IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A694/2010

DATE: 29 APRIL 2011

In the matter between:

SANUSE NONDALA Appellant

and

THE STATE Respondent

J U D G M E N T

TRAVERSO, DJP:

On 11 December 2008, the appellant was convicted in the Mossel Bay Magistrate's Court on one count of robbery and he was sentenced to three years imprisonment. On petition, leave was granted to the appellant to appeal both his conviction and sentence. At the commencement of the proceedings this morning, Ms Kuun, who appeared for the appellant, informed us that in February this year the appellant was already let out on parole. There was a long delay in bringing this matter to this court. In view of the conclusion to which we come, it will

be seen that a terrible injustice occurred as a result of this delay. The reasons for this will appear later.

The state's case was based on the evidence of a single witness, the complainant, a certain Mr Willie Tswenga. His evidence was brief and did not contain much detail, more particularly with regard to the identification of his assailants. He stated on the day in question he was on his way home when a group of people approached him and asked him what he had in his pockets. When he answered that what is in his pockets is his business, one of the assailants hit him with a golf club. The other stabbed him with a knife and one hit him with a *seekoei* (whatever that may be).

He tried to fight back, but in the process he stumbled and fell backwards, whereupon one of his assailants, he does not know which one, put his knee on his neck and removed his cellular phone from his pocket. One of the other assailants, again he is not sure which one, removed his shoes. This incident took place at about eight o'clock in the evening. He states that although it was not pitch dark, there was a shadow in the area where it took place. His evidence about the identification of the appellant was rather vague.

First he testified that he knows the appellant and that he often

sees him, but the main reason why he recognised him as his actual assailant, was because at one stage during the assault somebody called and said "come DJ, we have finished him off" (this is a direct translation from an Afrikaans record). At that stage he did not know who DJ was and states that he had subsequently established from certain gang members who DJ was and that he was on that occasion told that it was the appellant and he was told where he lived.

When he was asked to indicate by what features he identified the appellant, he stated that he identified him because he was short and he wore khaki clothes. He could not be more specific than that. As regards his other assailants, he could not identify them at all. One, therefore, has to ask the rhetorical question if the name DJ was not mentioned during the assault, whether he would ever have been able to identify any of his assailants.

The defence of the appellant was an alibi. The evidence of the appellant was all but satisfactory. A court, however, does not have to believe the version of the appellant. A court must weigh up the evidence on behalf of the state, together with that of the appellant and if the version of the appellant is reasonably possibly true, then the court must give the appellant the benefit of the doubt. In my view, the evidence of

the complainant falls short of proving the guilt of te appellant beyond reasonable doubt. The following passage, in my view, is decisive:

"HOF: Mnr Tswenga voor hierdie voorval, het u 'n man geken met die naam van DJ? --- Nee U Edele.

Nou verstaan ek nie nou nie. U sê die voorval het u na die beskuldigde se huis toe gegaan, hoe het u geweet u moet na sy huis toe gaan? --- Ek het by die ander bende wat daar in die straat bly gevra wie is DJ, toe sê hulle dit is Sanuse en toe wys hulle vir my waar hy bly.

Nou na hierdie voorval, het u op enige stadium weer die persoon gesien wat u beweer die beskuldigde is? --- Nooit weer gesien nie.

Nou sê net vir my op watter stadium het u die gesig gesien van die persoon wat u selfoon afgevat het?"

And then the interpreter answers:

"--- Hy sê toe hulle na hom toe kom, met die gholfstokke vir hom slaan, het hy agter 'n lang man weggekruip. Toe sien ek die mannetjie wat hier vir my met die gholfstok slaan, dit is die man wat ek

voorheen die dag gesien het."

That really is the high watermark of his evidence about the identification of the appellant. The approach of the magistrate in the court *a quo* was, in my view, incorrect. Although the magistrate was clearly aware of the fact that he had to approach the evidence with great caution due to the fact that he had to rely on the evidence of a single witness, he, in my view, paid mere lip service to this cautionary rule. He placed much weight on the evidence of the complainant about the fact that he had previously known the appellant and had seen him in the area, but as I pointed out earlier, his evidence amounted to no more in that he did not know who this person was or where he lived or what his name was. It is not as if they were acquaintances prior to the assault.

The magistrate also erred in my view to find that, on the totality of the evidence, there was sufficient time for the complainant to identify his assailant, that there was sufficient lighting to enable the complainant to identify his assailant and that the fact that they had known each other previously, was a guarantee that he could positively identify his assailant. All this court knows is that the name of the assailant was not known by him, he did not know where he lived and subsequent to the attack, strangely enough he never saw his assailant in

the area again.

In all the circumstances of this case, there is so much uncertainty, that in my view the appellant is entitled to the benefit of the doubt and that his conviction and sentence should be set aside. The result of this is, of course, that the appellant had spent his entire jail term in prison when that should not have taken place. Miscarriages of justice such as these, should be avoided by all people involved in assisting appellants to bring their appeals to court.

The order that I make is accordingly that the conviction and the sentence is set aside.

MANTAME, AJ: I agree.

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MANTAME, AJ

TRAVERSO, DJP: It is so ordered.

TRAVERSO, DJP