REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2017/00003

In the matter between:

VICTOR NAMPWEYA FILLIPUS **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Fillipus v S* (HC-MD-CRI-APP-CAL-2017/00003) [2019] NAHCMD 24 (18 February 2019)

Coram: LIEBENBERG J and USIKU J
Heard: **04 February 2019**
Delivered: **18 February 2019**

Flynote: Criminal Appeal – Identification – Principles applicable to identification reaffirmed – Identification evidence approached with caution – State witnesses corroborated each other as to identity of appellant.

Criminal Appeal – Alibi defence – Principles – No onus on appellant to prove alibi – Alibi assessed having regard to the totality of the evidence – Belated raising of defence may result in adverse inference to be drawn.

Criminal Appeal – Irregularity committed by trial court – Effect thereof on court's finding – Whether irregularity of fundamental nature vitiating the verdict – Despite irregularity court to consider evidence in its totality – Evidence established guilt beyond reasonable doubt – Appeal against conviction dismissed.

Summary: Appellant was convicted in the Regional Court on a charge of robbery and sentenced to 12 years' imprisonment. He was charged and convicted based on the doctrine of common purpose, in that he let in two persons in the complainant's home who overpower the domestic worker and thereafter stole large amounts of cash and jewellery from the complainant's safe. Appellant appealed against his conviction on the grounds that he was not at the scene of the crime on that day but in the North. The issues for determination on appeal mainly turned on identification and the alibi defence; also that the court relied on evidence that was ruled inadmissible i.e. cell phone records.

Held, that, identification evidence should be approached with caution as it is recognised that a witness's recollection of a person's appearance is dangerously unreliable. The court should therefore be satisfied that the witness is not only honest, but also reliable

Held, further that, an alibi must be assessed not in isolation, but to be considered in totality of all the evidence adduced.

Held, further that, the court was satisfied with the evidence of three witnesses who positively identified the appellant and placed him on the scene of the crime.

Held, further that, despite the irregularity by admitting inadmissible evidence, the trial court's verdict had not been tainted by the irregularity because the remaining evidence proved appellant's guilt beyond reasonable doubt.

Held, further that, appeal against conviction dismissed.

ORDER

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1. The appellant's non-compliance with rule 118 of the Rules of the High Court is condoned.
2. The appeal is dismissed.

JUDGMENT

LIEBENBERG J (USIKU J concurring):

[1] The appellant was tried and convicted in the Regional Court seated in Windhoek on a charge of robbery and sentenced to 12 years' imprisonment. Disgruntled by the outcome of the trial the appellant subsequently lodged an appeal against his conviction.

[2] On the initial date of set down of the hearing of the appeal on 19 January 2018, the matter was struck from the role due to non-compliance with rule 118(6) of the High Court Rules in that the appellant only filed his heads of argument four days before the hearing. The appellant re-enrolled his appeal and on 17 July 2018 filed an affidavit in support of an application for condonation. Mr *Siyomunji,* counsel for the appellant, subsequently filed heads of argument.

[3] On appeal, during oral submissions, the respondent raised a point *in limine*, taking issue with the affidavit filed by the appellant in support of the

condonation application on grounds that the explanation advanced by the appellant is not reasonable and acceptable. According to the appellant the delay was caused by his inability to put his counsel in funds timeously. Mr *Olivier,* for the respondent, now argues that the issue is not about funds, but rather the lack of detail in the explanation given. The court reserved its ruling on the application for condonation and invited the parties to argue the appeal on the merits.

[4] It was pointed out by Mr *Siyomunji* that when the matter came before the managing judge on the appeal mentions roll, the respondent did not raise any objection as it should have done before the matter was set down for hearing. I agree, for if the respondent was of the view that the matter was not ready for set down, it should then have informed the court accordingly who would then have made the appropriate order at the time. To have left it until the day of the actual hearing amounts to nothing more than an unreasonable delay in bringing the matter to finality.

[5] Bearing in mind that one year has passed since the appeal came before this court for the first time and the delay having been due to the appellant's own remissness, as well as the respondent having conceded that it has suffered no prejudice in preparing its supplementary heads of argument, I am of the view that the appellant's non-compliance with the rules should, in the circumstances, be condoned.

[6] In the Notice of Appeal the appellant enumerated 11 grounds on which the appeal is based. Not all of the grounds satisfy the requirement of being clear and specific and will therefore be disregarded (paras 10 and 11), whilst others overlap and raise the same issue, only differently formulated. These grounds will be delineated and considered jointly (paras 1, 2 and 4) and (paras 6, 7 and 8).

[7] The first defined grounds concern whether the appellant participated in the robbery, having acted with common cause with two persons unknown to the State. What the appeal essentially turns on is the identity of the appellant

and co-perpetrators, considered against the appellant's alibi defence that he was in the North at the relevant time. Appellant further contends that there was no evidence of an assault on the witness Vehugura Jaezuruka, despite the court finding otherwise. Also, that there was insufficient proof that a robbery took place, again contrary to what the trial court had found. Lastly, that the court for purposes of the conviction relied on evidence that it had ruled inadmissible during the trial.

Facts that are not in dispute

[8] It is common ground that the appellant was employed as gardener for the complainant, Ms Dresselhaus, for several years at the house where the alleged robbery took place on the morning of 05 March 2012. It is not disputed that Ms Vehugura Jaezruka was a domestic worker also working for the complainant and on duty on that day. Due to their working conditions they knew each other very well and had a good relationship for about four years. Also common cause is that the appellant during the month of March 2012 left Windhoek and travelled to the North where he remained for some time. There he handed N$5 000 in cash to his mother for safe keeping.

[9] The court *a quo* correctly identified three issues that were to be decided namely, identification and alibi of the appellant, and if proved, whether he had acted with common purpose with the two unknown perpetrators.

Identification

[10] Pertaining to identification evidence, such evidence should be approached with due caution as it is generally recognised that a witness's recollections of a person's appearance is dangerously unreliable.[1] The court in *S v Britz*[2] endorsed the remarks made in *S v Mthetwa*[3] on identification where the Appellate Division said:

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[1] Zeffert & Paizes The South African Law of Evidence 2 ed. at 152 – 153.
[2] 2018 (1) NR 97 (HC).
[3] 1972 (3) SA 766 (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 lighting, 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, gait 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. (At 768, per Holmes JA)'

[11] I turn next to apply the above stated guidelines to the present facts.

[12] Despite the appellant's defence that he was no longer in the employ of the complainant at the time of the robbery, the State led the evidence of three witnesses who said that he turned up for work on the day of the incident. The complainant testified that before she left home in the morning, she gave the appellant certain duties. This was to cart sand from outside into the yard. Complainant further said that upon her return she found the gate open and observed that the sand had not been shifted. The appellant was no longer to be seen on the premises and when she called him on his phone, he did not answer her call. Complainant's evidence was corroborated by Inspector Olivier who later visited the scene and found a wheelbarrow and spade in front of the house. During his investigation he also discovered that there was no forced entry into the house.

[13] Witness Jaezuruka's evidence corroborates that of the other State witnesses who placed the appellant at the scene on that day. She said he was already at work when she arrived past 08:00 and after greeting, she entered the house. She passed him at a distance of about 6 metres. The next time she saw the appellant was when he and two unknown men entered through the kitchen door. When the two unknown persons started to assault her, the

appellant left, not to be seen again. She said she was able to see the faces of the three persons and although she was unable to identify the other two, she was adamant that the appellant was among them as she knew him. Like the complainant, she knew the appellant by the name Fillip. Appellant disputed this, saying he went by his first name, Victor.

[14] The third witness placing the appellant on the scene is Mr Hendrick Schrader, the complainant's partner who resided at that address. According to him he saw the appellant that morning on the premises when leaving for work.

[15] When considering the testimony of the three State witnesses who gave evidence on identification, the trial court was guided by case law cited in the judgment and, correctly, followed a cautious approach. Mindful of the circumstances under which the witnesses made their respective observations and bearing in mind that the appellant was well known to them; and having found the witnesses credible and trustworthy, the court was satisfied that the appellant was positively identified. The appellant's evidence that he had travelled to the North the day before the alleged robbery, was accordingly rejected as false.

[16] Counsel for the appellant took issue with the credibility of the complainant as regards the witness having been afforded the opportunity to furnish certain documents to the court in support of her evidence that the appellant was in her employ, but which she failed to do so.

[17] I am unable to see how the complainant's failure to produce certain documents that would support her version would render her evidence incredible and unreliable. The *viva voce* evidence of the witness on identification, corroborated by two other witnesses, none of which having been discredited during cross-examination, was evidence that still had to be evaluated. The issue of access to the remote of the gate by the appellant was also raised on appeal. Despite the complainant's evidence that when she had the remote, access to her premises was not possible through the main gate, witness Jaezuraka testified that the appellant could make use of the remote

that was kept inside the house. Complainant on her return was surprised to find the main gate wide open. This suggests that she had closed it when she left but that someone opened it. The evidence points at the appellant who shortly thereafter accompanied two unknown persons into the house and on the strength of Jaezuruka's evidence, was possible.

[18] In *S v Auala (1)*[4] the approach to the evaluation of evidence when faced with mistakes made by a witness is discussed and where the court found that not every error made by the witness affects credibility. As already mentioned, the effect of the contradictions must be evaluated as to its nature, number and importance, and its bearing on the rest of the witness's evidence. In my view, the importance of the issue about whether the appellant had access to the remote to open the gate on that day fades into insignificance in light of evidence that the gate was later found left open and the appellant having accompanied two unknown men up to the house where after he disappeared from the premises, never to return.

The alibi defence

[19] The question of identification is entwined with the alibi defence raised by the appellant during the trial. The court in *S v Kandowa*[5] at 732F–I summarised the correct approach as to the assessment of an alibi defence, with reference to relevant authority, as follows:

> '(1) there is no burden of proof on the accused person to prove his alibi;
>
> (2) if there is a reasonable possibility that the alibi of an accused person could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt;
>
> (3) an alibi must be assessed, having regard to the totality of the evidence and the impression of the witnesses on the court;
>
> (4) if there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable; and

[4] 2008 (1) NR 223 (HC).
[5] 2013 (3) NR 729.

> (5) the ultimate test is whether the prosecution has proved beyond reasonable doubt that the accused has committed the relevant offence and for this purpose a court may take into account the failure of an accused to testify or that the accused had raised a false alibi.'

(Emphasis provided)

[20] Though there is no onus on the appellant to prove his alibi, it is a fact that his version of having travelled to the North one day prior to the robbery incident, stands uncorroborated and in conflict with the evidence of several State witnesses placing him at the scene where the robbery took place shortly before, and during the incident. His evidence is further inconsistent with that of his brother, Immanuel Nathan, who said that the arrangement between him and the appellant was that the latter would remain behind in Windhoek while he travelled to the North on the 2nd of March 2012.

[21] The appellant, when pleading not guilty, elected not to disclose the basis of his defence and raised an alibi for the first time during cross-examination of State witnesses who placed him at the scene. Except for saying that he had left Windhoek for the North the previous day, he provided no further details about his alibi defence. Evidence about him having met with his mother at the village merely confirms his presence at her village after the date of the robbery. This is a neutral factor and not in dispute as he was arrested in the North. In the present circumstances the court in its assessment of the appellant's alibi defence, is entitled to find that the belated raising of an alibi defence may adversely affect the value accorded thereto. Though the trial court did not specifically deal with it in its judgment, it is a fact that cannot be overlooked and must be considered with all the evidence.

[22] From a reading of the court *a quo's* judgment I am satisfied that the correct approach was followed with the necessary caution applied when evaluating the evidence on identification. It is trite that the trial court has advantages that the appellate court does not have in seeing and hearing the witnesses when testifying. For this reason the appellate court should be

reluctant to upset the findings made by the trial court.[6] The conclusion reached in the end that the appellant's alibi defence and his evidence in support thereof is not only improbable but false, is based on the correct assessment of the evidence and the court's acceptance of evidence given by the State witnesses. I am, in light of the totality of evidence adduced, unable to come to a different conclusion.

Irregularity by trial court

[23] I pause here to briefly deal with the point raised about the trial court having misdirected itself when relying on evidence, relating to cell phone records that were earlier ruled inadmissible.

[24] In its consideration of the alibi defence, the court relied on the evidence of Inspector Olivier who testified about a phone call made from the appellant's cell phone which was registered by a tower situated in Kleine Kuppe in Windhoek. Though recognising that the phone records were ruled inadmissible, the court reasoned that the evidence given by the witness in that regard cannot be ignored.

[25] It is evident that Inspector Olivier is not the author of the impugned records and that his testimony as to the location of the appellant's cell phone, emanated from the records itself – records the court had already ruled inadmissible. In view thereof, the content of these records should not have been admitted as evidence. In this regard the court clearly misdirected itself. The next step is to decide the nature of the irregularity, and its effect on the outcome of trial proceedings.

[26] The Supreme Court in *S v Shikunga and Another*[7] considered the effect of irregularities committed during the trial on appeal and at 171A-D stated thus:

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[6] *R v Dhlumayo and Another* 1948 (2) SA 677 (AD) at 705 – 706.
[7] 1997 NR 156 (SC).

'Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims - the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon.'

[27] When applying the above quoted principles to the court's misdirection in the present instance, I am satisfied that it is not of fundamental nature. Furthermore, in light of the totality of evidence adduced, the trial court's verdict had not been tainted by the irregularity. When the evidence of Inspector Olivier is excluded, there remains sufficient evidence that shows beyond a reasonable doubt that the appellant was not only in Windhoek during the commission of the crime, but on the scene itself. This ground of appeal accordingly falls to be dismissed due to the lack of merit.

Unsubstantiated grounds of appeal

[28] Two further grounds of appeal raised by the appellant concern the alleged assault on the witness Jaezuruka, and whether a robbery actually occurred. To argue that because the witness Jaezuruka did not seek medical treatment after the incident there was no assault on her is, with respect, absurd in light of her testimony about the assault and corroboration as to her emotional condition after the incident. Appellant seems to suggest that evidence to this effect was fabricated. This begs the question how the witness found herself locked up inside the bathroom? The mere shoving of the witness into the bathroom constituted an assault.

[29] As to the assertion that no robbery took place and that the complainant was quick to call the insurance company, ignores the undisputed evidence of the complainant who described in detail what was stolen out of her safe. On what legal basis would the court have been entitled to discredit the witness or exclude her testimony? I am unable to think of any, neither was any proposed in argument.

[30] These concerns should have been addressed during the trial and in particular, during cross-examination and not to be left until after conviction and on appeal. Submissions made in support of appellant's contention is in conflict with evidence adduced to the contrary and therefore found to be baseless. In light of the conclusions reached earlier herein, these grounds require no further consideration.

The doctrine of common purpose

[31] Lastly for consideration is whether the appellant had acted with common purpose.

[32] In the court's judgement it comprehensively set out the legal principles on the doctrine of common purpose and extensively quoted applicable case law. There is no need to refer thereto in any detail and it would suffice to say that in its determination as to whether or not the appellant acted with common purpose, it is necessary to show on the evidence adduced that there is a causal connection between the acts (or omissions) on the part of the appellant and the actual perpetrators. When applying the prerequisites set out in *S v Safatsa and Others*[8] to the present facts, the following has been established: Though there is no direct evidence that links the appellant to the actual unlawful taking of the complainant's property, he immediately prior thereto led the perpetrators into the house and upon entry an attack was launched on the unexpected victim. He must therefore have been aware of the assault perpetrated on her as he only thereafter left the scene. By allowing the perpetrators onto the scene and leading them into the house, the appellant's

[8] 1988 (1) SA 868 (A) at 897.

actions clearly shows that he associated with the conduct of the actual perpetrators. This is further confirmed by his unexplained disappearance from the scene with no intention of ever returning; and him subsequently having been seen in possession of a substantial amount of cash shortly thereafter.

[33] In circumstances where the appellant's evidence had been found improbable and rejected as false beyond reasonable doubt, and regard being had to all the evidence presented, the only reasonable conclusion to come to is that the evidence established a prior arrangement between the appellant and the other perpetrators to (a) allow them access onto the premises; (b) to subdue the domestic worker, Jaezuruka, in the absence of the complainant; and (c) to obtain access to the safe and its contents with the intention to permanently deprive the complainant of her property. The trial court, in my view, correctly, came to the same conclusion. This ground of appeal is thus also without merit and falls to be dismissed.

[34] In the result, it is ordered:

1. The appellant's non-compliance with rule 118 of the Rules of the High Court is condoned.
2. The appeal is dismissed.

JC LIEBENBERG

JUDGE

D USIKU

JUDGE

APPEARANCES:

APPELLANT	M Siyomunji Of Siyomunji Law Chambers, Windhoek.
RESPONDENT	M Olivier, Of the Office of the Prosecutor-General, Windhoek.