NOT REPORTABLE

CASE NO.: CA 98/2009

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THOMAS THOMAS **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **LIEBENBERG J & TOMMASI J**

Heard on: 7 /07/2011
Delivered on: 07/10/2011

APPEAL JUDGEMENT

TOMMASI J: [1] The appellant in this matter noted an appeal against conviction and sentence. The appellant was convicted of robbery with aggravating circumstances and was sentenced to five years imprisonment.

[2] The appellant brought an application for condonation for the late filing of the heads of argument and this application was not opposed by the respondent. Counsel for the appellant conceded that no grounds were advanced in the notice of appeal against sentence. Both counsel were *ad idem* that the only valid ground of appeal raised by the appellant in his notice of appeal was whether the court *a quo* correctly found that it was the appellant who stabbed the victim with a knife and then robbed her of her cell phone. A further ground was that the magistrate failed to assist the appellant during his trial although it was not specifically pointed out in which manner the magistrate had failed to assist him.

[3] Counsel for the appellant argued that the court *a quo* erred by: failing to adopt the proper procedure in respect of the previous inconsistent statements of the State witnesses, failing to make an adverse inference in respect of the State's failure to call available State witnesses; and relying on evidence which, when approached with the requisite caution, did not prove the identity of the appellant beyond reasonable doubt. Counsel for the respondent argued that the court *a quo* did not misdirect itself in the evaluation of the evidence and the court *a quo* correctly cautioned itself to treat the identification evidence with caution. For reasons that will become apparent I shall only deal with the procedure that was adopted in respect of the previous inconsistent statements of the State witnesses.

[4] The appellant pleaded not guilty in the court *a quo* and raised an alibi as a defence in his plea explanation in terms of section 115[1]. The State thus bore the onus to prove the identity of the appellant beyond reasonable doubt.

[5] The victim, on 12 January 2005, at around 17H00, walked down a street in Oshakati West with her two cousins (sisters). She was grabbed from behind by an assailant who was armed with a knife. He stabbed her on her arm and on her right chest and demanded that she give her cell phone to him. The assailant managed to take off with the cell phone despite the fact that he was chased by the complainant and a police officer living in the street where the robbery took place. The victim testified that she knew the appellant well before the incident and she knew where he lived. The police officer also testified that she saw the appellant when she pursued him and that she knew him well as he grew up in the same street where she had been living for a long time. The appellant was apprehended almost a month after the incident at his father's house situated in the same street where the incident took place. He averred that he was visiting a friend at another village at the time that incident occurred.

[6] Procedure adopted in respect of previous inconsistent statements: The State called three witnesses who were eye witnesses to the robbery namely, the victim; the police officer and the victim's cousin. The court *a quo* relied

[1]Of the Criminal Procedure Act, 51 of 1977

mainly on the identification evidence of the victim and the police officer to convict the appellant. The appellant, who was not represented at his trial in the court *a quo,* was given disclosure of the docket. The appellant cross-examination the two key State witnesses on their statements they had made to the police.

[7] The complainant, when cross-examined by the appellant, was asked whether she had made a statement to the police which she confirmed. The appellant wanted to know why she testified in court that she knew him before the incident whereas she indicated in her statement to the police that she did not know him prior to the incident. The magistrate then directed the appellant to refer the witness to the part in her statement which was inconsistent with her evidence in court. The appellant then read the relevant part to the witness.

[8] This was a clear indication that the appellant intended questioning this witness on a previous inconsistent statement. In *S v PITOUT,*[2] Gura AJ stated that:

> *"A judicial officer should realise that whenever questioning has to start on a previous inconsistent statement, he or she has a duty to see to it that the cross-examiner first lays the basis for such questioning (S v Jeggels 1962 (3) SA 704 (C)). Failure to observe this rule may adversely affect the probative value of such evidence*." (my emphasis)

[2] 2005 (1) SACR 571 (B) at page 576 D-E

[9] The police officer was also confronted by the appellant with her statement she had made to the investigating officer. The appellant simply asked her whether she had made a statement to the police. When she confirmed it, the appellant proceeded to read an extract from her statement to her and started cross-examining her on her statement which he alleged was inconsistent with her testimony in court.

[10] In order for the appellant to lay a proper basis to cross-examine the witnesses on their previous inconsistent statements, he was required to confirm whether the witnesses had made statements relevant to the case at hand; that it was made freely and voluntarily; and that they were the authors of the statement or in the case where it was taken down by someone else, that they appended their signatures thereto. This can be achieved by producing the original (or a copy where the non-production of the original can be explained satisfactorily) for the witness to confirm whether it was indeed her statement she had made and, if taken down by someone else, verifying that it was her signature that appears on the document wherever it may have been appended.

[11] In this case the statement was taken down by a police officer and it was important to determine in which language she communicated when the statement was taken down. If the statement was taken down in a language

other than the language she communicated it would be required to determine whether an interpreter was used. It is not uncommon in this jurisdiction for police officers to communicate with the deponent in one language and then to write down the statement in English, without the use of an interpreter. Given this fact it would be prudent for the cross-examiner to clearly establish how the parties communicated when the statement was taken down. It is further required to determine whether the deponent read the statement; alternatively whether it was read back to the deponent and that she understood the contents thereof before signing it. The witness should also confirm the date on which the statement was taken down. The court itself has to indicate that it is satisfied that the authenticity of the statement has been properly proved.

[12] Once the authenticity of the statement has been established, the contents of the statement may be published by reading the entire statement to the witness to confirm that the statement indeed correctly reflects what she had said. If the witness confirmed that she made the statement and it is apparent that it differs from her evidence in court, the witness must be given the opportunity to clarify or explain the discrepancies.

[13] The learned author Heimstra in *Hiemstra's Criminal Procedure* at 23-24 advises that presiding officers should guard against the practice that cross-examiners place only certain parts of the statement reflecting discrepancies

on record; and that judicial officers should in such a situation point out to the cross-examiner that the entire statement should be placed before the court if they wish the court to properly evaluate the previously inconsistent statement.

[14] If the cross-examiner failed or is unable to authenticate or prove the contents of the statement, it cannot be considered as evidence as it lacks probative value.[3] If the witness does not confirm the authenticity and/or the veracity of the contents of the statement, the cross-examiner may be allowed to tender the document into evidence provisionally and to cross-examine on the contents provided that the statement is properly proved at a later and appropriate stage. In the case where it was taken down by a police officer, the concerned police officer may be called to give evidence on the procedure he/she adopted when taking down the statement under oath as well as the interpreter where an interpreter was used. If the cross-examiner fails to later prove the statement, such statement should be totally disregarded.

[15] The appellant did not establish a proper basis before he cross-examined both these witnesses on their statements to the police in that he did not produce the statement; did not authenticate it; and did not prove the contents thereof. The appellant however was unrepresented. It is a well established fact that the magistrate has a duty to assist an unrepresented

[3]See S v TSHABALALA 1999 (1) SACR 163 (T)

accused and that failure to do so may lead to a violation of an accused's right to a fair trial.[4] The magistrate had a duty to ensure that the appellant had laid a proper basis for the cross-examination on a previous inconsistent statement[5] and further to point out to the appellant that the entire statement should be placed before the court. The magistrate gave no indication to the appellant that the prior statements of the witnesses were not properly authenticated and that the full statements were required for the court to properly evaluate the previous inconsistent statement and to satisfy itself that what was read by the appellant indeed appears in the statement.

[16] The question is whether the magistrate's failure to assist the appellant resulted in a failure of justice. The appellant raised an alibi as a defence and identification was thus an important issue. These two witnesses were key identifying witnesses. A cautionary approach to identification evidence is required. This means that the court must have regard to:

> *"...matters such as the identifying witnesses' previous acquaintance with the accused, the distinctiveness of the alleged criminal's appearance or clothing, the opportunities for observation or recognition, and the time lapse between the occurrence and the trial, should be investigated in detail,..."*[6]

[17] The incident took place on 12 January 2006 and the trial commenced on 14 May 2008 i.e more than two years after the occurrence. Under these

[4]S v Wapota 1991 NR 353 (HC) – duty to inform unrepresented accused of statutory presumptions; S v Soabeb and Others 1992 NR 280 (HC) – duty to assist with cross-examination; S v Katari 2006 (1) NR 205 (HC) duty to inform accused of his right to remain silent ect
[5]S v Pitout, *supra*
[6]Lansdown and Campbell South African Criminal Law and Procedure vol V at 935

circumstances a previously inconsistent statement made shortly after the occurrence deserved a proper consideration since it was material to the issue in dispute.

[18] Although the magistrate allowed the appellant to cross-examine witnesses on their statements made to the police, it ultimately had no probative value. The appellant intimated during cross-examination that the witnesses made previous inconsistent statements in respect of matters material to their identification of the appellant. The appellant was given no indication that his attempt to discredit the witnesses was futile as the previous inconsistent statements of the two key witnesses had no probative value and as such was disregarded by the court *a quo*. I pause here to mention that not every discrepancy, defect or shortcoming between the statements made to the police and the witness' evidence in court would necessarily mean that the truth had not been told.[7]

[19] The prejudice to the appellant by the magistrate's failure to fulfil his duty, is evident from the fact that the cross-examination on the previous inconsistent statement was completely disregarded by the court *a quo*. If the appellant had properly placed this evidence before the court *a quo*, the court would have been duty bound to consider same. The appellant, although he was not an inept cross-examiner, clearly needed the

[7] See S v BRUINERS EN 'N ANDER 1998 (2) SACR 432 (SE) A & S v MAFALADISO EN ANDERE 2003 (1) SACR 583 (SCA)

magistrate's assistance to properly lay the basis for the previous inconsistent statements before the court.

[20] The remaining witness' evidence was unreliable as she did not independently identify the appellant but was informed of his identity by the police officer. She furthermore only saw half of the assailant's face as he was wearing a cap at the time.

[21] Having considered the above I am of the view that the failure by the magistrate to assist the appellant herein has in fact resulted in a failure of justice.

[22] In the premises the following order is made:

1. Condonation for the late filing of the heads of argument is granted;
2. The appeal against conviction succeeds and the conviction and sentence are accordingly set aside.

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TOMMASI J

I concur

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LIEBENBERG J