

SOUTH AFRICA / JUDGMENT

Masiu and Others v S (A8/2014) [2014] ZAFSHC 246 (11 December 2014)

[2014] ZAFSHC 246

COURT

Free State High Court, Bloemfontein

BEFORE

Daffue, Moeng

CASE / FILE NUMBER

A8/2014

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FREE

STATE HIGH COURT,

BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Appeal

No. : A8/2014

In

the appeal between:-

TITI

MASIU

.....1st

Appellant

THULO

KHESHE

.....2nd

Appellant

NARCY

KHOZA

.....3rd

Appellant

and

THE

STATE

.....Respondent

CORAM: DAFFUE, J et MOENG,
AJ
HEARD
ON: 3 NOVEMBER 2014

JUDGMENT

BY: DAFFUE, J

DELIVERED ON: 11 DECEMBER 2014

INTRODUCTION

[1] On 16 May 2013 the three appellants were convicted on a count of motor vehicle theft by the Regional Court sitting in Botshabelo.

On 24 May 2013 they were sentenced to 5 years' imprisonment.

[2] On 24 May 2013 leave to appeal against conviction only was sought and the court a quo granted leave, having concluded as follows: ".....this court is of the opinion that the record (sic) will not come to a different conclusion or decision, but it does grant the application

for leave to appeal." This is certainly not the test to be applied. Once the trial court concludes that another court will not come to a different conclusion, the application for leave to appeal should be dismissed. The person who applies for leave to appeal must satisfy the court that he has reasonable prospects of success on appeal. The court should reflect dispassionately upon its decision and decide whether the court of appeal could reasonably come to another conclusion. See: *S v Mabena and another* 2007(1) SACR 482 (SCA) at para [22] and *S v Smith* 2012(1) SACR 567 (SCA) at para [7]. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. In casu the trial court should have refused leave to appeal based on the conclusion reached.

THE

ISSUES

[3] It is apparent from the application for leave to appeal that appellant relies on four grounds of appeal, to wit (a) the discrepancies between the versions of the two police officers who allegedly arrested the three appellants in the stolen bus were not properly considered and another court may find them to be untrustworthy; (b) the fact that the second State witness initially refused to make a statement to the police and her failure to answer certain questions; (c) that no fingerprints were lifted from the bus in circumstances where it could be expected insofar as all three appellants were allegedly arrested in the bus and 1st and 2nd appellants entered the bus earlier as well; (d) the date of arrest reflected in the docket and the charge sheet, being 24 November 2011, which differs from the direct evidence of the two police officers who testified that the arrest took place a day earlier.

- [4] Mr Vorster, appellants' attorney who appeared for them in the court a quo and before us, submitted that if we agree with the court a quo's finding that the three appellants had been found inside the bus as testified to by two police officers, the appeal was doomed to fail. However, he argued that the court a quo erred in this regard and insisted that the appeal should succeed based on the defence version.

FACTS

NOT IN DISPUTE

- [5] The following admissions were made and recorded in terms of s 220 of the Criminal Procedure Act, 51 of 1977, ("the CPA"):
- (a) the vehicle, a white Toyota Hino bus with registration no G 513 804 FS, was stolen at 01h51 on 21 November 2011 at 1504 K section, Botshabelo;
 - (b) at the time of the theft the bus was in the lawful possession of Lefa Ruben Molatuli;
 - (c) the bus was retrieved at Sterkspruit and identified by Mr Labuschagne of the Grootvlei Prison;
 - (d) the value of the bus is R750 000 and damages of R20 000 was caused thereto.

LEGAL PRINCIPLES

- [6] Where an appeal is lodged against a trial court's findings of fact, the court of appeal must take into account that the court a quo was in a more favourable position than itself to form a judgment. When inferences from proven facts are in issue, the court a quo may also be in a more favourable position than the court of appeal, because it is better able to judge what is probable or improbable in the light of its observations of witnesses who have appeared before it. Therefore, where there has been no misdirection in respect of fact, a court of appeal assumes that the court a quo's conclusion is correct and will accept it, unless it is convinced that it is wrong. See *R v Dhlumayo and another* 1948 (2) SA 677 (AD) at 705 - 6.
- [7] Clearly, the court's powers to interfere on appeal with factual findings are limited. Therefore, in order to interfere with the court a quo's judgment it has to be established that there was a demonstrable and material misdirection of fact and in the absence thereof its findings will only be disregarded if the recorded evidence shows them to be clearly wrong. See also *S v Monyane and others* 2008 (1) SACR 543 (SCA) at para [15] where the Supreme Court of Appeal stated that it is only in exceptional cases that that court will be entitled to interfere with the trial court's evaluation of oral evidence.

- [8] Insofar as the State's case was to an extent based upon circumstantial evidence, it is required to consider the case law in this regard. In *R v De Villiers* 1944 AD 493 at 508 - 9 the Appeal Court referred to the well-known dictum in *R v Blom* 1939 AD 188 at 202 pertaining to the test to be applied when reliance is placed on circumstantial evidence and pointed out that it is not each proved fact that must exclude all other inferences, but the facts as a whole must do so, and continued as follows:

"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way: the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."

See also *S v Ntsele* 1998 (2) SACR 178 (SCA) at 182b - f cited with approval in *S v Boesak* [2000] ZASCA 112; 2000 (1) SACR 633 (SCA), para [13] at 638f and *S v Reddy and Others* 1996 (2) SACR 1 (A) at 8c - g and especially the following dictum:

"A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . ."

As mentioned in these three judgments the ambit of the concept of reasonable doubt does not go so far that the State must prove the guilt of the accused "bo elke sweempie van twyfel", or put otherwise, "beyond a shadow of a doubt."

- [9] In assessing the evidence, a court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. This does not mean that the breaking down of the evidence in its component parts is not a useful aid to a proper evaluation and understanding thereof. See *S v SHILAKWE* 2012(1) SACR 16 (SCA) at 20, para [11]. The Supreme Court of Appeal approved of the following dictum :

"But in doing so, (breaking down the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees."

See *S v HADEBE AND OTHERS* 1998 (1) SACR 422 (SCA) at 426F – H and *S v MBULI* 2003 (1) SACR 97 (SCA) at 110, para [57].

[10] The same principles apply when an alibi defence is relied upon by an accused. The acceptance of the evidence on behalf of the State cannot by itself be a sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating the accused is true which can only be done if there is at the same time no reasonable possibility that the evidence exculpating him is not true. See *S v VAN ASWEGEN* 2001(2) SACR 97 (SCA) at paras [7] & [8], 100f-101e and *S v LIEBENBERG* 2005(2) SACR 355 (SCA) at 358H – 359E, paras [14] and [15]. The effect hereof is that once the trial court accepts the evidence in support of an accused's alibi as reasonably possibly true, it follows that the court should find that there is a reasonable possibility that the evidence led on behalf of the State is mistaken or false.

[11] Bearing in mind the above the correct approach is to consider the alibi in the light of the totality of the evidence in the case and the court's impression of the witnesses. See *R v HLONGWANE* 1959(3) SA 337 (A) at 341A. In doing so, the trial court should remind itself that no onus rests on an accused and that the State must prove that the accused committed the crime and it must therefore disprove the alibi.

[12] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was) dealt with this aspect as follows:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”

See *S v CHABALALA* 2003(1) SACR 134 (SCA) para [15]. In this regard it is apposite to consider the evaluation of inherent probabilities by the trial court as accepted by the Supreme Court of Appeal in *MAGADLA v S*, 80/2011 [2011] ZASCA 195 delivered on 16 November 2011, (unreported), at paragraph [22] and further.

[13] The right to remain silent and its effect on the disclosure of an alibi defence was thoroughly discussed and considered in the *S v THEBUS & another* 2003(6) SA 505 (CC) at 533 and further. The CC, per Moseneke J, found that a distinction may properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent. It is clear that the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi, although standing alone, it does not justify an inference of guilt. Secondly, such late disclosure is a factor to be taken into consideration in determining the weight to be placed on the evidence of the alibi. The Court stated further: “The failure to disclose an alibi timeously is therefore not a neutral

factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole.” At para 68, 537G

- [14] The identification of a perpetrator, based on the evidence of a single witness must also be considered. Section 208 of the CPA provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and having done so, should decide whether it is satisfied that the truth has been told, despite the shortcomings or defects in the evidence. See *S v SAULS* 1981 (3) SA 172 (AD) at 180E – G.
- [15] Our courts have repeatedly stated that evidence of identification must be approached with caution. There is no doubt that honest

witnesses may make mistakes because of the fallibility of human observation and therefore all various factors set out in *S v MTHETWA* 1972 (3) SA 766 (AD) at 768A – C and any other factors that need to be considered should be weighed one against the other, in the light of the totality of the evidence and the probabilities.

- [16] The fact that a witness failed to provide a description of the accused does not always assist him or her. In the event where the witness was in a situation where he or she had ample opportunity to make a proper and reliable observation of the perpetrator, such factor will be taken into consideration to consider the value to be attached to such evidence, especially so where the witness did not have any reason to falsely implicate the perpetrator. See *MAGADLA* loc cit at paragraph [32]. In this matter three judges found that the perpetrator had been identified correctly notwithstanding the fact that there was no evidence by the complainant as to the perpetrator’s clothing and any physical attributes or marks on his face or body with which she identified him, factors that the minority heavily relied upon in an endeavour to uphold the appeal. In the minority judgment strong reliance was placed on the judgment of Willamson JA in *S v MEHLAPE* 1963 (2) SA 29 (AD) at 32A – F.

EVALUATION OF THE EVIDENCE

- [17] The court a quo found that Ms Mona, a pensioner living in close proximity of the Roman Catholic Church in the rural area of Sterkspruit, was a credible witness. Ms Mona was the State’s second witness, but bearing in mind the chronology of events, her evidence is considered first. She met 2nd appellant twice before the events of 21 November 2011. She does not know his name. On a previous occasion he parked a motor vehicle close to her house and requested her to keep an eye on it whilst he went to Lesotho. On 21 November 2011 he again came to her and asked her to keep an eye on the bus that he had parked close to her house. He again informed her that he was on his way to Lesotho. That night a police officer questioned her about the presence of the bus in close proximity of her house and

informed her that the bus had been stolen. She conveyed to him the information received from 2nd appellant. The next day 2nd and 3rd appellants, whom she identified in the dock, came to her house whereupon she informed them of the police enquiries and the allegation that the bus had been stolen. 2nd Appellant denied this and mentioned that he would be going with the bus and its documents to Pumalanga (presumably the satellite police station). She noticed when the two appellants boarded the bus. She left her home thereafter, but on her return the bus was still parked at the same place. She could not say when the bus was removed and knew nothing of the events described by the two police officers, the 1st and 3rd State witnesses. She was unable to provide a description of the facial features of the appellants, and 2nd appellant in particular, but insisted that she knew him “very well” and that she informed the police that she would be able to point out the two. According to her 3rd Appellant was taller and lighter in complexion than 2nd Appellant.

[18] Ms Mona was a single witness. The court a quo did not pertinently refer thereto. She did not want to give a statement to the police initially and claimed that she was afraid of “those two boys”, referring to 2nd and 3rd appellants. One of the grounds of appeal is that she initially refused to make a statement to the police and failed to answer

questions. This ground of appeal is without merit. The witness who did refuse to make a statement initially, was eventually

persuaded to testify based on an undertaking that she would be protected and upon her arrival at court to testify, a statement was taken from her, a copy of which was presented to the defence. She was criticised in cross-examination for not answering questions, but a perusal of the record indicates that she explained what happened when her statement was taken down. I’ll deal with the approach adopted by the defence attorney *infra*. In any event, any possible difference between her statement and her *viva voce* version does not necessarily reflect on her credibility in the circumstances. Her version was accepted by the trial court to be credible. Although it might be argued that there are shortcomings in her evidence, I am of the view that the court a quo correctly accepted her version. There is corroboration for her version in the form of the evidence of the two police officers, Messrs Tenduka and Nkati. As will be seen it is the State’s case that they trapped the three appellants in the bus during the night of 22/23 November 2011. Their version is disputed by the appellants who denied that they were arrested in the bus. 2nd and 3rd Appellants also denied Ms Mona’s version about their visit to her earlier that day and 2nd Appellant’s visits before then and on 21 November 2011 in particular. This is not a case of mistaken identity by a single witness, but bearing in mind the argument of Mr Vorster, she is untruthful and conspired with the police officers to falsely

implicate 2nd and 3rd appellants. This argument is untenable in light of the objective evidence that she failed to give a statement earlier and

her explanation for such refusal. It is also unthinkable that the police would randomly pick a member of the public, a female

pensioner, to collaborate with them to falsely implicate innocent people.

[19] The two police officers, Messrs Tenduka and Nkati, were the State's first and third witnesses. No doubt, they contradicted each other in respect of aspects such as time and other minor issues. This could be expected, but instead of being indicative of collusion as Mr Vorster submitted, these differences are rather reconcilable with subjective observations by two persons who were at the same scene, but played different roles and testified from their own perspectives. Mr Vorster confronted Mr Tenduka with the witness statement of Mr Nkati and incorrectly suggested in cross-examination that there was indeed a material contradiction in their versions relating to their tactical approach of the bus just before the appellants were trapped inside. An analysis of Mr Tenduka's evidence clearly shows the fallacy of the cross-examination on this issue which should not have been allowed in the first place. I'll refer to this aspect again *infra*. Mr Vorster requested the occurrence book kept by the witness' police station and for that purpose the case had to be adjourned.

Copies of the occurrence book were eventually handed in as an exhibit which supported the State's case materially. Mr Nkati presented his pocket book as evidential material during his testimony. His observations recorded at the time in his pocket book confirm the version of the two police officers and the contents of the occurrence book materially. If Mr Vorster's submissions are to be heeded to, we should find on appeal that the entries in the pocket book had been fabricated by Mr Nkati. This was never put to him. The same applies to the entries in the occurrence book. I am of the view that the court *a quo* correctly found that these two witnesses gave credible testimony.

[20] The lack of fingerprints does not take the case any further and surely does not point to appellants' innocence in *casu*. According to the evidence of the police officers an attempt was made to lift fingerprints from the bus prior to the arrest of the appellants. No direct evidence was tendered in this regard, but it was not necessary. Experience has taught us that in many criminal matters accused persons cannot be positively linked to crime scenes by means of their fingerprints for a variety of reasons, such as the wearing of gloves, factors such as time delay, rain, dust, the deliberate removal of fingerprints by criminals and even the inexperience of police officers tasked to lift fingerprints.

[21] There cannot be any doubt about identification of the appellants by any of the above three State witnesses. The warnings referred to in the case law quoted do not come into play. Mr Vorster has conceded this. The issue is thus one of credibility and not the fallibility of the witnesses' identification. Therefore Mr Vorster had to rely on an argument that his clients had been framed. They had been handpicked and had been accused of being found in the bus, whilst they were arrested in another country, Lesotho, and on separate occasions by different police officers. In the process the police officers devised a scheme in terms whereof a female pensioner was selected to assist them in their devious attempts. The two police officers are not from the same police station where the theft of the bus had been reported stolen. No reasonable court could have accepted these submissions to be feasible.

- [22] It is necessary to consider the evidence tendered by 1st and 2nd appellants and their witness, Adv Nglama, a legal practitioner practising in Lesotho. 3rd appellant did not testify. They effectively relied on alibi's. The three appellants left Maseru, the capital of Lesotho during the early hours of 23 November 2011. They travelled in an Isuzu LDV belonging to a relative of 3rd appellant. The purpose of the trip was to deliver certain items to 1st appellant's brother who was attending an initiation camp in the mountains. They travelled to Deli Deli which town is about 4 to 5 hours' drive from Maseru. They intended to return to Maseru before dawn as 2nd appellant had to attend a traditional feast. This was objectively speaking impossible. At Deli Deli 2nd and 3rd appellants were left behind at a shop whilst 1st appellant went further into the mountains, the reason being that these two appellants would not be allowed to accompany 1st appellant to the initiation camp. 1st appellant was arrested in Lesotho by an unknown South African police officer whilst he was busy pouring water obtained from a river in the radiator of the Isuzu LDV in which he was travelling. The vehicle allegedly overheated. 2nd and 3rd appellants were arrested by Lesotho police at the shop where they had been waiting on 1st appellant and thereafter detained in the police cells of the Deli Deli police station. They relied on detention forms handed in by their Lesotho counsel and defence witness, indicating that they had been incarcerated from the early hours of 23 November 2011 to the next day at the aforesaid police station. If this is to be accepted as reasonably possibly true, the appeal should succeed as the State then failed to disprove the alibi's. The versions of the appellants are clearly untenable and improbable. However the defence case cannot be regarded in isolation and has to be considered with the State's evidence and the evidence of two witnesses called by the court a quo.
- [23] Proof of the alibi of 2nd and 3rd appellants, the detention forms, was not only produced late, but has been proven to be false. It is true that reliance was placed on alibi's during the plea explanation, but it was done in vague language without referring to the police station where the two appellants were kept and the identity of the arresting officer was not disclosed. There was also no reference to the existence of detention forms. The Lesotho counsel's evidence is not only suspect, but contradictory and vague in the extreme. He alleged that he became involved with the affairs of 2nd and 3rd appellants when they were incarcerated in Deli Deli. His first letter to the Lesotho authorities regarding the alleged illegal handling of the matter by the Lesotho police was written on 30 June 2012, seven months after the arrests. He allegedly obtained the detention forms just prior to his testimony on behalf of his clients. The State's case was closed during June 2012 and these forms were therefore not presented to any of the State witnesses in order to respond thereto. As mentioned the evidence of adv Nglama was not only vague, but he also contradicted himself on major issues, such as who presented the detention forms to him and with which officer at Deli Deli police station he consulted relating to the alleged events. Eventually his evidence was contradicted and shown to be false by the court a quo's witness, the station commander at Deli Deli, Sergeant Motjabe.

- [24] Sergeant Motjabe was a good witness. He made it clear that no policeman with the name of Seeiso, who ex facie the detention forms arrested the two appellants, was attached to his station at any time when he was in charge. He never signed the detention forms as station commander and denied that his signature was affixed to the documents. He also stated categorically that adv Nglama visited his station during 2012, looking for proof that he had arrested his clients, but that he informed him that it was not the case. He also did not hand any documents to the advocate. He denied that he arrested people and handed them over to the SAPS as alleged by the defence. His colleague, Rakabaela, who was at one stage also accused of arresting the two appellants, was not even on duty during the relevant period and this appears from his station's records handed in as an exhibit.
- [25] Another aspect relied upon by Mr Vorster is the information contained in the docket indicating that the arrests of the appellants were effected on 24 November 2011 and not on the 23rd as stated by the State witnesses. The investigation officer confirmed this inscription during his testimony when he was called as witness by the court. Again, his evidence must be read in context and it is not useful to look at one single inscription in isolation. Pumalanga police station where Messrs Tendula and Nkati are stationed is a satellite station. It does not even have holding cells to keep arrested people. It does not have all the stationery normally kept at proper police stations. The version of the State is that all three appellants were arrested inside the bus during the night of 22/23 November 2011 and that they were kept at the Pumalanga police station, the reason being that the Boithuso police in Botshabelo, in which area the theft of the bus had been reported, would have come to collect the suspects. This happened only on the 24th. The Pumalanga police officers were never in possession of the docket, it being a Boithuso docket. The investigation officer clearly had no idea when the arrests had been effected. He had to consult the docket. The appellants were not handed over to him ex facie the aforesaid pocket and occurrence books, but to a Warrant Officer Phuroe. The pocket and occurrence books show that the handing over took place at 03h50. According to the docket the arrests took place on the 24th at 04h00, which is clearly a mistake, and the suspects were fetched by the Boithuso police and detained at 08h06 that morning. This appears to be improbable bearing in mind the time of the day, the reaction time of the police and the distance between Sterkspruit and Botshabelo. The investigating officer's evidence does not disprove the direct and credible evidence of Messrs Tenduka and Nkati and the information contained in Nkati's pocket book and the occurrence book.
- [26] The court a quo dealt with appellants' alibi evidence. It was critical of the advocate's evidence and rightly so. It did not in so many words reject the alibi defence, but when considering the totality of the evidence as it should do, it concluded that the defence case was improbable and had to be rejected as false. Consequently the court a quo was satisfied that the State had proven its case beyond reasonable doubt. The criticism of appellants' evidence and that of their witness is well founded and even considered on its own, could be rejected as false and inherently improbable. When it is considered with the totality of the evidence the court a quo's rejection of their version and their ultimate conviction is supported. I am unable to find that the court a quo misdirected itself in the analysis of the

evidence. The only reasonable inference to be drawn from the proved facts is that the appellants stole the bus.

- [27] Consequently the court a quo did not err in its finding that the State had proven its case beyond reasonable doubt and therefore appellants' convictions are in order.
- [28] A study of the record revealed disturbing features relating to the cross-examination of the defence attorney that should be addressed. I do not intend to refer to all incidents, but limit myself to some only. The bounds of cross-examination were exceeded several times and the record speaks for itself. The first State witness was not prepared to commit himself to provide distances and exact times. It must be borne in mind that observation was conducted during the night and over a long period of time. Arrests were made during the early hours of the morning only. The witness was for no reason at all accused of lying. Worst of all, it was suggested that his one eye started to "flicker" every time he was telling a lie. The irony of this statement by the defence attorney is that he noticed the "flickering" at one stage when he was busy asking a question to the witness. This makes a mockery of his statement. This witness was also

incorrectly accused of giving a version in conflict with the police statement of his colleague, Mr Nkati. When extracts of the occurrence book was handed in, the defence attorney unfairly put it to the State witness that "this is perfectly in line with my instructions as put to you last week", while the reality is that the attorney put it to the witness the previous week that his clients were never taken to Sterkspruit and thus the Pumulanga police station after they had been fetched in Lesotho.

- [29] The cross-examination of Ms Mona went on in a similar vein. At a stage he shouted at her and had to be reprimanded by the presiding officer. At that stage the same question had been put to the witness four times. The attorney was not satisfied with the response on the very first question which I personally believe set out what the witness wanted to convey. This specific portion of her evidence does not appear from her police statement that was taken down that morning before the court proceedings resumed. If the cross-examiner did not understand the response as I understood it, he could and should have clarified the issue in a decent manner. The witness, who was afraid to become a State witness for the reasons advanced by her, got such a scare that she immediately hereafter sought permission to sit down. Later on the witness confirmed that she went to sleep at her house on the 22nd of November. The next question, a rather unnecessary one, whether she woke up at her house the next morning, was not immediately responded to and upon being asked why she was not responding, she came up with the logic reply: "... I am sleeping at my house, where will I sleep?" Immediately thereafter, when asked where the bus was the next morning, she tried to get assistance from the prosecutor "because I do not understand this gentleman who is asking me." She eventually answered the question, but it is apparent that she felt harassed by the cross-examination. Cross-examiners are entitled to vigorously fulfil their tasks in order to carry out their mandates to the best of their ability and in the interests of their clients,

but in doing so, they are expected to show courtesy towards the witnesses and act in a fair manner. This did not happen in casu.

ORDER

[30] Therefore the following order is made:

- (1) Appellants' appeal is dismissed.
- (2) The convictions and sentences are confirmed.

J.P. DAFFUE, J

I concur

L.B. MOENG, AJ

On behalf of appellant: Mr. J Vorster

Instructed by:

Vorster and partners

BLOEMFONTEIN

On behalf of respondent: Adv. M Strauss

Office of the Director of Public Prosecutions

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