



CASE NO.: CA 13/2009

**IN THE HIGH COURT OF NAMIBIA
HELD IN OSHAKATI**

In the matter between:

KAMATI TIMOTHEUS

APPELLANT

and

THE STATE

RESPONDENT

CORAM: LIEBENBERG, A.J. *et* SHIVUTE, A.J.

Heard on: 15.10.2009

Delivered on: 02.11.2009

APPEAL JUDGMENT

LIEBENBERG, A.J.: [1] The appellant was charged and convicted in the Regional Court sitting at Ondangwa of the following offences: Count 1. Robbery (with aggravating circumstances); Count 2. Possession of a machine gun, in contravention of s. 29 (1)(a) of the Arms and Ammunition Act, 1996 (Act No. 7 of 1996) ('the Act'); Count 3. Possession of ammunition in contravention of s. 33 of the Act. Appellant was sentenced as follows: Count 1. Ten (10) years imprisonment;

Count 2. Ten (10) years imprisonment; Count 3. One (1) year imprisonment. The court ordered 5 years imprisonment imposed on count 2 to be served concurrently with the sentence on count 1, while the sentence on count 3 was ordered to run concurrently with the sentence on count 2.

[2] Appellant conducted his own defence and pleaded not guilty on all charges. His defence on count 1 was an alibi and on the remaining counts, he denied having been in possession of either the machine gun or the ammunition.

[3] This appeal lies against the convictions and sentences imposed in respect of all three charges. For reasons set out *infra* there is no appeal against sentence before us.

[4] Ms. Ndalulilwa appeared *amicus curiae* for the appellant and we wish to extend our gratitude to her for the assistance she had given the Court in this regard. Mr. Wamambo appeared for the respondent.

[5] Appellant has over a period of one year filed four notices of appeal of which only the first two were filed within the period of 14 days after sentence, as required by the Magistrate's Court Rules (rule 67). In view of no application being made for the condonation of the late filing of the two latter notices, any new grounds arising there from are accordingly disregarded and not considered for purposes of this appeal.

[6] There is only one ground of appeal against conviction and that is that the court *a quo* erred by relying on the evidence of the State witnesses in order to establish the identity of the perpetrators and its subsequent finding that appellant was one such perpetrator. More specifically, it was argued that there was contradicting evidence regarding the clothes allegedly worn by one of the robbers during, and shortly after the robbery had taken place which connects the appellant with the robbery; the obvious mistaken identity of a co-accused by a State witness and her dock identification of the appellant as one of the persons she had seen that day; and, that the black jacket (Exh. 1) found in possession of the appellant does not fit the

description the complainant had given to the police as to the jacket worn by one of the robbers.

[7] It is not disputed that a robbery took place at around 07h30 on the 16th September 2002 at a shop called Struggle Market, at Onegwa village in the district of Ondangwa during which a worker, Maria Dingana, was forced into submission by gun point and robbed of cigarettes; shoe polish; body spray; roll-on deodorant; and N\$776-90 in cash. It is further common cause that appellant and Thomas Petrus, a co-accused who had absconded before going on trial, were arrested at Aron's cuca shop and that Thomas, upon his arrest, led the police to the place where an AK-47 assault rifle and packets of cigarettes were found.

[8] The facts are the following: Maria Dingana ('the complainant') said that whilst in the shop she was first approached by a person wearing a red T-shirt, who was then joined by a second person, wearing a black jacket ("like plastic"). Money was demanded from her and when she refused, the one took out a fire arm from under his jacket whereafter the complainant handed over the money. Her arms were tied and before a bag was pulled over her head, she saw them taking about 9 packets of cigarettes, roll-on "and other stuff". She was unable to see what else had been taken and estimated the cash stolen to have been between N\$300-00 and N\$400-00. Because they were wearing caps which covered their faces, complainant was unable to identify her assailants.

[9] When Salomon Namwene arrived at the complainant's shop that morning he noticed two persons running away, the one wearing a red shirt and the other a black jacket. He was unable to identify any of these persons. He found the complainant inside with her arms tied behind her back and after he mobilized members of the community, they started following the shoe prints of the two persons whom he had seen fleeing the scene up to Onanteni village where they turned back. They met with the police whereafter they returned to Onanteni village and continued following the prints up to a tarred road where the prints disappeared. They made enquiries at a

nearby cuca shop regarding persons who might have passed there fitting the description of the suspects and were then referred to Marofu's cuca shop. Upon their arrival he saw one person running into the cuca shop whilst another remained outside. They were questioned on the whereabouts of the firearm which was then found buried together with packets of cigarettes and shoe polish. Appellant did not challenge the evidence of this witness.

[10] Frieda Namjebo's evidence is that she was at home on the morning of the 16th September 2002 when appellant and accused no. 2 asked her for water and matches to light a cigarette. Accused no. 2 also asked directions to the house of a certain Aron Elias. She described the appellant as wearing a black jacket over a red T-shirt but she was unable to describe the clothes of accused no. 2. They proceeded and in the afternoon whilst at work, the police made enquiries with her about two persons, whereafter she directed them to Aron's house. On their way back the police stopped at her place to inform her that they had found the persons they were looking for and she also saw them sitting in the vehicle. In cross-examination it became clear that Namjebo could not positively identify the appellant. Although she said he was the one who was wearing the black jacket over a red T-shirt, she conceded that she was only able to recognise the appellant because he was in the dock and that she would not have been able to do so, had she seen him on the street. Contrary to what she had said earlier, Namjebo said she recognised the appellant on his face and voice and was adamant that it was him who had passed at her house on that day. She also noticed that his hair was plaited.

[11] I pause here to consider the reliability of the witness Namjebo's evidence regarding the identity of the appellant, as him being one of those persons who approached her at home that morning. What is clear is that she only identified the appellant because he was in the dock and, on her own evidence, would not have been able to do so under different circumstances. This, despite her claims that she recognised him on his face and voice. She is further mistaken regarding the identity of the other person whom she claimed to have been accused no. 2, as it is clear from

his evidence, as well as that of other State witnesses, that accused no.2 was not arrested with the appellant, but only some time later. The person who was arrested with the appellant is Thomas Petrus, and not accused no.2. As for the appellant wearing plaited hair at the time, that evidence was also contradicted by other witnesses, including the appellant who said that Thomas was having plaited hair on that day.

[12] I do not believe that Namjebo deliberately lied to the court, but – possibly due to passage of time - she was simply unable to independently identify the appellant on her own recollection and therefore, relied on the fact that he and accused no. 2 were in the dock. By seeing the appellant in court she probably felt reassured in her identification of him, even though she admitted, this may not have been the position under different circumstances. The question is, what evidential value should be placed on Namjebo's evidence regarding her identification of the appellant on that day? When regard is had to the contradictions between the evidence of Namjebo and the other witnesses (including the appellant) on the appearances of the two persons who approached her; and the identification she had made on them, I do not find such evidence to be reliable and will only rely thereon as far as it is corroborated by other evidence. The extent to which the witness' evidence may be relied upon is that she was approached by two men who had asked her for water and matches; the direction to Aron's house and that one of them was wearing a black jacket.

[13] The witnesses Annalisa Shileka and Werner Shihepo corroborated each other in material respects and their evidence amount to the following: They were at Aron Elias's house when appellant, who is related and known to them by the name 'Timo', and another person turned up. They had lunch together whereafter they asked for water so that they could wash their clothes. Both wore T-shirts (black and red) while appellant was also carrying a black leather jacket. Annalisa said she left them at home in the company of Werner when she left for work at the cuca shop and they later followed. She saw the police arrive in two cars where upon the person who had come there with the appellant went inside the cuca shop while appellant remained

seated outside. Both were apprehended and questioned separately by the police during which appellant was beaten by the police officers. She said that after the police had left with the suspects they later returned and showed them a firearm which they claimed to have been recovered.

[14] Werner confirmed that a person called Timo and another man came to their house, but he was not prepared to say that Timo was in fact the appellant. He gave them washing powder to wash their clothes and a shoe brush so that Timo could polish his shoes. According to him they came there with shoe polish, spray (deodorant) and roll-on which were taken from the black jacket appellant arrived with. Werner was present when the police arrived and also witnessed the one who came there with Timo, run inside the cuca shop. After they were questioned they departed in order to collect the firearm and with their return Werner fetched Timo's jacket, with the other items, from the house. The jacket, he said, was similar to the one before court (Exh. 1). When asked in cross-examination by appellant whether he recognised the appellant as the person who had been at their house, Werner replied that he was not certain as he had only seen this person once and did not know whether appellant went by the name of Timo.

[15] Constable Theofilus came to know the appellant since his arrest in connection with this case and was part of those police officers who followed the prints from the scene as testified by the other witnesses until they reached Aron's cuca shop. There he saw a person wearing a red T-shirt running inside the shop and later found him behind the bar counter. Appellant, he said, dressed in a black jacket, also tried to leave but was apprehended by the other officers. They were searched and found to be in possession of N\$117-00 and N\$60-00 respectively. During interrogation the other person made a report regarding the fire arm and also pointed out where it was hidden under a fence. Appellant was not involved in the pointing out and remained seated in another vehicle as he, according to the witness, did not mention anything about the firearm. He furthermore confirmed that the fire arm was

an AK-47 with 19 rounds of ammunition in the magazine, and that packets of cigarettes were also found buried with the firearm. When asked in cross-examination why he said that appellant and the other person were together, Cst. Teofilus replied that they fitted the description of the people they were following and they were the only ones amongst students present, who tried to leave the place. His observation that the appellant at that stage was wearing a black jacket is inconsistent with the evidence of other witnesses.

[16] Constable Hangula is the investigating officer and after he had interviewed the complainant, he later joined those police officers following the shoe prints of two suspects. His evidence as to how they came to the cuca shop of Aron corroborates that of the other State witnesses. He saw a person wearing a red T-shirt run into the cuca shop, while the appellant also tried to leave but was called back. He confirmed that money was found on the appellant and when he asked him with whom he was, appellant replied that he came there with the person who had run inside. According to the witness appellant told him that he had been with Thomas when they committed the robbery at Onegwa village, whereafter Thomas offered to show them where the firearm was hidden. He confirmed that appellant remained with him in the vehicle when the firearm was retrieved by Thomas. Appellant told him about his jacket that was still at Aron's house and which was then fetched by Werner, along with shoe polish and some deodorant. According to const. Hangula the appellant's statement was reduced to writing in which it was said that the firearm was provided by Jona Alughodi, accused no. 2.

[17] As for the money, appellant claimed that it belonged to him and denied that it derived from the robbery; and furthermore disputed that he was found in possession of the jacket and other items. Appellant denied having confessed to the police his involvement in the commission of the crime and said he was assaulted and threatened with a firearm by the police at the time of his arrest and that the firearm was only discovered after he had been locked up. The alleged assault however was disputed by const. Hangula.

[18] Appellant's version is that he had left his mother's home on the 15th of September 2002 and on the day of the robbery (the 16th), he was in Ondangwa where he attended a boxing training session in the morning and thereafter went to Oshiwambo (alone) to visit his family staying at Aron Elia's house. There he met with the elders and after enjoying a meal with them, he proceeded to the cuca shop. He denied having met with the witness Werner or Annalisa at home and said he only came to see Annalisa at the cuca shop and not at home as they claimed. He said police officers arrived in two vehicles and started assaulting him whilst accusing him of having committed a robbery at Omushanga village. According to him Thomas came there with the police in one of the cars whereafter they left and later returned with a firearm. As he was not present, the circumstances under which the firearm was found are not known to him. Appellant said that subsequent to his arrest and detention he was taken to a mortuary and was again assaulted in an attempt to force him into admitting his involvement in the commission of the robbery, but that he still denied his involvement. He was later given the names of three people and when he admitted that he knew them, he had to take the police to their houses. This led to the arrest of Jona Alugodhi, whose name was one of those mentioned by the police. Appellant said he only came to know Thomas Petrus since their first court appearance and that it was his hair that was plaited.

[19] In his testimony Jona Alugodhi denied that he had given a firearm to the appellant and his involvement in the commission of the robbery.

[20] When summarizing the evidence in his judgment, the magistrate, when dealing with the testimony of Annalisa Kashimba, said that this witness testified that appellant was beaten up by the police (in her presence) and therefore, it was not true when they testified that they did not do so at all. He furthermore acknowledged the fact that the appellant was not involved in the recovery of the firearm as it was willingly pointed out by Thomas Petrus who cooperated with the police.

[21] From the aforementioned it is clear that the court *a quo* found on the evidence of Annalisa Kashimba that appellant was indeed assaulted at the cuca shop during his arrest, which had no impact on the pointing out made by Thomas. The two suspects were kept a distance apart when questioned by the police and were not in each others company; therefore, in the absence of evidence to the contrary, the finding by the court that Thomas made the pointing voluntarily, is substantiated by the facts and is proper. The court in its finding did not rely on any admission the appellant had allegedly made to the police, which obviously, would have been made involuntarily and under duress, rendering it inadmissible (*S v Cele* 1965 (1) SA 82 (A)). On the appellant's own account he did not admit his involvement in the commission of the crime and persisted in saying that he only came to know Thomas since their court appearances and not sooner.

[22] Appellant contended that the trial court erred by relying on the evidence given by Frieda Nandjebo regarding the identity of appellant as one of the two persons to whom she had given water and directions that morning. The court however, was alive to the contradictions in her evidence and found that she mistakenly identified accused no. 2 as one of the persons whom she saw; and that her version in that regard was not supported by the evidence of other witnesses. With regard to the testimony given by the other witnesses the court came to the conclusion that this person was in fact Thomas and not accused no. 2 as she had testified. I am not convinced that the court *a quo* should have rejected the evidence of Frieda in its entirety and misdirected itself in that regard as appellant contended. As stated earlier herein, the discrepancies in her evidence are such that the court could only rely thereon, where corroborated. Her evidence also, should not be viewed in isolation but in context with the rest of the evidence.

[23] Appellant furthermore contended that the trial court misdirected itself by finding that the black jacket the appellant had with him is the same one which complainant said, one of the robbers wore during the robbery, as it was a leather jacket and not made of plastic as complainant described it. The trial court was clearly

not so much concerned whether it was a plastic or leather jacket found in possession of the appellant, but rather by the fact that appellant had been seen with a black jacket by several witnesses earlier that day, despite his denial of having been in possession of a black jacket.

[24] The description given by the complainant and Salomon Namwene of the clothes worn by the two assailants i.e. the one wearing a red T-shirt and the other a black jacket, enabled the police, when they lost track of the shoe prints they were following, to make enquiries in that regard and on the information obtained from Frieda, they went to the cuca shop of Aron Elia where appellant and Thomas were arrested. Although appellant at that stage was not wearing a jacket, Thomas was wearing a red T-shirt and drew the attention of the police when he ran inside the cuca shop; while appellant, at the same time, tried to leave. Both Annalisa and Werner shortly before that saw appellant arriving at Aron's house carrying a black jacket which he left behind when he went to the cuca shop and which Werner later on had to fetch on the request of the police. Because the appellant was not wearing the jacket when apprehended by the police, they could only have known about the jacket which was left behind, if someone informed them about it; and as it was only the appellant and Thomas who accompanied the police, it had to be one of them who made mention of the jacket at Aron's house and which was then fetched by Werner. This supports the evidence of the police that it was the appellant himself who had asked that the jacket be fetched. Against this background the trial court considered the credibility of the witnesses who gave evidence connecting appellant with the jacket; reminding itself of the shortcomings in their evidence and, in my view correctly, found that the black jacket in question, belonged to the appellant.

[25] Because the complainant was unable to identify her assailants, there is no direct evidence implicating appellant as one of the robbers and the State case entirely rests on circumstantial evidence. It has been said that in assessing circumstantial evidence the court should not approach the evidence on a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable

possibility that the explanation given by an accused is true. What is required is to consider the evidence in its totality from which the court would then be able to draw certain inferences if (i) the inferences sought to be drawn are consistent with all the proven facts and, (ii) the proved facts are such 'that they exclude every reasonable inference from them save the one sought to be drawn' (*R v Blom* 1939 AD 188 at 202-3; *S v Reddy* 1996 (2) SACR 1 (A)).

When evaluating circumstantial evidence I find the following remarks of Davis AJA in *R v De Villiers* 1944 AD 493 at 508-9 apposite:

"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."

[26] In the present case the proven facts are the following: An armed robbery was committed at a cuca shop during which money, cigarettes and deodorant were stolen by two unidentified men, one dressed in a red T-shirt and the other in a black jacket, who thereafter fled the scene on foot. Their shoe prints were followed over a distance up to the main road where it disappeared. On information obtained from a nearby cuca shop about two persons who had passed there earlier that day and who fitted the description of the suspects, the police proceeded to the cuca shop of Aron where Thomas tried to hide and appellant tried to leave, but both were apprehended. By then Thomas was wearing a red T-shirt while appellant had left his black jacket at the house of Aron, a family member. Appellant and Thomas arrived together and had in

their possession cigarettes, deodorant and shoe polish. Subsequent to their arrest they were searched and cash was found on each, whereafter Thomas pointed out to the

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police a machine gun, a magazine with ammunition and more cigarettes that were found hidden together. These items were later identified by the complainant as having been stolen from the cuca shop during the robbery earlier that same day. All this happened within the space of one day.

[27] In this case the learned magistrate in his judgment gave comprehensive reasons why he rejected the appellant's version and accepted the State witnesses' account; while at the same time, he was mindful of the discrepancies in their evidence. I accept those reasons to be well founded and irrefragable and therefore cannot find any good ground to reject his finding that appellant and Thomas Petrus committed the robbery on the 16th of September 2002 at Onegwa village. Furthermore, that both actively participated in the robbery and that it was the appellant who produced the firearm from under his jacket during the robbery.

[28] Regarding counts 2 and 3, the evidence concerning the mechanics of the firearm was not challenged and it was proved in the court *a quo* that the said firearm is a machine gun as defined in the Act.

[29] Having carefully considered the totality of the evidence, I have no reason to fault the learned magistrate's factual findings and his findings of credibility and his conclusion that it has been proved beyond reasonable doubt that the appellant is guilty of the crimes preferred against him.

[30] The appeal against sentence is based on one ground only namely, that the sentence induces a sense of shock and is disturbingly inappropriate. It was contended that the trial court overemphasised the seriousness of the offences and failed to give adequate weight to the mitigating factors when considering the triad of factors.

[31] This Court already indicated in par.[5] that appellant has filed several notices of appeal of which some did not comply with the Magistrate's Court Rules and therefore would not be considered for purposes of this appeal. Appellant did not note an appeal

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against sentence in the notices filed in time; nor did he advance any grounds against the sentences imposed. It is only in the notice of appeal dated 1st of July 2006 that appellant included his appeal against sentence. As this notice was filed out of time with no application made condoning its late filing, any new grounds raised therein, were therefore not considered as part of this appeal.

[32] In the result, the following order is made:

The appeal against conviction on counts 1, 2 and 3 is dismissed.

LIEBENBERG, A.J.

I agree.

SHIVUTE, A.J.