REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 23/2011

In the matter between:

MATHEUS SHIHEPO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Shihepo v The State* (CA 23/2011) [2013] NAHCNLD 33 (31 May 2013)

Coram: LIEBENBERG J and TOMMASI J
Heard: **31 May 2013**
Delivered: **31 May 2013**

Flynote: **Criminal procedure** – Robbery – Accused unrepresented – Presiding officer under a duty to assist the accused – Duty of guiding the accused during cross-examination of State witnesses to challenge material evidence incriminating the accused by directing the accused's attention to such evidence – Failure constituting a misdirection vitiating proceedings.

Identification – Principles applicable re-affirmed.

Summary: Robbery – Appellant convicted of robbery on single evidence of the complainant. Court relied on the complainant's bold assertion that he positively identified the appellant as one of his assailants without testing the reliability of such evidence. In the circumstances the identification of the appellant has not been established beyond reasonable doubt.

ORDER

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

JUDGMENT

LIEBENBERG J (TOMMASI J concurring):

[1] Appellant and his co-accused (hereinafter referred to as accused no 2) were unrepresented when tried and convicted on a charge of robbery (with aggravating circumstances) by the regional Court, sitting at Ondangwa. Each was sentenced to a term of six years' imprisonment.

[2] Although the notice of appeal filed by the appellant reflects that the appeal lies against both conviction and sentence, no grounds of appeal against sentence were noted. Mr *Wamambo*, for the respondent, was further of the view that the notice of appeal did not satisfy the requisites of being clear and specific, as required by the Rules. Though counsel's contention is not completely without merit, the court is mindful that the notice was drawn up by a lay person and, although the grounds contained therein could have been better articulated, the gist of the notice is clear, namely, that the evidence adduced at the trial was insufficient to sustain appellant's conviction. We therefore proceeded to hear the appeal against conviction only.

[3] Appellant was convicted on the single evidence of the complainant who said that both the appellant and accused no 2 were known to him prior to the robbery, and that he had known the appellant for some years. He however did not say in what respect he came to know the appellant or how regularly they had contact. He testified that he met with accused no 2 (also known to him) earlier that evening in a taxi, whilst on his way home; and that he had mentioned that he would be on foot. They walked together from where they were dropped off, up to where the last cuca shops were, whereafter they parted ways. Having walked some distance, he was suddenly attacked from behind by two persons. The one held his arms behind his back whilst the other searched through his pockets. He recognised the appellant as the person who was searching him, while the other one who had given the order for the search, he recognised as accused no 2. After searching him the appellant fled the scene whilst his co-accused remained behind, still holding him. The latter then robbed complainant of his bag by cutting loose the sling with a knife, before running away. Complainant gave chase but was unable to catch his assailants. It is not clear under which circumstances did the complainant recover the bag that same evening. He spent the night with a friend and in the morning they returned to the scene from where he could see his assailants' footprints leading in the direction of Oshikango. He did not say that he followed the tracks up to a specific point; only that he met with the appellant and accused no 2 in the company of others, in Oshikango. When he asked them to return his property the appellant replied that he really did not know where it was. From there the complainant went to the police.

[4] Appellant and his co-accused both testified and denied any involvement in the robbery of the complainant, or that had they been together on the night in question.

[5] The magistrate clearly misdirected himself on the facts when he found that the complainant was robbed at knife point, and that cash in the sum of N$1 700 was taken from the complainant. No evidence to that effect was adduced at the trial and the only time the complainant testified about a knife that was used, is when the bag was cut loose from the complainant's grip by

accused no 2 after the appellant had already fled the scene. As regards the cash, complainant was unable to state the specific amount and it is not clear how the magistrate came to the amount mentioned in the judgment.

[6] Much was made in the judgment about appellant and his co-accused denying that they had previously known the complainant, whilst the complainant said they were well-known to him. This seems to be the sole reason relied upon by the court when rejecting their evidence as false, because, so the magistrate reasoned, they have failed to challenge the complainant's evidence in cross-examination on that point. As mentioned, the complainant was not questioned about his relationship with the appellant other than saying that he had known him for some years. However, it does not mean to say that because appellant was known to the complainant by name, therefore, the appellant also knew the complainant. In respect of accused no 2, it seems that they knew one another fairly well and were on speaking terms. However, in my view more should have been done to establish whether the appellant and complainant were well-known to one another and more so, where this was a factor the court would heavily rely on when convicting.

[7] It is a well-established rule of practice that a presiding officer is duty-bound to assist the unrepresented accused during the trial; not only to assisting the accused presenting his or her case to court, but also by guiding the accused sufficiently during cross-examination of the State's witnesses to challenge material evidence incriminating the accused by directing the accused's attention to those aspects of the evidence. The lay and unrepresented accused is usually unfamiliar with court proceedings and lacks the skill to cross-examine a witness meaningfully. It is often said that the duty of the presiding officer towards the unrepresented accused at trial proceedings is not fulfilled once the accused is apprised of his or her rights at the commencement of proceedings. In this instance no assistance was given by the court to the unrepresented accused during cross-examination of the complainant, failing which constituted a serious misdirection. More so, where the court in its evaluation of the evidence, drew adverse inferences from the accused persons' failure to challenge certain material aspects of the evidence

adduced against them. The magistrate should have assisted the accused persons by reminding them of complainant's evidence about the relationship between them and the complainant; and, more importantly, also in respect of his evidence of identification of the appellant and his co-accused as the complainant's assailants. Had the complainant's evidence been properly challenged in cross-examination the court might have come to a different conclusion, instead of finding that complainant was 'quite consistent in his evidence'.

[8] For the foregoing reasons it seems to me that the misdirection committed by the trial court is such that it taints the conviction and that the appellant was not given a fair trial. For these reasons alone, the appeal should be upheld. But there is more.

[9] As regards the identification of the appellant and co-accused by the complainant, all that was said in the judgment is that they were positively identified. No other reasons were given explaining which facts were relied upon in reaching that conclusion, except for saying that the complainant was an impressive witness and that he had no reason to falsely incriminate the accused persons as there was no grudge between them prior to the incident. There is nothing on record showing that the magistrate investigated or tested the complainant's evidence of identification with the view of satisfying himself that the observations complainant made on his attackers are trustworthy. It would appear from the judgment that complainant's bold evidence of identification was accepted by the court only because the complainant's assailants were previously known to him; and that he identified them facially during the robbery. The court was further satisfied that the complainant was an impressive witness and had no reason to falsely incriminate the accused persons.

[10] The law relating to identification is well established and the bold statement of a witness that the accused is the person who committed the crime is simply insufficient, for such statement, unexplained, untested and un-investigated, leaves the door open for possible mistakes. The honesty and

sincerity of a witness is in itself insufficient because the accuracy of identification evidence depends upon the trustworthiness of the witness' observation, recollection and narration.[1] Different factors could play a role which may seriously affect these elements and in this regard I am guided by what was said by Holmes JA in the oft quoted case of *S v Mthetwa*[2] at 768A:

'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'

[11] Whereas the record of proceedings is silent as to whether or not the factors mentioned above were at all considered by the court *a quo* and what weight was given to each factor (if any), it is difficult, if not impossible, to see which factors the court actually relied upon when accepting the complainant's identification evidence as being reliable. It is common cause that the attack on complainant took place at night where there was no artificial light; that his assailants came from behind and that he only had a side-glimpse of the person he claims to have been the appellant. His observation of the person was only brief. Although the complainant testified that visibility was such that he could identify these persons 'as it was shining and it was not so dark', it seems obvious that he did not have a clear view of his attackers because of poor lighting and little opportunity for observation – at least as far as it concerns the person he claims to have seen, being the appellant. Even in circumstances where the appellant was facially known to the complainant, the trial court could not, on the strength of the evidence presented, have been

[1] *R v Mputing* 1960 (1) SA 785 (T).
[2] 1972 (3) SA 766 (A).

satisfied beyond reasonable doubt that the appellant was positively identified and that complainant's evidence is trustworthy and reliable in that respect. The fact that appellant was seen the next morning in the company of accused no 2 does not strengthen the complainant's evidence of his identification of the appellant and co-accused the previous night.

[12] Besides the evidence of identification, there is no other circumstantial evidence that links the appellant to the robbery on the night in question. After due consideration of all the evidence presented, I am convinced that the identity of the appellant as one of complainant's attackers, has not been established beyond reasonable doubt and that the conviction is not in order.

[13] In the result, the appeal succeeds and the conviction and sentence are set aside.

_____

JC LIEBENBERG

JUDGE

_____

MA TOMMASI

JUDGE

APPEARANCES

APPELLANT	R Nathaniel-Koch Of the Directorate: Legal Aid, Oshakati
RESPONDENT	N Wamambo Of the Office of the Prosecutor-General, Oshakati