REPUBLIC OF NAMIBIA **NOT REPORTABLE**

IN THE HIGH COURT OF  **NAMIBIA**

JUDGMENT

CASE NO.:CA 07/2011

IN THE HIGH COURT OF NAMIBIA

NORTHERN LOCAL DIVISION

In the matter between:

CONIS NEPELE & OTHERS **APPELLANTS**

and

THE STATE **RESPONDENT**

Neutral citation: The State v Nepele & Others (CA 07/2011) [2013] NAHCNLD 43 (2 May 2013)

CORAM: SMUTS, J *et* UEITELE, J

Heard on: 2 May 2013

Delivered on: 2 May 2013

Flynote: Appeal against appellant's conviction for robbery and sentences of 14 years imprisonment. Challenge to evidence on identification of the appellants found to be lacking. Appeal against conviction and sentence dismissed

---

ORDER

---

1. That condonation for the late filing of the notice of appeal is granted and,
2. Appeal is dismissed.

EX TEMPORE JUDGMENT

JUDGEMENT

SMUTS, J: [1] The appellants were convicted of robbery with aggravating circumstances and each of them was sentenced on 20 August 2009 to 14 years imprisonment in the Regional Court at Eenhana. They were legally represented at the trial.

[2] On 10 September 2009 the appellants filed a rambling joint letter entitled "application for leave to appeal". Certain sections of the Criminal Procedure Act were referred to. It is clear that they intended to appeal against their convictions. They were no longer represented when they did so. But they subsequently secured the services of their present legal representatives. After doing so, their practitioners sought to file an amended notice of appeal against conviction and sentence on 9 August 2011.

[3] The point was taken that this was not the correct procedure. As a consequence, the earlier notice was withdrawn and a new notice was filed on 26 July 2012. State counsel raised the point that the new notice of appeal has not been served upon the presiding magistrate. It was also not apparent from the notice in the court file that this had occurred. But at these proceedings, Mr Ntinda who represented the appellants in this appeal, provided a copy of a notice which did bear the stamp of the clerk of the court at Eenhana. Mr Mutota who appears for the respondent accepted that service had occurred. This concession was in my view properly made. The erstwhile legal practitioner for the appellants sought condonation for the late filing of the notice of appeal in these circumstances and set out the reasons for this in his affidavit. I am satisfied that a case is made out for condonation in the unusual circumstances of this matter and would grant it.

[4] The grounds of appeal essentially raise the following issues:

- the evidence of identification;
- the contention that there was contradictory evidence of the two state eye witnesses called;
- an alleged lack of evidence on how appellants two and three were linked to the crime;
- the unexplained failure on the part of the State to have called certain witnesses certain issues relating to the way which the prosecution conducted the case; and
- finally it was contended that the Magistrate misdirected himself on sentence.

[5] In order to deal with these grounds and the issues raised by them, it is necessary to briefly refer to the facts which emerged at the trial. The complainant, a certain Augustino Esto Mega, an Angolan citizen, was accompanied by his sister when they entered Namibia from Angola on 9 March 2007 at Oshikango. The complainant testified that he was a police officer in Angola. The complainant's purpose in entering Namibia was to buy a vehicle at a car dealership referred to as KBG situated not far from Oshikango. To do so,

he hired a taxi to take them there. The complainant testified that three persons were already inside the taxi which he had hired. He said that the taxi driver was the third appellant. Seated in the front passenger's seat was the first appellant. He testified that the second appellant was seated in the back seat.

[6] According to his evidence, the driver proceeded past KBG and the complainant was informed that the driver first wanted to pick up some things and would return there. The complainant testified that the driver thereafter turned off the main road and stopped in a bushy area. The complainant said that he and his sister were told to get out of the vehicle. They all alighted from the vehicle. According to the complainant, the first appellant pointed a firearm at him and the complainant raised his hands. He said that the first appellant was in close proximity to him and said that the complainant's sister was told to run away, an instruction that she followed and ran off and hid behind bushes not far away.

[7] The complainant then testified that the second appellant proceeded to search him and take his money from him in the sum of U$12 000 which he had brought along with him to purchase a motor vehicle as well as taking his cell phones. He said whilst this occurred the third appellant looked on. The complainant said that he was able to see all three appellants clearly.

[8] The appellants then departed from the scene after his money and his phones have been taken from him. Shortly afterwards he said the complainant's sister returned to the complainant and they made their way back to the road. They hailed a minibus and were advised to report the incident. They did so at the border post at Oshikango and were referred to the Namibian Police.

[9] The complainant's testimony on this incident was corroborated in material respects by his sister who also gave evidence at the trial. She confirmed the purpose of the visit and that they took a taxi together with the three appellants and confirmed where they were all seated in the vehicle. She also testified as to the incident and the first appellant's pointing of the firearm,

the instruction for her to run away and that she was able to observe from her hiding spot that the taxi had departed. She returned to her brother. She also confirmed how the matter became reported to the police.

[10] They both said that they returned to Angola and came back to Namibia on the following day, 10 March 2007, for an identity parade. They said that they had separately and independently participated in an identity parade where a number of men appeared. Each of them separately identified the first appellant as the person who had pointed the firearm at the complainant.

[11] The Investigating Officer, Warrant Officer Joseph also gave evidence. He is attached to the Serious Crime Unit of the Namibian Police stationed at Ohangwena. All three of the appellants were known to him. He said he received the docket on 12 March 2007. He approached an informant and received information concerning the first appellant and arrested him on that same day. The second and third appellants had not as yet been arrested then. He said that he arranged for an identity parade on 13 March 2007 and contacted the complainant and his sister who attended the identity parade, but Warrant Officer Joseph did not participate in the identity parade. He testified that he subsequently received information from a certain Eliazer Amupofi, who was not called to give evidence, which led to the arrest of the second and third appellants.

[12] The evidence of the complainant and his sister was for the large part and in its material respects not disturbed under cross-examination. They both however said that the identity parade was on 10 March which contradicted Warrant Officer Joseph who said it was on 13 March. But I also take into account that they gave their evidence in June 2009 in the Regional Court, more than two years after the event. The holding of the identity parade itself was not put in issue in cross-examination. It was confirmed by Warrant Officer Joseph and was indeed confirmed by the first appellant in the initial notice of appeal. The actual discrepancy as to its date is not in my view material. What is material

is that it happened shortly after the incident and that both the complainant and his sister separately identified the first appellant at it.

[13] It was however put to the complainant in cross-examination by the appellant's erstwhile legal representative that all of the appellants were with him on 9 or 10 March 2007. It was also put to the complainant that he was engage in dealings with another Angolan person and that the appellants were there to assist him although it was not explained how. As Mr Ntinda pointed out in argument, the complainant denied meeting them before the incident. It was also put to the complainant that the third appellant had not driven the vehicle but that somebody else had done so, being a person known as Eliazer. But the complainant unequivocally denied this by stating that the third appellant was the driver.

[14] It was also put to the complainant in cross-examination that he had handed over an envelope to the first, second and third appellants at the time. That was also denied. When the question was raised with the complainant as to how he could identify the third appellant as the driver, he responded that he had spoken to him when he had asked him to take them to KBG. It was again put to the complainant that he was able to identify the first appellant at the identity parade because he had had prior dealings with him. Although this was denied, it would follow that it was accepted on behalf of the first appellant that he was identified at the identity parade by the complainant.

[15] The second and third appellants were identified by the complainant at the trial. Their arresting officer did not give evidence as to how their arrests were effected and the circumstances under which they had occurred. The complainant's identification of the second and third appellants was however unequivocal. He said the second appellant sat with them on the back seat of the taxi and that he had spoken to the third appellant as I have already pointed out.

[16] The complainant's sister testified that she could not remember the third appellant very well, but could remember the first and second appellants very well. This was understandable because, according to her evidence, the second appellant had sat in the back seat with them. She confirmed in cross-examination that the first appellant had pointed a firearm and that he had said to her that she should run away.

[17] In cross-examination it was put it her that on 9 March 2007 the second appellant had been in their company when the first appellant and the complainant went to Oshikango. This was denied by her. But it was also put to her that the complainant had left her in the company of the first and second appellants when going to a soccer field. And it was again put to her that she was able to identify the first appellant because there had been ample time when being transported from the border and because the first appellant's dealings with her brother.

[18] After the State closed its case, the appellants each elected not to give evidence. Their erstwhile legal representative only handed up statements of the complainant and his sister which had been provided to her.

[19] In their grounds of appeal, the appellants have taken issue that they were properly identified. The argument advance on appeal before us was more related to the issue of credibility on that issue. Even though the second and third appellants were only identified by the complainant and his sister in court some two years after the incident, this should not be seen in isolation. Mr Ntinda correctly invited us to have regard to the totality of circumstances of the case. Whist evidence of that nature especially given two years after the fact would ordinarily be of little value, as was stressed by Hoff J in *S v Haihambo*[1], in this case it was expressly put by the appellant's legal representative at the time that the appellants had met with the complainant and his sister on the date in question.

---

[1] 2009 (1) NR 176 (HC)

[20] It was thus not placed in issue that they would not be able to identify them. On the contrary, it was accepted that they could. Coupled with this is the unequivocal evidence of both the complainant and his sister that the second appellant had sat on the back seat with them in the taxi and that the first appellant had pointed a firearm. The complainant was also able to identify the third appellant as the driver even though it was put to him that someone else had driven the vehicle. Not one of the appellants gave evidence in the context where they were all put on the scene by their counsel in cross-examination. It was not in issue that they all had met up with the complainant and his sister on the fateful day. Furthermore, there was the evidence that an identification parade had been held, even though there were differences as to its date. Both the complainant and his sister said that they were able to identify the first appellant. This would appear to be accepted in cross-examination.

[21] It would follow in my view that the first appellant's identity was plainly established beyond reasonable doubt.

[22] Both the complainant and his sister were able to identify the second appellant even though the arresting officer did not testify as to his arrest. As I have indicated, it was not put in issue that they would be able to identify him.

[23] As for the third appellant, the complainant's sister said that she could not remember him. But the complainant said that he could and said that he was the driver and that he had a cap on. Had it not been put to the complainant on his behalf that he (the complainant) had handed an envelope to appellants one, two and three and also put to him that on the same day there were dealings between himself and the first, second and third appellants, they may have arisen some doubt as to the evidence on the identification of the third appellant even though the complainant was adamant that he was the driver. Having thus being placed on the scene by the complainant and it having been put to him that the third appellant had had dealings with him on that very day, a *prima facie* against the third appellant was established. Yet he elected not to give evidence. As was correctly pointed out by the presiding magistrate, this attracted risk.

[24] It has been well established that a Court is entitled find that the State has proved a fact beyond reasonable doubt if a *prima facie* case had been established and the accused failed to gainsay it, not necessarily by his own evidence but by admissible evidence. In this regard, I refer to *S v Boesak* both in the Constitutional Court[2] and in the Supreme Court of Appeal in South Africa.[3]

[25] In my view, the identity of the appellants was established beyond reasonable doubt in the circumstances.

[26] A further ground of appeal which was not persisted in argument was an assertion that there was a misdirection on the part of the magistrate in accepting that the complainant and his sister had entered into Namibia from Angola. Quite why this was raised is beyond me. It was not put in issue at the trial. Nor is it an element of the crime. According to the work by Snyman Criminal Law, 'robbery consists of in the theft of property by unlawfully and intentionally using violence to take the property from someone else or threats of violence to induce the possesser of the property to submit to the taking the property.'[4]

[27] A further ground concerned alleged discrepancies between the evidence of the two state eye witnesses on the one hand and between the complainant's sister's prior statement on the other. But the example put to us in argument by Mr Ntinda had not been properly canvassed with her in cross-examination at the trial. An explanation could have been given for the discrepancy. It would also not appear to be material. Furthermore, the discrepancy as to how they were reunited after the robbery was also not properly put in cross-examination. It is also not entirely material. Even though the statement was handed up, it was not properly canvassed in cross-examination, and would hardly assist the appellants on appeal when referring to the differences between that statement and the evidence which was given. This ground and the argument advanced in

---

[2] *S v Boesak* 2001 (1) SA 912 (CC)
[3] *S v Boesak* 2000 (3) SA 381 (SCA) at par 56
[4] (5th ed, 2008) at p 517

relation to it are untenable in the context of a cross-examiner's obligation to put an accused's defence on each aspect placed in issue. This was with respect, succinctly stressed in *President of South Africa and Others v SA Rugby Football Union & Others.*[5]

[28] It would follow that the grounds of appeal which have been raised do not in my view carry weight and that the convictions of the appellants should not be set aside.

[29] The notice of appeal also contended that there were misdirections with regard to sentence. In support of this contention, it was firstly raised that the court did not take into account that it should suspend the sentence or a portion of it and secondly that the personal circumstance of the appellants had not been taken into account. As was correctly conceded by Mr Ntinda in argument, the court would ordinarily impose a custodial sentence even upon first offenders when it comes to the serious crime of robbery with aggravating circumstances. It would follow that the first misdirection raised is unfounded.

[30] As to the second, the regional magistrate did in fact refer to the personal circumstances of each of the appellants. We also take into account that the starting point in this form of enquiry is that sentencing is pre-eminently a matter for a trial court and that this court will only interfere if the court below misdirected itself or committed an irregularity or if the sentence is so inappropriate so as to induce a sense of shock.

[31] It is clear from the reasons given by the regional magistrate for sentence that he took into account the personal circumstances of the three appellants, the seriousness of the crime and the fact that a firearm was used and that the stolen property was not recovered. The regional magistrate had correctly also found in his judgment that there were aggravating circumstances present, given the use of the firearm.

---

[5] 2000 (1) SA1 (CC) at 36-37

[32] A lengthy custodial sentence is clearly called for in a case of robbery with aggravating circumstances where a firearm or a dangerous weapon is used. In this context I refer to two unreported judgments of this court. Firstly *S v Paulus*[6] and a more recent case of *Guas v S.*[7] In both judgments, it was emphatically stressed that a lengthy custodial sentence is called for in cases of robbery with aggravating circumstances.

[33] In the circumstances, I cannot find any fault with the approach of the regional magistrate on sentence. Even though it was not raised in the notice of appeal, the sentences do not in my view induce a sense of shock, when compared with some of the other sentences given for robbery.

[34] Both counsel initially questioned the further order made by the regional magistrate with reference to declaring the appellants unfit to possess a firearm for two years. But it was pointed out that the regional magistrate did in fact afford the opportunity to appellants' counsel to advance reasons or present evidence as to why such an order should not be made. That order can also not be faulted.

[35] It follows that the order I would make in this appeal would be to:

1. Grant condonation for the late filing of the notice of appeal and,
2. Dismiss the appeal.

[6] Unreported, 28 March 2000
[7] On 10 April 2012

_____

DF Smuts

Judge

I agree

_____

SFI Ueitele

Judge