

SOUTH AFRICA / JUDGMENT

Oliphant and Another v S (C.A. & R: 26/2015) [2015] ZAECHGC 48 (7 May 2015)

[2015] ZAECHGC 48

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, V Reddy

CASE / FILE NUMBER

C.A. & R: 26/2015

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
GRAHAMSTOWN
C.A. & R: 26/2015
DATE: 07 MAY 2015

In the matter between:

SINDILE

OLIPHANT.....First

Appellant

BONGINKOSI

MAHLAKAHLAKA.....Second

Appellant

And

THE

STATE.....Respo

ndent

Date Heard: 29 April 2015

Date Delivered: 7 May 2015

JUDGMENT**EKSTEEN J:**

- [1] The appellants were convicted in the Regional Court of Humansdorp of housebreaking with the intent to rob and robbery with aggravating circumstances. They were each sentenced to 15 years imprisonment. The appellants appeal with the leave of the court a quo against their conviction and sentence.
- [2] Both the appellants pleaded not guilty and denied any knowledge of the offence. The undisputed evidence reveals that one Rululu was employed as a gardener for one Lethbridge at this home in St Francis Bay. On the morning of 19 September 2013 whilst mowing the lawn at his place of employment he was approached by two assailants, one carrying a knife. A struggle ensued over possession of the knife, Rululu was overpowered and his assailants threatened to shoot him if he resisted. They then removed the laces from his shoes and tied his hands and feet. They placed him in the pump room where the swimming pool filter system was housed. They left him there as they proceeded with their crime.
- [3] After a while the men returned. They untied Rululu's hands and then retied them, this time behind his back and tied a cloth over his eyes before again leaving him. He struggled to free himself and after a while managed to untie his hands. He then freed himself and ran to the police station to report the matter. Later in the day a bag containing certain power tools and other small items was retrieved from a refuse bin in a public garden which borders onto the property of Lethbridge. These items he identified as being the property of Lethbridge and Rululu states that they had been in the storeroom on the property. The storeroom had been unlocked when Rululu was attacked but the door had been pushed closed. It was accordingly necessary to open the door in order to obtain access to the storeroom and to remove these items.
- [4] The sole issue in dispute in this matter relates to the identity of the assailants.
- [5] In his evidence in chief Rululu states that when he reported the matter to the police he made a statement in which he gave a detailed description of his assailants. He stated that they were short men with blue overalls and fishing jackets. One, he said, had a beard and the other a distinctive scar under his right eye. It is not in dispute that the physical description matches the appearance of the appellants. The first appellant was arrested on the same day at approximately 13h10, whilst travelling in a red taxi from St Francis Bay to Humansdorp, apparently after receipt of information from an anonymous police informer. The second appellant was arrested at his home two days later. An identification parade was held shortly thereafter and Rululu pointed out both of the appellants as his assailants.

- [6] The investigating officer, Warrant Officer Nodiyizana testified that the arrests followed upon information which he received from his informer, which, in turn, was based on the description which Rululu had given of his assailants. There is no other evidence or information which links the appellants to the crime other than the identification by Rululu. On this aspect Rululu is a single witness.
- [7] As I have set out earlier Rululu states that he gave a description of the clothing worn by the robbers. No such clothing was subsequently found in possession of either of them. During cross-examination of Rululu his statement to the police, to which I have referred earlier, was put to him. It contains no physical description of the assailants at all. Moreover it reflects that it was only taken late in the afternoon, after the arrest of the first appellant. In the circumstances Rululu was constrained to concede that the description of his assailants which was at the disposal of the police at the time of the arrest of the first appellant was limited to the report which he had made in respect of the clothing worn at the time of the robbery. Nodiyizana, however, insists that Rululu had provided him with a detailed physical description of the suspects which description led directly

to the receipt of information which led to the arrest of the first appellant. This is irreconcilable with Rululu's evidence that the first time that he saw Nodiyizana was late in the afternoon, at approximately 16h40, which was after the arrest of the first appellant. During cross-examination of Nodiyizana, when these discrepancies were put to him, he insists that Rululu's is incorrect. These contradictions coupled with the absence of any physical description of the assailants in Rululu's statement

raise serious questions regarding the reliability of the evidence set out above.

- [8] This evidence must further be considered in the light of the events which occurred at the arrest of the first appellant. Nodiyizana testified to the arrest which he effected. It is not in dispute that the first appellant was a passenger in a red car which was stopped by Nodiyizana on its way to Humansdorp. In cross-examination it was suggested to Nodiyizana that initially his focus was on the driver of the vehicle and that he confronted the driver of the vehicle about drugs which Nodiyizana had allegedly found in the vehicle some two weeks earlier. Nodiyizana's first response was that he could not recall that. He then immediately changed his evidence to deny that this occurred at all. It was thereafter put to Nodiyizana that the first appellant was simply arrested because he was also in the car with the driver and there was no suggestion at the time of any robbery. This too Nodiyizana denied. Nodiyizana was, however, constrained to admit that he did arrest both the driver and the first appellant. His explanation for the arrest of the driver is unconvincing. At first he states that the driver of the vehicle was arrested as some of the goods stolen in the robbery were in his car. This, of course, is not so. He then suggested that he arrested the driver as he wanted to search the vehicle in order to ascertain whether any of the stolen goods might be in the vehicle. When challenged in this regard he denied that he actually arrested the driver and states that he just took him in ("hom ook gevat").

- [9] I think on a consideration of all the evidence it has not been shown that Rululu had provided any physical description of the suspects prior to the arrest and at no stage did he record any such description in any written statement. As best can be gleaned from the evidence there is nothing in the docket to support the contention that Rululu gave a physical description at any time prior to the identification parade. As earlier recorded neither of the appellants were found to have been in possession of the clothing which matched the description given by Rululu. In the circumstances I think that there is merit in the argument advanced by Mr Renaud, on behalf of the appellants, that the arrests did not flow from any description given by Rululu, but rather from the non-descript information, untested, which was provided by an anonymous police informer. The reliability of this information cannot be determined on the evidence. Suffice it to say that on a proper consideration of the evidence it has not been established that Rululu ever gave any physical description of his assailants.
- [10] The matter of the identification parade therefore assumes considerable significance in this matter. The procedure for the conduct of an identification parade is largely a matter of police practice, however, Judges have laid down rules which should be observed if the accused is not to be prejudiced and the parade is to have maximum probative value. (Compare *The South African Law of Evidence*: DT Zeffertt and AP Paizes (2nd ed) p. 157.) It emerges from the evidence that a number of irregularities occurred in the performance of the identification parade. Non-compliance with the rules of procedure are not, however, necessarily fatal and each case must depend upon its own facts.
- [11] Mr Renaud argues that the identification parade held in the present case was lacking in four material respects:
- (i) the adequacy of the appellant's legal representation;
 - (ii) the lack of an interpreter;
 - (ii) the duties performed by different officials; and
 - (iv) the composition of the parade.
- [12] It is common cause that an attorney, one Humphries, was present at the identification parade. Whilst it is not in dispute that he was there to represent the interests of the first appellant there is some controversy as to whether he was in fact instructed to represent the interests of the second appellant. I do not think that much turns on this controversy for if Humphries was satisfied with the conduct of the identification parade on behalf of the first appellant it seems to me overwhelmingly probable that he would have also been satisfied with the conduct of the parade on behalf of the second appellant, had he been instructed by the second appellant. By virtue of the conclusion to which I have come below, however, it is not necessary in this matter to make any further finding in this regard.
- [13] Captain Feni, who conducted the identification parade, acknowledges that no official interpreter was present at the identification parade. All the participants on parade, he says, were Xhosa speaking as was Rululu. He himself is also Xhosa speaking. Where it was

necessary for translation, for the benefit of Humphries, Feni states that he acted as interpreter. This is not a satisfactory state of affairs. Were Humphries to require consultation with his client it would require Captain Feni to be privy to his consultation with his client. I mention this circumstance because it is one which should not arise at an identification parade. It is one which poses a handicap to an accused person in communicating confidentially with his legal representative.

- [14] The evidence shows that the appellants did indeed object to the composition of the parade. The record of the parade records that the second appellant objected that the other participants on the parade did not look like him and did not have similar scars under their eyes. Captain Feni testified that the persons on parade were taken randomly from those who happen to be in the police custody at the time and were accordingly not specifically selected for their likeness to or dissimilarity from the appellants. This, Mr Renaud argues, constitutes an irregularity. The argument has its origin in Rules 5 and 8 relating to identification parades which provide that, in principle, a parade should consist of at least ten persons and that they should be of more or less the same height, build, age and appearance as the suspect and should be similarly dressed. In *S v Mohlathe* 2000 (2) SACR 530 (SCA) at 541a-d Scott JA stated:

“Common sense dictates that the non-suspects participating in an identification parade should be similar to the suspect in general appearance. Indeed, as appears from the identification parade form which was used on this occasion, it is a matter of police practice that the non-suspects be 'of about the same height, build, age and appearance' as the suspect and that they be similarly dressed. Where the parade includes several suspects whose general appearance is markedly different, whether on account of height, build, age or otherwise, care should be taken to ensure that there are sufficient non-suspects whose general appearance approximates that of each of the suspects. ... If the number of non-suspects whose general appearance approximates that of each suspect is too few, or if there are other features of the parade which may materially influence an identifying witness, the probative value of the identification will be greatly reduced. The danger in such a case is, of course, that, because the identification is made

at a parade, it carries with it an assurance of reliability which is unjustified.”

- [15] What is required, in principle is that the persons should be “more or less” the same height, build, age and appearance as the suspect”. It is not required that ten persons should be found with scars under their right eyes nor is it required that all persons on the parade should be identically dressed, as if in uniform. A common sense approach is required. In the identification parade in issue twelve men, all black, were lined up on the parade. The photographs of the parade reveal that they varied marginally in height, however, there were a sufficient number of persons on parade of similar height to each of the appellants. All were casually dressed and none were dressed in a manner which would make it glaringly obvious that he was different from the others. One was 19 years of age, eight in their 20's and three in their early to mid-forties. This, to my mind, reflects that they were more or less of the same height, build, age and appearance. On a consideration of the evidence placed before us I do

not think that the criticism of the composition of the identification parade in the present matter is well-founded and Mr Renaud, understandably, did not pursue this argument with any vigour.

- [16] There is, however, one feature of the identification parade which casts serious doubt on the reliability of the identification made. The identification parade form used in this case was completed by Captain Feni, who was in charge of the identification parade. It reflects that the identifying witness, Rululu, was brought to the identification parade for purposes of his identification by Warrant Officer Masoka. Feni testified in support thereof and confirmed that Warrant Officer Masoka brought Rululu to the identification parade in order to make his identification. Masoka testified that he knew both the appellants prior to the day upon which the identification parade was held as he had worked at the court in Humansdorp for a considerable period and had seen both of them previously. He states that his function was to look after the prisoners on the identification parade and he was present in the parade area where the suspects and non-suspects were lined up. He is in fact depicted on a photograph standing along with the suspects and the non-suspects in the parade area. Masoka accordingly knew precisely how the parade had been formed, knew which were the suspects and in which positions they stood and knew how they were dressed. Masoka therefore had the facility to convey this information to Rululu. When asked whether he had fetched Rululu to bring him to the identification parade Masoka was, at best, evasive and ultimately testified that he has no recall as to whether he had fetched Rululu or not.
- [17] The fact that the services of Masoka were utilised to fetch the witness seems to me to constitute a significant irregularity. In *R v Nara Sammy* 1956 (4) SA 629 (T) Dowling J commented at 631D-F:
- “A further irregularity was that the constable, who was employed to fetch the witnesses one by one in order to give them an opportunity of identification, was admitted into the room when the parade was formed and when the parade was re-formed for purposes of the next witness, and he was therefore in a position to convey information which would make it possible for the identifying witness, if not too sure on his own recollection, to point out the accused. It is not suggested that the constable, who performed this function, was in any way dishonest. I mention that circumstance because it is one which should not arise at an identification parade; it is one which introduces opportunities of abuse, and identification parades should be made as free from such opportunities as is reasonably practicable.”*
- [18] In the present instance, as set out earlier, Masoka was actively involved in the formation of the parade and his evasiveness when questioned about the performance of his function in escorting witnesses to the parade must necessarily raise further doubt as to his impartiality in the performance of his function.
- [19] In these circumstances I am of the opinion that the parade was held in such a way as to be calculated to prejudice the accused. In *R v Masemang* 1950 (2) SA 488 (A) at 493-494 held:

“... where such identification rests upon the testimony of a single witness and the accused was identified at a parade which was admittedly conducted in a manner which did not guarantee the standard of fairness observed in the recognised procedure, but was calculated to prejudice the accused, such evidence standing alone can have little weight.”

[20] I consider these comments to be particularly apposite to the present matter. Whereas the State’s case rests on the identification made by Rululu on this identification parade I think that the magistrate erred in finding that such evidence was sufficiently reliable to establish the identification of the appellants beyond reasonable doubt. In fact, to my mind, this identification can have very little weight by virtue of the irregularity to which I have referred earlier.

[21] In these circumstances I think that the appeal must succeed.

[22] In the result, the appeal in respect of the first and second appellants succeeds and the convictions and sentences are set aside.

J W EKSTEEN

JUDGE OF THE HIGH COURT

REDDY AJ:

I agree.

V REDDY

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellants: Adv Renaud

Instructed by the Grahamstown Justice Centre, Grahamstown

For Respondent: Adv Els

Instructed by the Director of Public Prosecutions, Grahamstown

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