



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 272/15

In the matter between:

DUZE, LUCAS

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Duze v State* (272/15) [2015] ZASCA 170 (26 November 2015)

Coram: Ponnan, Bosielo, Leach, Petse and Zondi JJA

Heard: 11 November 2015

Delivered: 26 November 2015

Summary: Evidence of identification – appellant’s conviction based on identification evidence of a single witness – to guard against inherent risk of mistaken identification – such evidence required to be approached with caution – not enough for identifying witness to be honest and reliable but reliability of his observation to be tested.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Victor J and Ratshibvumo AJ sitting as court of appeal):

- 1 The appeal is upheld.
- 2 The appellant's convictions and sentences imposed pursuant thereto are set aside.

JUDGMENT

Zondi JA (Ponnan, Bosielo, Leach and Petse JJA concurring):

[1] The appellant and his four co-accused appeared in the Wynberg Regional Court on 20 counts. They each faced six counts of robbery with aggravating circumstances, eight counts of kidnapping and six counts of attempted murder. The charges related to three separate events on 5 September 2003; 5 November 2003; 19 February 2004 and 3 March 2004. The appellant was convicted on six of those charges relating to 19 February 2004 and 3 March 2004 and sentenced to an effective period of 22 years' imprisonment.

[2] The appellant appealed to a full bench of Gauteng Local Division of the High Court, Johannesburg against his convictions. His appeal on the charges relating to the incident of 19 February 2004 was upheld and the sentences imposed pursuant thereto were set aside, but dismissed on the charges relating to the incident of 3 March 2004. The further appeal to this court is thus concerned only with the charges relating to the 3 March 2004. The appeal against his convictions is with the special leave of this court.

[3] The charges, the subject of this appeal, arise from the following incident: On 3 March 2004, at about 21h30, Mr Richard Dancer arrived at his home in Parkview, Johannesburg in his Audi S3 motor vehicle. As he approached his house he opened the garage door with a remote control. There is no security gate on the premises. He drove straight into the garage. He testified that the garage was well lit. When he was about to switch off the engine of the vehicle, an unknown male person emerged from the window on the driver's side and pointed a firearm at him. The suspect ordered him to get into the back of the vehicle and lie on the back seat with his eyes closed. A second suspect got into the vehicle. Thereafter the two suspects drove away with him to a deserted spot in the vicinity of Eldorado Park. There the suspects and a third person who had accompanied them in a BMW X5(the evidence establishes that the BMW X5 had been hijacked on a separate occasion) were surprised by a group of five policemen, resulting in a shootout during which one policeman was wounded and the suspects fled the scene. Arising from this incident the appellant and his co-accused were charged, first, with robbery with aggravating circumstances in that they had unlawfully assaulted Richard Dancer (Dancer) and had forcibly taken from him an Audi S3, a Guess watch, a wallet containing bank cards and R400 in cash, secondly, with kidnapping Dancer and thirdly, attempted murder of Inspector Clark.

[4] Inspector Clark testified on the charge of attempted murder. In essence his evidence confirmed that of Dancer in so far as it related to the shooting incident in the veld. Inspector Clark together with his four other colleagues were already at the scene when the Audi and the BMW arrived. They were there because they had information that the hijacked vehicles were taken to that area for the removal of tracking devices. When Clark saw the suspects from the vehicles busy fiddling with the boot of the Audi, he and his colleagues shouted at them to announce their presence. Clark shone his flashlight on the suspects and warned them to stand still. But they ignored the warning and started shooting at them. Inspector Bangula, one of the police involved in the operation, got shot on the thigh.

[5] Dancer described the gun-wielding suspect as a ‘dark-skinned’ man with a round face, very wide and clear eyes and semi-pointed nose and the firearm as a long barrelled grey pistol. He could not see his hairline and ears because the hood of his jacket covered the back of his head. Dancer first identified the appellant at an identification parade held on 22 April 2004 and later in the dock. The appellant gave evidence in his defence, denying that he was involved in the commission of the offences concerned, stating that he was elsewhere.

[6] The trial court found Dancer to have been a good and honest witness and accepted his identification evidence as reliable. It rejected the appellant’s evidence. The high court emphasised on appeal that Dancer had a good opportunity in the garage to observe the gun-wielding suspect when he ordered him to get into the back seat of the vehicle. According to the high court, the fact that Dancer lay on the back seat with his eyes closed did not deprive him of an opportunity to observe the suspect. It held that Dancer’s evidence did not stand alone. In this regard it expressed itself in these terms: ‘Dancer was taken to the veld where the police bust took place. The evidence also revealed a close connection between appellant one and three by way of an invitation where appellant one was invited to his wedding. I am satisfied that appellant one was correctly convicted on counts 12 and 13.’

[7] As far as the conviction on the attempted murder charge is concerned, the high court confirmed it on the basis of the reasoning that ‘once the appellant is involved in the Dancer counts then it follows as a matter of logic that appellant... was at the scene and thus involved in the shooting of Inspector Clark...’

[8] It is against these findings that the appellant appeals, submitting that the trial court and the high court on appeal had erred in finding that his identity had been proven beyond a reasonable doubt.

[9] Dancer testified in a truthful and honest manner and was willing to make concessions when it was necessary to do so. But Dancer's honesty and truthfulness by themselves do not provide a sufficient basis for the acceptance of his identification evidence.¹ For his evidence to be accepted it must also be reliable in the sense that it must be shown that he had a proper opportunity in the circumstances in which the offences concerned occurred, to carry out such observation as would be reasonably required to ensure a correct identification.²

[10] I am not satisfied that Dancer's identification evidence was reliable and sufficient to sustain the conviction on the charges concerned. Dancer did not have sufficient opportunity to observe the suspect. He testified that in total the time that he had for observation was a second or less. This was no more than a fleeting glance and of a person whose features were partially obscured by the hood of the jacket he was wearing.

[11] Moreover, under cross-examination he conceded that, at the time of the incident, he was traumatised and a lot of thoughts went through his mind, which could make it difficult for him to concentrate on a specific aspect of the identity of the suspect.

[12] Although Dancer did identify the appellant at the identification parade held some seven weeks after the incident, he had told Inspector Viljoen, the investigating officer, who interviewed him shortly after the incident, that it would be difficult for him to make an identification. What is more, is that Dancer conceded under cross examination that he was not certain as to the identity of the appellant. In fact he went so far as to admit that the possibility existed that it may not have been the appellant. Apart from Dancer's own assertion that the appellant was the person who robbed and kidnapped him, there is no objective evidence which linked him to the offences concerned. In *Charzen & another v S* 2006 (2) All SA 371 (SCA) para 19 this court had this to say:

¹ *S v Mthetwa* 1972 (3) SA 766 (A) at 768A.

² *S v Mehlahe* 1963 (2) SA 29 (A) at 32C.

‘The greatest assurance of guilt must lie in such evidence, rather than in identification on its own, which as this case shows can be beset by error and misdescription and doubt, in which case possibly and even presumably guilty persons must walk free.’

[13] In my view, considering the totality of the evidence, it cannot be said that the appellant’s guilt was proved beyond reasonable doubt.

[14] In the result the appeal succeeds and the order of the court below is set aside and replaced with the following:

- 1 The appeal is upheld.
- 2 The appellant’s convictions and sentences imposed pursuant thereto are set aside.

D H Zondi
Judge of Appeal

Appearances

For the Appellant:

P J du Plessis

Instructed by:

BDK Attorneys, Johannesburg

c/o Symington & De Kok, Bloemfontein

For the Respondent:

A Smith

Instructed by:

The Director of Public Prosecutions, Johannesburg

The Director of Public Prosecutions, Bloemfontein