and he was arrested. Of importance is that the appellant was pointed out by Ms K. and her son at an identification parade conducted shortly thereafter. A third victim, who was also present at the robbery (the customer who was stabbed with a bottle) however, pointed out a wrong person at the identification parade. The identification of the appellant was made on his facial features and not the gold tooth. However the investigating officer confirmed that the appellant had a gold tooth at the time he interrogated him.

6. It was submitted on behalf of the appellant that the case for the State was not proved beyond a reasonable doubt in that he was not properly identified, in that inadmissible evidence was tendered during trial and that he was ill represented by his legal representative.

7. It is necessary to revisit the basis upon which a court of appeal may interfere with the finding of a trial court. The approach to be adopted by a court of appeal is summarised in *R v Dhlumayo* 1948 (2) SA 677 (A): a court of appeal will not disturb the factual findings of a trial court unless a misdirection has been committed. In the absence of misdirections on facts by the trial court, the presumption is that his conclusion is correct. The appeal court will only interfere if convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, it will uphold it. See also *DPP v S* 2000 (2) SA 711 (T); *S v Leve* 2011 (1) SACR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another NNO* 2011 (1) SACR 469 (SCA).

8. I now revert to the arguments presented before this court. First, it was submitted that the appellant was not properly identified in that the witnesses should have observed a scar which the appellant alleged he had, that they (in particular, Ms. K.), did not have sufficient time to observe the appellant during the robbery, and that the identification parade form SAP 329 was irregular in that certain portions were left blank. Upon closer scrutiny of the form, it is apparent that the portions that were left open are those where the names of officers who escorted the witnesses into and out of the parade room were to have been written.

9. While it is desirable that all the portions of the SAP 329 are completed and if not, that reasons therefore ought to be furnished, the mere failure to adhere to these cannot result in the nullity of the identification parade as a whole. In *R v Kola* 1949 (1) PH H100 (A) Schreiner JA warned of the dangers of not complying with the rules of an identification parade and concluded as follows:

> 'But an identification parade though it ought to be a most important aid to the administration of justice may become a grave source of danger if it creates an impression which is false as to the capacity of the witness to identify the accused without the aid of his compromising position in the dock. Unsatisfactory as it may be to rely upon the evidence of identification given by a witness not well acquainted with the accused, if that witness has not been tested by means of a parade, it is worse to rely upon a witness whose evidence carries with it the hall-mark of such a test if in fact the hall-mark is spurious. Of course an identification parade is not necessarily useless because it is imperfect. In some respects the quality of the parade must necessarily be a question of degree.' (*own emphasis*).

See also *S v Mohlanthe* 2000 (2) SACR 530 (SCA) and *Tanatu v S* [2004] JOL 13144 (E).

10. Of importance is that the appellant was legally represented by counsel at the identification parade, and that no objection was raised either by him or his legal representative concerning any aspect of the parade. I am accordingly satisfied that although the identification parade (or the completion of the SAP 329 form thereof) should perhaps have been afforded more attention, that it remains reliable and in accordance with the general rules and safeguards applicable to conducting identification parades. I am unable to find any misdirection by the trial court in attaching due weight to the identificatory evidence at the identification parade.

11. The contention was raised that appellant was ill represented at the trial in that his legal representative failed to object when inadmissible evidence was tendered. It is necessary to consider the record of the proceedings in order to determine whether inadmissible evidence was tendered and if so, whether this resulted in the appellant not having had a fair trial.

12. Admittedly, the investigating officer alluded to a number of admissions made by the appellant and that a bulk of these was elicited by the defence during his cross examination. It is clear from the evidence of Warrant Officer Mojapelo that when he was led into the appellant's house, he had already identified him as the suspect and he had made up his mind that he would have him arrested as he did, irrespective of the explanation he gave. His interrogation of the appellant continued even after he was released on bail. At no stage

was it apparent that the appellant was warned of his right to silence and that information he gives could be used as evidence against him at a later stage.

13. In a judgment, comparing the Judges' Rules with the provisions of the Constitution, Satchwel J (in *S v Sebejan and Others* 1997 (1) SACR 626 (W) at 632h) held the following pertaining to questioning of a suspect before arrest:

> 'In short, non-suspects may be questioned without any cautions or warnings whereas suspects, even in circumstances where answers to questions may establish innocence, should receive the benefit of the caution or warning. The suspect is treated differently and entitled to certain protective cautions not afforded to a mere witness.'

See also *S v Mthethwa* 2004 (1) SACR 449 E, *S v Mgcina* 2007 (1) SACR 87 (T) and *S v Khan* 2010 (2) SACR 476 (KZP). The question remaining is whether the appellant was at that stage a suspect already or not. This question however does not require any further evaluation in light of what I have said above. Evidence on information given by the appellant is thus inadmissible. The finding however, does not assist the appellant: absent the evidence I have referred to, the remaining evidence, beyond reasonable doubt, proves his identification and involvement in the robbery.

14. The submission further made was that the trial court erred in accepting inadmissible hearsay evidence, with reference to a number of affidavits that were handed in as exhibits. The submission overlooks the provisions of sections 213 and 222 of Act 51 of 1977 which incorporate sections 33 to 38 of Act 25 of 1965 into the Act. Section 213 provides for the acceptance of written statements by consent whereas section 222 provides for such acceptance under

certain circumstances. What the contention further fails to address is that the statements in no way incriminate the appellant. The argument accordingly, is without substance and is rejected.

15. I turn now to the conduct of the appellant's legal representative at the trial, in particular eliciting inadmissible hearsay evidence in cross examination. The defence obviously attempted to test the credibility of state witnesses by reference to their police statements. The risks involved in doing so, are exposure to and eliciting inadmissible evidence. Failure to do so, on the other hand, may well lead to the criticism that differences and contradictions were not exposed. The strategy of appellant's legal representative did not produce the desired results: the investigating officer must have omitted such evidence deliberately, knowing that it could contain improperly obtained confession. The criticism of this attorney over his rather difficult choice is lately a trend that I find unfortunate and in some instances, unwarranted.

16. In *S v Halgryn* 2002 (2) SACR 211 (SCA) at 216h-217b) it was held:

> 'The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of ex *post facto* dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. The court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect. The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to

call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited."

17. In *Halgryn* (*supra*), Harms JA quoted from *Strickland v Washington* 466 US 668 (1984) at 689, and continued:

> 'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."

and concluded

> '[n]ot everyone is a Clarence Darrow or F E Smith and not every trial has to degenerate into an O J Simpson trial.'

18. The manner in which the defence was conducted in this case is unlike that portrayed in *S v Saloman and Others* 2014 (1) SACR 93 (WCC), were the court held,

> '..he brought no professional skill, judgment or knowledge to the advantage of his client. He sat passively during the deposition and, lamentably, failed to protect his client's interests or indeed advise his client properly about the implications of the latter's conduct. He failed to take basic steps to represent his client properly.'

19. In *Pretorius and Others v Magistrate, Durban and Others* 2013 (2) 153 (KZP) at paragraph 29, it was held:

> 'Indeed one must act on the assumption that a legal representative, entrusted with an accused person's defence, is indeed competent. It is always easy in hindsight to allege that an accused's defence was improperly conducted. Given the highly competitive nature of criminal practice, one will often find another legal representative who will offer what he/she would undoubtedly term a 'better alternative'. This of course is usually after an accused person has been convicted and/or sentenced.'

20. I am not persuaded that the appellant was not properly represented or that the conduct of his legal representative resulted in unfairness. I am moreover, satisfied that the trial court correctly found that the case for the State was proved beyond a reasonable doubt.

21. In the result the following order is made:

The appeal is dismissed.

TV RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

FOR THE APPELLANT	**: ADV J VAN ECK**
INSTRUCTED BY	**: THOMAS NEL ATTORNEYS KRUGERSDORP**
FOR THE RESPONDENT	**: ADV Z PECK**
DATE HEARD	**: 19 MAY 2014**
JUDGMENT DELIVERED	**: 19 MAY 2014**