REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 96/2013

In the matter between:

ELIAS TJIRIANGE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:

Tjiriange vs The State (CA 96/2013) NAHCMD 369 (04 December 2013

Coram: DAMASEB, JP et HOFF, J

Heard: 22 November 2013

Delivered: 04 December 2013

Flynote: Criminal law – Evidence- Circumstantial evidence **-** A court should only convict on circumstantial evidence if the inference sought to be drawn is consistent with the proved facts and the proved facts exclude every reasonable inference from them save the one to be drawn – Lack of corroboration between proved facts and circumstantial evidence due to poor investigation and inadequate prosecution. Conviction and sentence set aside.

ORDER

The appeal succeeds and the conviction and sentence are set aside.

JUDGMENT

Damaseb, JP (Hoff, J concurring):

[1] The appellant comes to this court seeking the reversal of his conviction on a count of robbery with aggravating circumstances. He was found guilty and sentenced to 7 years imprisonment of which five years were made to run concurrently with another sentence he was already serving at the time. He now appeals against both conviction and sentence.

[2] The complainant's evidence was that he was robbed on 25 June 2007 during broad daylight by three men who the complainant, from their manner of speaking, believed were probably Zimbabwean. The complainant testified that he was robbed of the following items:

(a) DVD player;
(b) DVDs;
(c) His two ‘favorite’ blue and black suites;
(d) An ‘expensive’ long leather coat extending down to his knees;
(e) ‘Our mobiles’, i.e. his cellphone and that of his female companion;
(f) A Toshiba laptop; and
(f) N$ 6000.

[3] None of the stolen items were ever recovered. In his testimony at the trial, the complainant never stated the color of the ‘expensive’ long coat that was stolen or whether it was for males or females. The complainant was never asked during his

evidence in chief to describe ‘our mobiles’ (his and his female companion’s) which were stolen or to confirm the serial numbers of any of those handsets.

[4] The complainant confirmed that after he reported the robbery the police came and lifted fingerprints from the crime scene. The appellant under cross-examination obtained the crucial concession from the only police officer who testified that his fingerprints were not found on the scene of crime.

Complainant’s description of the robbery

[5] The complainant testified that on the fateful day he answered a call at his door. A man was at the door holding a box and said he was making a delivery. The complainant is in the restaurant business. He was therefore not surprised to be receiving such a delivery. He had not long before received another delivery. The complainant testified that he opened the door to let in the supposed delivery man, whereupon another man - brandishing a firearm - surprised him and pointed the firearm to his head and forced the complainant and his female companion to lead the intruders, now three, into the bedroom. The first of the robbers, the supposed delivery man whom the complainant in court pointed out as the appellant, dropped the box he was carrying and did most of the talking during the robbery. The complainant testified that the appellant was well dressed and spoke very good English.

Complainant’s identification of the appellant

[6] The first time the complainant identified the appellant was in the dock at the trial. On this occasion he testified, pointing at the appellant who was then the only person in the dock, that he would never forget the face of the man who robbed him, that the robber had looked him right in the eyes at the time and that he had the opportunity to properly observe the appellant whom he was therefore able to point out in the dock.

[7] During cross-examination of the police officer who testified at the trial and whose evidence I shall deal with presently, the appellant elicited the vital evidence

that after this traumatic experience the complainant had told the investigating officer that he would never be able to recognise the robbers if he saw them again. It was apparent from that cross-examination that the complainant had said as much in a witness statement he had given to the police.

Arrest of the appellant

[8] The appellant was arrested by warrant officer Felix Ndikoma. The arrest was made, according to this officer who testified at the trial, as a result of information supplied by a friend of the appellant, one Mr Methuselah Dausab. That information was to the effect that the appellant had in the past called him using a cellphone number which, according to warrant Ndikoma, was confirmed by Namibia Mobile Telecommunications Company (MTC) cellphone records, to have been hosted on the cellphone stolen from the complainant. A Mr Harmut Riedl, an employee of MTC, testified at the trial and corroborated warrant Ndikoma. Mr Dausab had also told the investigating officer, and confirmed in court under oath, that he had on the same day of the robbery seen the appellant with a cellphone he had not before seen him with and a leather coat which was in a laptop bag.

[9] Mr Dausab stated in his evidence that he and the appellant were good friends for quite some time and that the friendship dates back to when they were at school. The appellant visited him regularly and on 25 June 2007 (the day of the robbery) came to stay with him as he had a quarrel with his father. Later that day the appellant returned and had with him a black Nokia cellphone Mr. Dausab had not seen before the appellant left and a black leather coat which was in a laptop bag. Mr Dausab testified that the appellant told him that the items belonged to his girlfriend and that he needed to sell them as he had to go to the north urgently. According to Mr Dausab, the leather coat the appellant had in his possession came up to the ankles or the feet. He testified that the coat was for a male.

[10] Mr Dausab further testified that a few days after the robbery the appellant told him he was leaving because he feared that the police had recognised him and were looking for him.

[11] Although, and dare I say inexplicably, Mr Dausab was never asked in-chief to confirm under oath and on the record his cellphone number and that of the appellant which he was said to have confirmed to the police, the appellant, who had by then chosen to conduct his own defence, elicited through cross-examination from Mr Dausab that the number that the appellant called him from before the robbery was 0813279645. He also confirmed that it was that number that he pointed out to warrant Ndikoma as the number from which the appellant had called him in the period before the robbery.

[12] Warrant officer Ndikoma stated under oath that as part of the investigation into the subject robbery, he obtained certain records from MTC. Based on those records, according to this witness, he made the link between the complainant's stolen cellphone and the cellphone number of Mr Dausab. The gravamen of his evidence was that Mr Dausab then informed him that a number which the police implicated as belonging to one of the robbers was identified by Mr Dausab as being the one from which the appellant had called him in the past. According to warrant Ndikoma, the number thus linked by Mr Dausab to the appellant was, in the period after the robbery, hosted on a cellphone stolen from the complainant which was, by unique serial number, identified as the stolen cellphone of the complainant.

[13] I must repeat at once that inexplicably no evidence whatsoever was elicited in-chief from the complainant that the cellphone bearing the serial number identified by both Ndikoma and Mr Riedl of MTC as that of the complainant and which hosted, in the period after the robbery, the number linked to the appellant, belonged to the complainant.

[14] The learned magistrate justified the conviction on the dock identification and on inferential reasoning, as does the State now on appeal. The reasoning goes that the events of 25 November 2007 were so indelibly imprinted on the complainant's mind that his identification of the appellant as the robber in the dock was reliable and safe. The danger of a mistaken identification was excluded, the magistrate found, by

the appellant being found in recent possession of the leather coat fitting the description of that stolen from the complainant - in a laptop bag - also an item stolen from the complainant and, most importantly it appears, confirmation by Dausab that the appellant had called him from a number subsequently confirmed by MTC to have been hosted after the robbery in a cellphone stolen from the complainant.

The appellant's arguments against his conviction

[15] The appellant has on appeal urged us to find that his conviction is unsafe and that the State had not proved his guilt beyond reasonable doubt. In the first place , he argues that the dock identification is unsafe in that the complainant was the very man who had after the event told the police that he would never be able to again recognise the robber; that contrary to the complainant's statement to the police that the robbers were probably Zimbabwean, he is Namibian; the complainant never pointed him out at an identification parade and only did so while he was in the dock in circumstances which excluded any possibility of the complainant pointing out any one else but him.

[16] The appellant also argued that it was never proved that the coat found in his possession was that stolen from the complainant and, as far as the cellphone is concerned, he forcefully argued that Mr Dausab's evidence is most unreliable in that the MTC records fail to establish any calls made between the number alleged to be his and reportedly hosted on the stolen phone and Mr Dausab's cellphone number. The point he makes here is that there is no corroboration by MTC records of Dausab's version that the appellant communicated with Dausab using a cellphone number said to have been hosted on the stolen cellphone.

[17] A court should only convict on circumstantial evidence if the inference sought to be drawn is consistent with the proved facts and the proved facts exclude every reasonable inference from them save the one to be drawn. If the proved facts do not exclude other reasonable inferences we are left with a doubt whether the inference sought to be drawn is correct.[1]

[1] R v Blom 1939 AD 288.

[18] Dock identification is approached with caution.[2] Single witness evidence, it has been held, must be approached with even greater caution in the case of identification.[3] In my view, that danger becomes even more pronounced where the identity of the alleged perpetrator is by means of a dock identification which had not been(as here) preceded by a proper identification parade.[4]

[19] The present conviction cannot be justified either on the *Blom*-test or on the test for safe dock identification.

The dock identification is unsafe

[20] The complainant was a single witness on the issue of identification. The complainant's earlier admission that he would never be able to recognise the robber again rendered unfair, and prejudicial to the appellant, the State's failure to have arranged an identification parade that would have afforded the complainant the opportunity to point out the appellant prior to the dock identification. The appellant's contention, that the complainant was placed in the position that he could point out no other person but him, is a good one.[5] Besides, the complainant's earlier assertion that the robbers were probably Zimbabwean given their manner of speaking, is irreconcilable with the common cause fact that the appellant is a Namibian. During cross-examination the appellant elicited from the complainant that the latter had seen a picture of the appellant in a newspaper in connection with an unrelated alleged crime and then resolved it was the same person who had robbed him.

[21] Although the complainant was at pains to point out that the newspaper article containing the appellant's picture did not mention the present offence, it was never produced in evidence. Significantly in my view, it is the sort of evidence one would have expected the State to place before court and to eliminate any risk of false or mistaken identification based thereon. In my view therefore there is a very real likelihood that the appellant was prejudiced in the way proof of his dock identification was presented.

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[2] S v Haihambo 2009 (1) NR 176 at 182, paras 22-24.
[3] S v Kavandjii 1993 NR 352 at 353H.
[4] Compare the reasoning of Hoff J in S v Haihambo 2009(1) NR 176 at 182, paras 22- 26.
[5] Ibid, para 26.

The proved facts don't lead to guilt as only reasonable inference

[22] It was the State's duty to prove beyond reasonable doubt that in fact the appellant was the owner of the suspect number hosted on a stolen phone; that the phone allegedly stolen was actually stolen and that it belonged to the complainant. The State failed to prove certain facts in the absence of which the *Blom* inferential reasoning does not apply. Except for warrant Ndikoma's say-so, the State did not elicit any evidence from the complainant that he was in fact the owner of a cellphone bearing the serial number which after the robbery hosted the sim card number linked by Mr Dausab to the appellant. Without that connecting evidence, warrant Ndikoma's evidence and that of MTC's Mr Riedl that there was contact between the number attributed to the appellant and that stated by Mr Dausab as his', counts for nothing in circumstances were the accused denied that he neither possessed the stolen phone nor owned the number which was hosted on it.

[23] The inference of guilt is gravely undermined by the fact, not disclosed by the State, that no fingerprints of the appellant were found on the crime scene in circumstances where one would have expected such evidence to be found considering that there is no evidence on record that the robbers wore gloves at the time of the robbery. Also significantly favourable to the appellant is the evidence that the coat seen by Dausab appears not to be the same coat described by the complainant. Faced with this difficulty, counsel for the State sought to argue that Mr Dausab's description of the coat as reaching up to the ankles or feet (as opposed to the complainant's evidence that it came up to his knees) was not 'precise' but urged us to accept as corroborating the complainant in that it conveyed that the coat was 'long'. Fact remains, the two descriptions differ and the State made no effort to clarify the anomaly. That the coat stolen from the complainant was the same coat seen by Mr Dausab is not the only possible inference on the facts.

[24] Warrant officer Ndikoma under cross examination stated that Dausab told him that Dausab had also seen the appellant in possession of a laptop. The inference sought to be drawn was that since the complainant had been robbed of a laptop, that

found in the appellant’s possession was the complainant’s stolen laptop. Dausab’s credibility , in so far as his incrimination of the appellant goes, is undermined by the fact that he had told the investigating officer that he had seen the appellant with a laptop but at the trial denied that he saw the appellant with a laptop.

[25] The appellant argued, and it was conceded by counsel for the State, that MTC records do not establish at all that at any stage before or after the robbery, a number attributed to the appellant had been in contact with a number said to belong to Mr Dausab. The only evidence there is for that is Dausab's say-so. The investigating officer's evidence is that he found the link to the appellant through Mr Dausab in that he established that the stolen phone hosted a number that communicated with Dausab. On what basis then can there be no evidence from MTC of the suspect number calling Dausab – at any stage?

[26] I am therefore compelled to agree with the appellant that the State failed to prove beyond reasonable doubt that the appellant was at any stage in possession of the stolen cellphone.

[27] The State also failed to prove that the coat found in the appellant's possession was that stolen from the complainant. The complainant did not as much as state the color of his stolen coat. Not only that, the State concedes that there is a discrepancy, I dare say a significant one, between the coat described by the complainant and that found in the appellant's possession based on Mr Dausab’s description of the coat.

[28] I am satisfied that the State failed to prove that the appellant was the robber. This case is a sad example of a very poor investigation and a very inadequate prosecution. No serious attempt was made to connect the proverbial dots both during the investigation and the prosecution with the result that a possibly guilty man must go free from so serious a charge.

[29] True, the accused chose not to give evidence under oath to put his version of events. I am not surprised, given the deficiencies in the State’s case. It is trite that if

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the case against an accused is tenuous, he does not expose himself to any appreciable risk if he does not give evidence.[6] An accused's silence is really only significant, I do not by any means suggest irrelevant, where there is direct testimony (as opposed to circumstantial evidence) implicating the accused.[7] The accused's failure to testify was therefore of no moment on the facts before us. All told, the case for the State is so deficient that no reasonable court, properly directing itself, could have convicted the appellant. He was entitled to the benefit of the doubt.

[30] The appeal succeeds and the conviction and sentence are set aside.

P T Damaseb

Judge-President

E P B Hoff

Judge

[6] S v Haikela and Others 1992 NR 54 at 63E.

[7] Ibid at 64A.

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APPEARANCES

APPELLANT: In Person

RESPONDENT: E N Ndlovu

Of Office of Prosecutor-General