IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO.: CA 109/06

In the matter between:

AYANDA MALOPE APPELLANT

AND

THE STATE RESPONDENT

JUDGMENT

MONAMA AJ:

INTRODUCTION

[1] On 23 March 2007, this Court set aside conviction of the accused in terms of Section 52(2) of the Criminal Law Amendment Act. I also ordered the immediate

release of the accused. We undertook to furnish our reason for doing so in due course. These are the reasons.

[2] The Appellant is twenty-eight years old. He was charged with and convicted of robbery with aggravating circumstances in the Regional Court sitting in Rustenburg. On 13 April 2004 he was sentenced to fifteen years imprisonment. He now appeals against both the conviction and sentence.

[3] The State led evidence of a single witness, namely Suliman Hassen. Mr Hassen testified that on 9 April 2000 at approximately 18H30 he arrived at his premises known as Hassen General Dealer in Maanhaarand in the district of Rustenburg. He was driving his motor vehicle.

[4] On arrival he was warned by one William to be careful because two unidentified black male wanted to shoot him. He testified that two armed people appeared on the scene and escorted him and William into the house. On their way into the main house he encountered another armed person on the veranda who was guarding his wife, Louise and Isabel.

[5] The complainant and other victims were escorted into the house and assembled in a bedroom. They were guarded. The assailants demanded the money, keys to the safe and to the shop. At some stage, he, William and Samuel were locked in an office. The complainant testified that the invaders robbed them of some money. The whole incident happened “in the wink of an eye”.

[6] The next witness to testify for the State was Captain Lekenna. He testified that on 9 April 2000 he uplifted an identifiable fingerprint on the outside “top portion of the damaged land-line telephone”. He compared this uplifted fingerprint with a set of fingerprint of the accused which were taken by his colleague Inspector Mmatli on 22 November 2004. The witness then testified that he compared the little fingerprint on the set and found it to be compatible.

ISSUES

[7] The two issues present themselves in this appeal. The reliability of the evidence of Mr Hassen as a single witness and the probative value of Mr Lekenna as an expert witness.

[8] It is trite that the evidence of a single witness must be

approached with caution. It has been repeated time and time again that a trier of fact should not be ready to rely on the evidence of a single witness. Mr Hassen made numerous contradictions which impact negatively on any reliance on his evidence. He has not been able to explain the illumination at the scene of the crime both in the house, the office and the area where they were locked in. He never attempted to describe the facial features of the Appellant. [As opined in **S v Charzen and Another** 2006 (2) SACR 143 (SCA).] Indeed Mr Hassen conceded that he was shocked and could not see properly.

[9] No identification parade was held and no explanation was offered for such default. The witness only identified the Appellant by the so called "dock parade". Such identification is always suspected. See **S v Moti** 1998 (2) SACR 245 SCA.

[10] According to the testimony of Mr Hassen he found the Appellant in the house. He never expressed an opinion how he looked like as stated above. Indeed the court found that:

> "Daar is geen uitstaande kenmerke aan die beskuldigde se gesig waaraan hy by beskuldigde itenfifiseer nie . . . ".

On such admission the court **a quo** should have acquitted the Appellant. The complainant was not confident that the identification is reliable.

[11] The complainant testified that there were several witnesses to the commission of the crime, namely his wife, Isabel, William, Samuel, Ruth and Louise. Yet the State fails to explain why one of these witnesses was not called. I assume Mr Hassen's wife was readily available. The court ought to have drawn an adverse inference against the State for the failure to call any if those witness - see **S v Ngxumsa and Another** 2001 (1) SACR 408 (TKD) at 412 f-j and **S v Teixeira** 1980 (3) SA 755 (A) at 763D – 764B.

[12] The opinion evidence of Captain Lekenna is circumstantial in nature. First the trial court did not pronounce itself on whether or not Captain Lekenna was an expert. The court did not engage him extensively but merely accepted his recital.

[13] The uplifted identifiable print of 9 October 2000 was handed to a clerk for safe keeping. The reliability of the safe keeping, the age and probable lasting quality of the print were never investigated. There is no evidence

on record that the trial court reminded itself of the danger alluded to in **R v Nksatlala** 1960 (3) SA 543 (A) at 546H to 547A-C.

[14] The State failed to prove its case beyond a reasonable doubt. Accordingly the appeal succeeds. The order of the court below is set aside and substituted with the following order:

> **"The appeal succeeds. The accused is acquitted of the charge."**

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R E MONAMA

ACTING JUDGE OF THE HIGH COURT

I agree

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M M LEEUW

JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING : 23 MARCH 2007
DATE OF JUDGMENT :

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COUNSEL FOR RESPONDENT : ADV U. MOKONE

ATTORNEYS FOR APPELLANT :
ATTORNEYS FOR RESPONDENT : DIRECTOR OF PUBLIC PROSECUTIONS