REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 156/2007

In the matter between:

ITEMBU TEMUS KANDOWA **APPELLANT**
and
THE STATE **RESPONDENT**

Neutral citation: *Kandowa v State* (CA 156/2007) [2012] NAHCMD 90 (29 November 2012)

Coram: HOFF J and VAN NIEKERK J

Heard: **18 September 2009**
Delivered: **29 November 2012**

Flynote: Evidence – correct approach to assessment of alibi defence – if there are identifying witnesses court should be satisfied witnesses are honest and evidence is reliable – details of alibi to be provided as early as possible - where alibi only revealed during evidence-in-chief by accused – adverse inference to be drawn.

Assessment of evidence on appeal restated – best indication that court applied its mind where conflict of fact is to be found in reasons for judgment – where reasons insufficient or non existing – court of appeal may draw own conclusions having regard to totality of evidence.

Error by witness – does not necessarily impact negatively on credibility of witness – effect of error must be considered with due regard to its importance, nature and bearing error has on other parts of witness' evidence.

Summary: The appellant was charged with one count of housebreaking with intent to steal and theft and one count of housebreaking with intent to rob and robbery.

The identification of the perpetrator was in dispute – The appellant raised an alibi- The appellant was caught red handed inside the respective residences of the complainants – It is common cause that the appellant has a squint eye – The complainant in respect of count 1 subsequently identified the appellant at an identification parade – This evidence was not disputed.

The complainant in respect of count 2 accurately drew a picture of the facial features of the perpetrator on the basis of which the appellant was subsequently arrested by police officers.

The correct approach to the assessment of an alibi is inter alia that there is no burden of proof on the accused person to prove this alibi – Where there are identifying witnesses the court should be satisfied not only that they are honest but also that their identification of the accused is reliable.

The details of an alibi must be provided as early as possible during a trial – Where an alibi is revealed only at the stage when the accused person testifies during evidence-in-chief, there is prejudice to the State and an adverse inference may be drawn by the court.

The assessment of evidence on appeal is restated – The best indication that a court has applied its mind where there is a conflict of facts, is to be found in the reasons for its judgment.

An appeal is a rehearing with certain limitations and where the reasons are insufficient or non existing, a court of appeal may having regard to the totality of the evidence presented in the court a quo, draw its own conclusions – Findings of fact by

the court a quo are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

Not every error made by a witness affects such witness' credibility – An error must be evaluated taking into account the nature of the error and its importance, and the bearing such an error has on other parts of the witness' evidence.

In casu, there was a material contradiction between appellant's evidence and the evidence of the witness called by the appellant, in respect of his alibi defence – This fact taken together with the late disclosure of the alibi defence compels this court to conclude that the alibi raised by the appellant, was a fabrication.

This court is satisfied that the identification of the appellant by the two complainants was honest and reliable and that there was no misdirection by the presiding magistrate in convicting the appellant in respect of both counts.

The convictions and sentences are confirmed.

ORDER

(a) The appeal is dismissed.

(b) The convictions and sentences are confirmed.

JUDGMENT

HOFF J (VAN NIEKERK J concurring):

[1] Appellant was convicted in the Magistrate's Court, Swakopmund, on one count of housebreaking with intent to steal and theft and one count of housebreaking with intent to rob and robbery. On the first count he was sentenced to 2 years imprisonment and on the second count to 3 years imprisonment.

[2] Although appellant's notice of appeal is headed 'Application for leave to appeal against conviction and sentencing', he raises no grounds of appeal against sentence, but directs all the grounds of appeal to the convictions. Both in the court a quo and on appeal the gist of appellant's defence against the State's case is that he was mistakenly identified by both complainants as being the perpetrator of the crimes.

[3] The facts may be summarised as follows: On 6 June 2005, the 71 year old complainant in count 1, Ms Mouton, removed her vehicle from the garage at her home to go to town. A person whom she later identified to be appellant stood at the gate and asked for work. She told him that she had no work. She returned to the front of her home and activated the alarm. All the doors were locked and the windows closed. She did not notice what happened to the accused. She left for town, where she remained for 1½ 2 hours.

[4] When she returned, she put her vehicle in the garage and locked the latter. She de-activated the alarm, unlocked the front door, entered the home and locked the front door. She then heard the sound of the back door and looked into that direction where she saw the man who earlier had asked her for work. He was inside her house, standing about a meter away from her. She asked him what he wanted, but appellant did not answer. He moved closer to her and she realised that he wanted her handbag that was hanging over her shoulder. She held it close to her body. As appellant went for her bag, he hit her in her face with the palm of his hand. Her nose started bleeding. The appellant hit her a second time. This was a very hard blow. He then pushed her in her face and pushed her into the bathroom. He locked the door from the outside. She started calling for help from the bathroom window. After about an hour she attracted the attention of her neighbor who entered the house at the back door and freed her.

[5] Ms Mouton inspected the house and found everything to be in order. Her handbag was lying on the table. Its contents had been thrown out. She missed two purses, one of which contained about N$190 in cash. She also missed a windbreaker jacket. She noticed that the lock of the back door had been forced open and broken. About a week later the complainant pointed the appellant out at an identification parade as the perpetrator. She sustained injuries as a result of the

attack. Her face was swollen and bruised. A finger on her left hand was broken when appellant hit her hand to get hold of her bag.

[6] After this complainant's evidence was dealt with, the prosecutor applied for an amendment of the charge on count 2 from housebreaking with intent to steal and theft, to housebreaking with intent to rob and robbery. The appellant had no objection and pleaded not guilty to the amended charge. Ms Wesche, the complainant in count 2 is a 65 year old woman. On 13 June 2005 at 09h00 she heard a noise at the main door of the house. When she opened the door, she noticed that the gauze of the screen door on the outside had been cut open. She saw appellant standing outside the door. He put his hand through the gauze, opened the door and entered the house. He grabbed the complainant at the throat and forcefully pushed her down the passage to the bedroom and into the bathroom. Complainant recalled a story related to her the previous day about a person who had been locked up in a bathroom and that no-one heard this person calling for help. She therefore put up a fight by kicking her assailant and biting him on his hand. He let go of her and she managed to move out of the bathroom to the side of the bedroom where he locked her up. She was worried that her jewellery would be stolen, so she rather directed the attacker's attention to her handbag, which was in the passage.

[7] Ms Wesche opened the burglar bars from inside the bedroom, left via the window to the outside and obtained help. When she returned to the house, the robber was gone. Her handbag was laying in the passage with its contents thrown out. She missed her cheque book and a purse with N$370 in cash.

[8] The police were called and arrived shortly thereafter. They took a statement and obtained a description and drawing of the robber from her (Exhibit B). The drawing of the suspect was made by the complainant in their presence. The next day the police arrested a person fitting the description and brought him to complainant, who identified him as the attacker. It was the appellant.

[9] Two police officers testified and confirmed that, armed with the drawing and description given by Ms Wesche, they were on the lookout for the assailant in Kramersdorf. On 14 June they saw appellant coming from a certain erf and entering another. They approached him when he came out. He explained that he was looking

for work. He wore a cap and dark glasses. When these were removed, they saw he fitted the description given by Ms Wesche and that his facial features corresponded with that on the drawing. They arrested appellant and took him to the complainant, who identified him immediately. When appellant denied being the robber, the complainant drew the police's attention to the fact that she had bitten his hand. Upon inspection, a fresh wound was found on his left hand under his 'big finger'.

[10] The appellant's defence is in the nature of an alibi. He testified that when the incidents happened, he was in the northern part of Namibia. He left from Swakopmund in April 2005. On 13 June 2005 he returned from there to Swakopmund in the company of his brother Theofelus. They arrived at the home during the afternoon between 12h00 and 13h00. Appellant went to sleep. The next day he went to his previous employer, who was not at home. He went to another house to look for work, but there was none. He did not walk far before he was stopped by the police and arrested because he allegedly fitted the description of the robber. The police went to his house in Mondesa but found no stolen goods.

[11] Appellant called his brother Theofelus Mwuva, who stated that appellant came to the North in April 2005 and that they travalled to Swakopmund on 13 June 2005. They arrived at 08h00 on 14 June 2005 just after sunrise. Appellant left and never returned. He later heard that appellant was in custody and saw him in the police cells when they were both in custody. Under cross-examination he denied meeting appellant or speaking to him, but confirmed that appellant and he could communicate to each other by talking loudly, as their cells were adjacent. Significantly he testified that appellant spoke very loud and that 'he spoke of our journey and how I travelled with'. This is a clear indication that the appellant and his witness had the opportunity and did in fact discuss his alibi. The appellant's witness contradicted his evidence regarding the time and date when they allegedly arrived from the North in Swakopmund.

[12] In *S v Malefo* 1998 (1) SACR 127 (W) at 157i – 158a-d the court summarised the correct approach to the assessment of an alibi defence with reference to relevant authority as follows:

> there is no burden of proof on the accused person to prove his alibi;

if there is a reasonable possibility that the alibi of an accused person could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt;
an alibi must be considered having regard to the totality of the evidence and the impression of the witnesses on the court;
if there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable; and the ultimate test is whether the prosecution has proved beyond reasonable doubt that the accused has committed the relevant offence and for this purpose a court may take into account the failure of an accused to testify or that the accused had raised a false alibi.

[13] In *S v Zwayi* 1997 (2) SACR 772 (CKHC) at 778g-j the court in considering an alibi only raised during cross-examination or when the accused testified remarked as follows:

'It should be apparent the if the court is properly to assess whether there is a reasonable possibility of the alibi being true, the details thereof should be provided since in its absence the accused's defence is simply a bare denial. In my view, if these details are only disclosed, as in the present instance, at the late stage when the accused testifies, the value to be accorded to the alibi may be adversely affected. I cannot see on what basis an accused can claim that he would be prejudiced in the presentation of his defence if he had to disclose the details of his alibi defence during the cross-examination of the State's witnesses. On the other hand, if he withholds same until he testifies there is prejudice to the State since the State will not have been provided with the opportunity of leading evidence which could expose the alibi as false.'

[14] It is not in dispute that the crimes (counts 1 and 2) had been committed. The identification of the perpetrator of those offences is in dispute.

[15] In respect of count 1 the reliability and the admissibility of the evidence at the identification parade was never challenged – not by the appellant during the trial neither by counsel appearing on behalf of the appellant during the appeal hearing.

[16] During cross-examination of the complainant in respect of count 1, the appellant asked her whether there was anything regarding his face which she

remembered and her reply was that he has a skew eye. The magistrate observed this and recorded this fact. It is common cause that one of the eyes of the appellant is skew or squint. The complainant in respect of count 1 had on the day she had confronted the appellant inside her house ample opportunity to observe his face and I am satisfied that her identification of the appellant was not only honest but also reliable.

[17] In respect of complainant in count 2 it was never put in issue the fact that she was able to draw a sketch of her attacker in such a precise manner that the police officers were able to arrest the appellant on the strength of such sketch. There was no evidence that she identified the appellant at an identification parade, however one of the police officers Constable Simson Naspile, testified that after complainant in count 2 had identified the appellant, the appellant denied that it was him whereupon she immediately drew their attention to the fact that she had bitten her attacker on one of his fingers. On inspection of his left hand this fact was confirmed.

[18] The appellant never disputed the evidence of complainant in count 2 that she bit him on one of his fingers, neither did he dispute the evidence of police officer Constable Timoteus Shimi that there was a fresh mark on his finger. It was only during cross-examination of the second police officer Constable Simson Naspile when the appellant denied that he had a mark on one of his fingers. It was also not categorically disputed by counsel appearing on behalf of the appellant that appellant had been bitten by complainant in respect of count 2. The criticism of counsel in this regard was that the information contained in a J88 reflecting alleged observations should be disregarded since the medical officer was not called to testify in the court a quo.

[19] The appellant did not testify about the incident in respect of count 2 at all neither did he testify and explain how it was possible for complainant in count 2, who had never seen him before, to be able to draw a sketch of his face with such precision that the police could have arrested on the strength of such a sketch.

[20] The undisputed evidence of complainant in count 2 was that the incident took place at 09h00 on 13 June 2005 and that the police arrived 20 minutes later at her house.

[21] If the evidence of the appellant, is for the sake of argument, to be accepted as correct that he and his witness arrived in Swakopmund between 12h00 and 13h00 on 13 June 2005, then he could not have been on the scene of the incident and the complainant in respect of count 2 would not have been able to draw such an accurate sketch of him. Since no person can be at two places at the same time the inevitable conclusion is that the accused person must have been at complainant's house at the time of the incident. If the evidence of the appellant's witness is to be accepted regarding the time and date when they had arrived in Swakopmund namely at 08h00 on 14 June 2005 and having regard to appellant's evidence that he slept the whole day on the day they had arrived in Swakopmund, then it would have been impossible for the police officers to have arrested him on 14 June 2005 since appellant, on this version, only ventured into town the next day, ie 15 June 2005.

[22] In my view it is more than just a coincidence that appellant was identified by the complainant in count 2, who had accurately drawn a sketch of the perpetrator clearly indicating the squint eye and on the basis of which appellant was arrested, and by the complainant in count 1 who had identified the very same person with a squint eye during the identification parade and whom she had observed a week prior to the 13 of June 2005 in her house in Swakopmund. I have indicated that the reliability and the admissibility of the evidence regarding the identification parade were never disputed. There is further a material discrepancy between appellant's version as to when they had arrived in Swakopmund and that of his witness for which there is no explanation. The inescapable conclusion is thus that the alibi of the appellant was false.

[23] It is common cause that the appellant never raised the defence of alibi during his plea explanation, which was a bare denial of the commission of the offences, neither did he raise the alibi during the cross-examination of witnesses. The defence of alibi was raised for the first time during his evidence-in-chief. What was said in *Zwayi* (supra) aptly applies in this instance. The value that this court should accord to the alibi, presented at this late stage, is therefore adversely affected.

[24] The fact that the alibi was raised at such a late stage together with the testimony of the appellant and his witness that they had a discussion about their

journey in the police cells is an additional basis for finding that the alibi defence was a fabrication.

[25] Mr Hoveka counsel appearing on behalf of the appellant criticised the evidence of the complainant in respect of count 2 where she had described the perpetrator to the police officers inter alia as 'very bold' with a 'yellow skin'. 'Very bold' should in the context of her description be read as 'very bald' especially if one has regard to the sketch drawn by the complainant indicating a total absence of hair. It is common cause that the appellant is not yellow skinned and that the complainant made a mistake in this regard. However, this should not in my view detract from the accuracy of her identification of the appellant in view of other distinctive features of the appellant namely his squint eye and the fact that the appellant had a fresh wound on one of his fingers where he was bitten by the complainant. This was an error made by the complainant and not every error made by a witness affects such witness' credibility. An error must be evaluated taking into account the nature of the error and its importance, and the bearing such an error has on other parts of the witness' evidence. (See *S v Mkohle* 1990 (1) SACR 95 (A) at 98f-g).

[26] It is the duty of a court of appeal to investigate carefully the findings of a court a quo in order to ascertain their correctness (*S v M* 2006 (1) SACR 135 (SCA) at 152 (a)).

[27] Mtambenengwe J in *S v Engelbrecht* 2001 NR 224 at 225E-G referred with approval Leon J's remarks in *S v Singh* 1975 (1) SA 227 (N) at 228F-H how the evidence on appeal should be assessed:

'Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that the court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best

indication that a court has applied its mind in the proper manner in the abovementioned exampled is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

[28] Mr Hoveka submitted that this court is deprived of the reasons why the learned magistrate arrived at the conclusion that the State proved its case beyond reasonable doubt because the magistrate failed to record those reasons.

[29] The magistrate in her judgment summarised the evidence and thereafter concluded that the evidence of the complainants were 'clear and true', that the appellant and his witness 'lied' and then made the finding that the State proved its case beyond reasonable doubt. The magistrate did not apply the test enunciated in *Singh* (supra), however it does not follow that this court should set aside the convictions for that reason alone.

[30] In *R v Dhlumayo and Another* 1948 (2) SA 677 (AD) Davis AJA stated that an appeal is a rehearing, with limitations, to which an applicant is in law entitled and added at 699 that an appellate court may find itself in as good a position as the trial judge to draw inferences even where there is a controversy on facts.

[31] Strydom CJ followed *Dhlumayo* in *S v Shikongo* 2000 (1) SACR 190 (NmS) at 201 d-e where he remarked as follows:

'Because of the misdirection committed by the court a quo this court is now at large to disregard the findings on fact of that court even though based on credibility and must come to its own conclusion based on all the evidence.'

[32] In *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 e-f the court stated the following regarding appeal hearings:

'Before considering the submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.' (See also *Koopman v S* 2005 (1) All SA 539 (SCA) at 548 par. 32).

[33] In view of the aforementioned guidelines this court, in the absence of reasons by the magistrate for the acceptance of the evidence of the State witnesses and the rejection of the evidence of the appellant and his witness, may draw its own inferences.

[34] I have considered the merits and the demerits of the evidence of the witnesses called by the respective parties and have considered the probabilities and have concluded that the alibi of the appellant was, for the reasons mentioned, a fabrication.

[35] I am of the view, having regard to the totality of the evidence, that the presiding magistrate did not misdirect herself in any material way by finding that the State had proved the commission of the counts 1 and 2 beyond reasonable doubt, including the identity of the perpetrator, namely the appellant.

[36] The appeal against the convictions therefore stands to be dismissed.

[37] In the result the following orders are made:

(a) The appeal is dismissed.

(b) The convictions and sentences are confirmed.

EPB Hoff

Judge

K van Niekerk

Judge

APPEARANCES

APPELLANT:	Mr T K Hoveka (Amicus curiae) Of Dr Weder, Kauta & Hoveka Inc., Windhoek
RESPONDENT:	Mr Kuutondokwa Of Office of the Prosecutor-General, Windhoek