A327/2012

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: A327/2012

DATE: 31 AUGUST 2012

In the matter between:

**VUSUMZI JONAS** Appellant

and

**THE STATE** Respondent

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**J U D G M E N T**

**BOZALEK, J**

The appellant was convicted in the Paarl Regional Court on 29 November 2011 on one count of robbery with aggravating circumstance and sentenced to 10 years imprisonment of which three years was suspended for a period of five years.

On petition the appellant was granted leave to appeal against the conviction only.

The state's case against the appellant was that he and an unknown accomplice had entered Ackermans store in Paarl in May 2011 and, after threatening a security guard with a knife should he intervene, had stolen children's clothing to the value

of some R1 800,00.

The appellant, who was legally represented, pleaded not guilty and furnished a plea-explanation to the effect that he had indeed shopped in the store that morning and had shortly thereafter been apprehended at a taxi rank by the police accompanied by an Ackermans employee, but he denied any knowledge of, or involvement in, a robbery at the store.

The state's case comprised the evidence of three employees of the store and the policeman who apprehended the appellant at the taxi rank.

The appellant testified alone on his own behalf.

The security guard, Mr J Sarel, testified that the appellant and his accomplice had jointly taken the clothing off a rack and packed it into a bag and that when he approached them the appellant drew a knife and threatened to stab him if he came any closer. The alarm was raised and when the police arrived he accompanied them and a co-employee, Ms Marilyn Albertus, to the taxi rank being the direction in which the two men had run off. There he had identified the appellant *inter alia* by his orange jersey and he had been arrested.

Ms Albertus confirmed Sarel's evidence in all material respects adding that she had initially attempted to assist the appellant in the shop when she found him removing the tag from a pair of shoes. She testified that the police had searched the appellant upon his arrest and found a knife. Both witnesses testified that they had pointed out to the police the accomplice who was sitting further back in the taxi but by the time they had done so it had driven off with him inside and the police had taken no steps to chase down the taxi.

A store manager testified that Sarel had reported the robbery to her and that she had raised the alarm using a panic button.

The arresting officer, Sergeant Grant Abrahams, testified that he had arrested the appellant at the taxi rank after he had been pointed out to him by Sarel. On searching the appellant, who had initially resisted arrest, he had found an Okapi knife in his pocket. Albertus had also accompanied the police and had been present at the scene of the arrest.

The appellant testified in accordance with his plea-explanation, admitting that he had been present in the store that morning to purchase shoes, that he had dealt with Ms Albertus, that he had been identified at the taxi rank by her and was then arrested by the police after he had initially

resisted arrest. He testified however that he had been alone in the shop and denied being involved in any robbery or theft or that any knife had been found on his person.

The magistrate found that both Albertus and Sarel were credible witnesses, although the latter had been traumatised by the incident, and accepted their evidence. She held further that the only issue was whether their identification of the appellant could be relied upon and concluded that the appellant's version of events were so improbable that it could be rejected as false beyond reasonable doubt.

On behalf of the appellant the conviction was challenged mainly on the grounds of discrepancies in and between Sarel's evidence and that of Albertus and Abrahams and furthermore alleged weaknesses in the identification evidence of these two witnesses.

In S v Mthethwa 1972(3) SA page 766 A–D (A) it was held that both the honesty and reliability of identification witnesses must be tested, the latter depending on various factors such a lighting, visibility, eyesight, proximity of the witness, his opportunity for observation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build, gait and dress

and the evidence by or on behalf of the accused. These factors are not individually decisive but must be weighed one against the other in the light of the totality of the evidence on the probabilities.

The challenge to the identification evidence of the state witnesses herein is robbed of much of its force by the simple fact that the appellant admitted his presence in the store shortly before his arrest. The only question then is whether the state witnesses mistook the appellant for another man who had been in the shop shortly beforehand and who co-incidentally had also been wearing an orange jersey and long khaki trousers.

In considering this possibility, it must be taken into account that both witnesses interacted with the appellant in the store in broad daylight and thus had a full opportunity to observe him for several minutes. Both witnesses unhesitatingly identified the appellant within half an hour of the incident as the armed robber and in fact pointed him out to the arresting officer. There is the further "co-incidence" that a knife was found on the appellant.

It is correct that there were discrepancies both in the evidence of Sarel and between his evidence and that of Albertus. These

related *inter alia* to when and where he had seen the knife after the arrest of the appellant and whether he and Albertus had notified Abrahams of the presence of the other suspect in the taxi, something of which Abrahams claimed to have had no knowledge.

The magistrate correctly noted that Sarel had been traumatised after being threatened with a knife and, furthermore, that some discrepancies between the evidence of the three principal state witnesses were inevitable.

I would observe too that it was ill-advised to have allowed Sarel, a Xhosa speaking person, to have testified in English rather than in his home language through an interpreter. The record indicates that he was simply not up to this task and the quality of his evidence suffered materially as a result.

There is a conflict between the evidence of Abrahams, the arresting officer, and the other two witnesses as to whether he was advised by them of the presence of the other suspect in the taxi. It seems common cause that the taxi left shortly after the appellant was removed from it by Abrahams and in these fluid circumstances it seems quite possible that Abrahams failed to grasp the situation or decided that the apprehension of the appellant alone would suffice.

The appellant was critical of the fact that neither Sarel nor Albertus furnished any detailed description of the suspect to Abrahams, but in as much as they were accompanying him to search for the suspect, this would have been an artificial and unnecessary exercise.

On the appellant's version both Albertus and Sarel conspired to falsely accused him of robbery. To support this the appellant testified that he had previously had an argument with Sarel about xenophobia and that the witness had borne him a grudge ever since. This alleged grudge and the fact that he claimed to have known Sarel previously was not put to the witness and was not even conveyed by the appellant to his own legal representative.

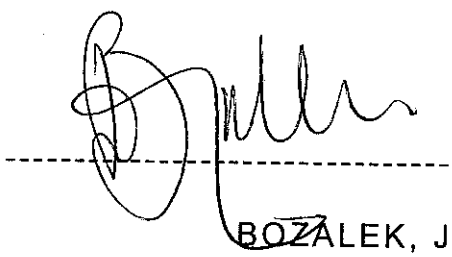
It is trite that an appeal court will not hastily reject the trial court's findings of fact or interfere with its credibility findings. In S v Hadebe and others 1997(2) SACR 641 (SCA) at 645 (e – f) an appeal court's approach to such findings of fact are summarised as follows:

> "... in the absence of demonstrable and material misdirections 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."

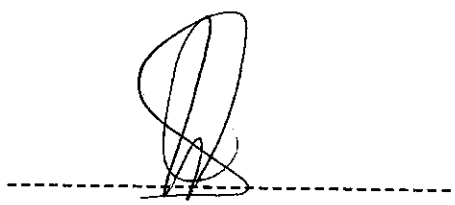
Having regard to the evidence as a whole, I am unpersuaded that the magistrate erred or misdirected herself in accepting the state evidence, in finding that the identifications of the appellant were both honest and reliable and in finding in the light of the state's evidence that the accused version could be rejected as false beyond reasonable doubt.

For these reasons I would **DISMISS** the appeal against conviction.



BOZALEK, J

I agree and it is so ordered.



SAMELA, J