REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2023/00061

In the matter between:

LEMEGIUS KALWENYA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kalwenya v The State* (HC-MD-CRI-APP-CAL-2023/00061) [2024] NAHCMD 97 (08 March 2024)

Coram: D USIKU J *et* CHRISTIAAN J

Heard: **09 February 2024**

Delivered: **08 March 2024**

Flynote: Criminal Procedure – Appeal – Powers of Court of Appeal on appeal – No substantive reasons by trial court on conviction judgment – Constituting a misdirection – consequences – Court of appeal to decide evidence afresh – Not duty of court of appeal.

Criminal Procedure – Evaluation of evidence – Single witness evidence and mutually destructive versions principles restated.

Criminal Procedure– Evaluation of evidence – Section 208 on Single witness evidence – *S v Noble* 2002 NR 67 (HC) – Caution must be exercised when evaluating the uncorroborated evidence of a single witness –The court must be satisfied by the credibility of the witness' evidence and it should constitute proof of the guilt of the appellant beyond a reasonable doubt.

Criminal Procedure – Mutually destructive versions – Court must have good reason to accept one version over the other and not only consider the merits and demerits of the testimonies of witnesses – Court also to consider the probabilities present – Evidence must neither be considered in isolation but be looked at holistically - *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others*.

Criminal Procedure – No onus rest on appellant to convince the court of the truth of any explanation even if that explanation is improbable – What is required is for the court to be convinced that the explanation is not only improbable, but false beyond reasonable doubt – *R v Difford* 1937 AD 370 at 373 – It is sufficient if the court is satisfied that there is a reasonable possibility that it may be substantially true – The approach the court must follow to decide whether the defence case, considered with the entire body of evidence, is reasonably possibly true is outlined in *S v Radebe*.

Appeal – Evidence – Identity evidence by a single witness – The testimony of the complainant not clear in respect of his opportunity to observe the perpetrator without the mask – No description of perpetrator – *Court a quo* ought to have treated his testimony with circumspection Evidence – Evaluation of - *Court a quo* erred by not treating evidence with circumspection – The cumulative effect of the unsatisfactory aspects of complainant's evidence and shortcomings in the manner the identification was done makes it unsafe to rely on identification evidence for a conviction.

Summary: The appellant appeared in the Magistrates Court sitting at Windhoek on one count of housebreaking with the intent to steal and theft. After evidence was

heard, the appellant was convicted and sentenced to two years' imprisonment. Aggrieved by the outcome of the trial, the appellant lodged an appeal against conviction. Appellant alleges the trial court did not properly evaluate the evidence of identification by a single witness.

Held: The remissness of the presiding magistrate to prepare and deliver a full and reasoned judgment is a misdirection impacting severely on the function and duties of the court of appeal which is now forced to step into the shoes of the trial court. This is not the duty of a court of appeal except where an irregularity was committed which impacts on the outcome of the proceedings.

Held that: The State and the appellant are entitled to know how the court reached its verdict in order to decide whether or not there are good grounds to appeal.

Held; that the onus is on the state to prove that the appellant committed the offences beyond a reasonable doubt.

Held further; that, no onus rests on the appellant to convince the court of the truth of any of the explanations he gave, even if the explanation is improbable.

Held, further; that the test is whether there is a reasonable possibility that the appellant's evidence may be true and, in applying that test, the court need not even believe his story.

Held, further that it is sufficient if the court is satisfied that the evidence of the appellant though not probable may be reasonable possibly true.

Held further: that the evidence of the state falls significantly short of satisfying the applicable requirements when assessing the evidence of a single witness, thus rendering it unreliable.

ORDER

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1. The appeal is upheld and the conviction is set aside.
2. It is ordered that the appellant be released from custody forthwith.
3. Matter is removed from the roll and regarded as finalised.

JUDGMENT

CHRISTIAAN J (concurring USIKU J):

Introduction

[1] The appellant appeared in the Magistrates Court sitting at Windhoek on one count of housebreaking with the intent to steal and theft. After evidence was heard, the appellant was convicted and sentenced to two years' imprisonment. Aggrieved by the outcome of the trial, the appellant lodged an appeal within the prescribed time limit against the conviction.

[2] The appeal against conviction is founded on five grounds enumerated in the appellant's Notice of Appeal. These grounds will be specified below when considering whether or not they have merit.

[3] Mr Kanyemba appeared before us for the appellant, while Mr Lilungwe represents the respondent.

Judgment delivered by the trial court

[4] Before dealing with the respective grounds of appeal, it seems apposite to remark on the judgment of the court *a quo*, particularly in view of the argument advanced on behalf of the appellant that the trial court was selective in her analysis of the evidence presented and evaluated the evidence in piecemeal, as per the judgment, that it *per se* constitutes a misdirection. The judgment covers two and a

half pages of which two pages are devoted to the summary of evidence adduced. The court's reasoning and conclusions reached are condensed in only half a page from which it is evident that the trial court did not properly evaluate the evidence and failed to apply its mind as regards the application of the law to the facts.

[5] Besides stating that she considered the submissions made by both the state and the appellant in assisting the court to come to a fair conclusion, and that the court exercised caution when considering the single witness evidence in terms of s 208 of the Criminal Procedure Act. The trial court in a summarised manner stated the following in her judgment:

"However, the appellant failed to provide a reasonable explanation which would create reasonable doubt in the courts mind. The defence witnesses' testimonies were not credible and reliable as they were vague, seemed fabricated and could not help the court reach a reasonable conclusion. Therefore, the benefit of doubt cannot be granted to the appellant person. Therefore, based on the aforementioned evidence that was led, the court is of the opinion that the state has proved its case beyond a reasonable doubt based on above mentioned reasons; therefore, the appellant hereby found guilty on a charge of housebreaking with the intent to steal and theft."

[6] Liebenberg J with January J concurring in the matter of *Lupandu v The State*[1], had the following to say regarding the omission on the part of the magistrate to incorporate in the judgment, the court's reasoning and basis for the findings reached:

"[6] …Unfortunately, the remissness of the presiding magistrate by neglecting to prepare and deliver a full and reasoned judgment when called upon to do so, has consequences. Without the benefit of having the court a quo's reasons for accepting the evidence of state witnesses, while rejecting that of the appellant and how the court applied the law to the proven facts, this court, sitting as court of appeal, is unable to gauge whether any misdirection was committed by the trial court during its assessment of the evidence which materially impacts on the convictions. What would now be required of this court is to evaluate the evidence afresh to decide whether the bold conclusions reached by the trial court are justified and based on the evidence and whether the convictions are in accordance with the applicable legal principles. (My own emphasis)

[1] *Lupandu v The State* (HC-MD-CRI-APP-CAL-2022-00093) [2023] NAHCMD 265 (15 May 2023).

[7] It seems apposite at this juncture to remind presiding officers of their duty to set out in their judgments the weight accorded to evidence adduced and provide adequate reasons for the conclusions reached by the court. In my view, the state and the appellant are entitled to know how the court reached the verdict pronounced in the end. Without a full judgment, how would the state or the appellant be in a position to decide whether there are grounds of appeal, based on any misdirection by the trial court on either the facts or the law? Furthermore, it impacts severely on the function and duties of the court of appeal which is now basically forced to step into the shoes of the trial court and decide the matter afresh. That is clearly not the purpose of a court of appeal, except in circumstances where an irregularity committed by the trial court is not of such gravity that it resulted in a failure of justice and where the court of appeal is required to evaluate the evidence afresh in order to determine whether, despite the irregularity, there is sufficient evidence to justify the trial court's finding(s).[2]"(Our own emphasis)

[8] I find no reason why we should deviate from the above conclusions and direction extended by our brothers, and would therefore discuss this matter on the backdrop of the same. I find it necessary at this juncture, to highlight the importance of the presiding magistrate's duty to prepare and deliver a full and reasoned judgment when called upon to do so, as this omission has consequences, not only for the appellant, but for the court of appeal in deciding whether a misdirection was committed.

Appeal against conviction

Grounds of appeal and submissions
Ad grounds 1, 3 and 5

[9] Grounds 1, 3 and 5 will be addressed together as they deal with the aspect of the trial courts evaluation of the evidence and the onus of proof.

[10] The appellant contends that the trial court, in essence, erred by being selective in her analysis of evidence presented, and only evaluated the evidence piecemeal. Appellant particularly took issue with the way in which the testimonies of the appellant's witnesses were considered, even when they were corroborated in the given circumstances. Furthermore, it was argued that the court misdirected itself by

[2] *S v Shikunga and Another,* 1997 NR 156 (SC).

concluding that the appellant failed to provide a reasonable explanation which would create reasonable doubt while ignoring the fact that there is no onus on the appellant to proof his case.

[11] Appellant further contends that the trial court failed to adopt the approach laid down in the matter of *S v Singh*[3], when evaluating the evidence. The approach outlined requires that a court must apply its mind not only to the merits and the demerits of the state and the defence witnesses but also to the probabilities of the case, and after applying its mind reach a conclusion as to whether the guilt of an appellant has been established beyond reasonable doubt. This the Appellant contends must be clearly outlined in its reasons for judgment including its reason for the acceptance and the rejection of the respective evidence.

[12] On the aspect of onus of proof, the appellant contended that the appellant does not have the onus to prove his innocence and that the onus is on the state to prove beyond reasonable doubt. It was argued further, that the state must produce evidence of such a high degree of probability that the ordinary reasonable man after mature consideration comes to the conclusion, that there exist no reasonable doubt that it was the Appellant that committed the crime charged. (See *R v Mlambo 1957 4 SA 727 at 738).*

[13] Opposing grounds 1, 3, and 5, the Respondent argued that the Appellant failed to point out the specific evidence the learned magistrate was supposed to consider and therefore is vague and lacks specificity and that amounts to a mere conclusion drawn by the draftsman. It was further argued that grounds of appeal should be clear and specific and that ground 1 does not appear so.

[14] It was further contended that the trial court in its evaluation of the evidence considered the evidence in its entirety and came to the conclusion that the state witnesses were to be believed and that this is evident from the trial courts judgment.

[15] It was further argued that the trial court summarised the evidence of the defence witnesses and a conclusion reached, that the defence witnesses were not

[3] *S v Singh* 1975 (1) SA 27 N at 228 F- H.

credible and reliable as they were very vague and that their evidence was fabricated and could not help the court to reach a reasonable conclusion.

[16] The Respondent contended that it is true that there is no onus of proof which rests on an appellant to prove his innocence, but where there is evidence presented that implicates an appellant he must answer in order to proclaim his innocence. Therefore the trial court was correct in concluding that the evidence of the appellant was false beyond a reasonable doubt, and therefore there is no reason to temper with the trial court's finding on the conviction.

Ad grounds 2 and 4

[17] The remaining grounds of appeal listed are that the trial court misdirected itself in law by failing to exercise the cautionary rule pertaining to the single- witness evidence in terms of section 208 of the Criminal Procedure Act 51 of 1977. The trial court found that this was owing to the fact that there were many contradictions in the complainant's testimony during the examination in chief, and still finding his version most probable and accepted as true. It was further argued that the basic requirement demanded by our courts for the acceptability of such evidence is that it must be credible.

[18] Regarding the identification of the perpetrator who committed the offence, it was argued that the trial court misdirected itself when evaluating the single evidence of the complainant and failed to exercise the necessary caution in finding that the appellant was correctly and properly identified as the perpetrator who committed the offence. Directing the court to the matters of *S v Kavandji, S v Mthetwa* and *S v Naango*[4], the appellant argued that the identification of the perpetrator who committed the offence depend on various factors as outlined in the aforementioned decisions, and the evidence by or on behalf of the appellant. It was further argued that it is the duty of the court to weigh these factors, one against the other, in light of the totality of the evidence and the probabilities.

[19] Opposing grounds 2 and 4, the Respondent argued that it is clear from the judgment of the trial court that the learned magistrate considered the evidence and

[4] *S v Kavandji* 1993 NR 352 (HC); *S v Mthetwa* 1972 (3) SA 766 (a) at 768 A – C; *S v Naango* 2006 (1) NR 141 (HC).

submission made by both the state and the appellant in assisting her to come to a fair conclusion, by making specific reference to the provisions of s 208 of the CPA. It was further argued that it is therefore without merit to argue that the learned magistrate misdirected herself by failing to properly exercise the cautionary rule pertaining to the single witness evidence.

[20] The Respondent further argued that even if there were any contradictions in the testimony of the complainant, they are not so material that they have any bearing on the evidence adduced in court and that should not lead to the rejection of the complainants' evidence.

[21] The Respondent fiercely contested on the aspect that lies central in determining whether it was indeed the Appellant who committed the offence in question. It was argued that there was absolutely no reason why the complainant would falsely implicate the Appellant, as the Appellant was positively identified as the perpetrator.

[22] It was further argued that the complainant's evidence clearly stated that he torched the Appellant in the face at a close distance of one meter and a half, and he had the benefit of both proximity and lighting when he recognized the appellant as the person who broke into his premises. It was further argued that, not only did the complainant identify the Appellant at night, but he recognized him on his identity card which was amongst a number of identity documents presented.

[23] In conclusion, regarding the failure by the magistrate to consider the evidence of the defence witnesses, it was argued that the learned magistrate in her evaluation of the evidence considered the evidence in its entirety and came to the conclusion that the state witness was to be believed.

Discussion

[24] It is clear from the above submissions, that the gist of the appellant's grounds of appeal is that the trial court misdirected itself when evaluating the single evidence of the complainant and failed to exercise the necessary caution in finding that the appellant was correctly and properly identified as the perpetrator who committed the offence and in the assessment of the totality of evidence adduced, when accepting

the complainant's version as credible, whilst at the same time rejecting the appellant's version as false.

[25] In order to decide whether there is merit in the assertion, the complainant's evidence requires further scrutiny. I do not consider to summarise it in all its detail but rather to put it in context with the rest of the evidence adduced.

[26] The alleged incident of housebreaking with the intent to steal and theft as testified to by the complainant took place on 24 October 2021 at the Big 5 Lodge in Brakwater, whilst alone. According to the complainant, at around midnight, the alarm to their electrical fence went off, and on his way to inspect he observed two unknown men jumping the fence. A few moments later the alarm went off again, and this prompted him to sit in front of the flat, with lights off, in order to catch the suspect off guard.

[27] The complainant testified that it was strange for him to see people approaching their side of the residence, as guests are not permitted to get to their side of the guesthouse. The complainant further testified that not long after, he observed an unknown person walking in the pathway approaching him. He immediately switched on his flash light onto the face of this unknown person, and asked him what he was doing. According to him the person asked him why he is flashing the light in his face and ran away, so fast that he could not get hold of him. Testifying about the lightning conditions, he stated that the pathway, along which the person approached him, had lights on, and there was also floodlight that assisted his sight. What he could further remember is that there was grass on the head of the unknown person, and that he immediately suspected that he gained entry under the fence.

[28] The complainant's next response was to call the building contractor that was busy with renovation work, to provide him with photographs of all nine workers that were on site, and he provided him with four identity documents via WhatsApp Messenger. The complainant looked at the identity documents and recognised the appellant from the photographs on the identity documents and informed the building contractor the identity number of the person he recognised, not knowing it was the

son of the building contractor. The response of the building contractor was that it could not be possible that it was his son, to which the complainant responded that he does not know the workers of the building contractor.

[29] In conclusion, the complainant testified that according to his observation the appellant gained entry to the premises, by cutting the power cables supplying electricity to the fence, and this he discovered the next morning. He further discovered that a number of items were stolen, namely, double mattress, chairs and gas bottles and other items he cannot remember, as his wife made a list of all the items. These items according to the complainant were stolen from a tented chalets which can be regarded as a permanent structure. The estimated value of the stolen items according to the complainant was around N$25 000.00 and nothing was recovered.

[30] The complainant testified that when the plea explanation of the appellant was given he had no comment to make if the appellant said it was not him as he was a student and busy studying for his examination. He was sure that it was the appellant that he saw that night.

[31] During cross examination the complainant was asked to respond how it was possible to identify the appellant from an identity document, which was taken in 2017 and by torching him with a light. His response was that the appellant must produce the identity document to the court, which he did. There was no further evidence after the identity document was produced before court.

[32] The complainant was further asked during cross examination whether he called the police, after the unknown person, he torched ran away. He responded in the affirmative, although the police took some time to arrive at the scene of the incident.

[33] It was further put to the complainant during cross examination that his version comprised of fabricated lies against him with the aim of ruining his studies and education. The complainant responded that he requested the father of the appellant to return the stolen items or pay him for the damages, so that he would withdraw the case against the appellant, however this never happened.

[34] The appellant pleaded not guilty and gave a plea explanation. He informed the court that he was not involved in the commission of the offence. He was a student and was busy writing his examinations at the time the incident happened. He further explained to the court that the complainant never saw him, neither does he know him. He further explained that the only person that he met was his wife. He met her on some occasions when he drops and pick up the workers. He did not go to the site on a daily basis. The appellant called two witnesses in his defence after the close of the state's case.

[35] Lukas Kalwenya, the appellants' father testified that the complainant requested for the identity documents of his employees, which he provided. The complainant returned the identity document of the appellant, whom he claimed to have committed the offence of housebreaking with the intent to steal and theft at the guesthouse. Kalwenya, informed the complainant that it could not be true, as the appellant is his son, who is a student. He would usually pick him up before he proceed to pick his employees.

[36] The witness further testified that he asked the complainant to explain to him, how he was able to identify the appellant as the one who committed the offence. The complainant explained that he flashed a torch light in the appellant's direction when he was one (1) meter away from him. He informed the complainant that it was impossible that he could have identified the appellant, asserting that it was the first time he heard the appellant accused of being in an incident of stealing.

[37] During cross examination, the witness was asked to clarify about who requested for the identity documents and whether it was him or the police. He confirmed that it was him who requested for the identity documents, where after the police officer called him to have an interview. He further confirmed that the identity document of the appellant was part of the identity documents he forwarded to the complainant.

[38] When asked during cross examination why he forwarded the identity document of the appellant when he was not an employee but a student, he replied that he did so as he was requested, to send the identity documents of the employees and everyone that was at the guesthouse.

[39] The witness was confronted with the version of the complainant's testimony, that there was a one (1) metre distance between him and the appellant. He was adamant that it is impossible to identify an unknown person which you have not seen before from a distance of one metre. The witness further confirmed to the court that the appellant is his son and that he was not at the scene of crime when the incident transpired. He testified and confirmed that the appellant was not the one who committed the offence of housebreaking.

[40] The second witness testified that he was an employee of the first witness for, at the time that the appellant was arrested. He further testified that he knew the appellant the appellant for a very long time. He could not believe when he was informed that it was the appellant who committed the offence. The witness informed the court that it was impossible for proper identification of the appellant to have taken place, when there was a distance of one (1) metre between the appellant and the complainant. During cross examination, the witness admitted that he was not present at the scene of crime.

[41] The appellant testified in his defence. He informed the court that, on the date of the alleged incident his father picked him up from school, he accompanied his father from where he was busy with his examination to picking up his employees from their work site. The next morning, his father asked for his identity document which he provided. After some time his father informed him that he was identified by the complainant as the perpetrator of an offence of housebreaking with the intent to steal and theft which was committed at his property.

[42] The appellant further informed the court that the complainant continued to make calls to his father telling him to give him his things that were stolen. The complainant informed the appellant's father that he should know who stole the items. The appellant informed the court that he did not take this issue seriously until when the police called him. They questioned him and was thereafter detained for the offence of housebreaking with the intent to steal and theft.

[43] During cross examination the appellant was asked why he never cross examined the complainant about the fact that he was not an employee but a student

that only accompanied his father. He maintained that he informed the witness that he was a student and that he was not an employee.

[44] The appellant was further asked during cross examination, why he did not challenge the testimony of the complainant, when he informed the court that when the complainant torched him in the face, he yelled at him not to torch him and then ran away. He remarked he informed the complainant that it was not him.

[45] The appellant was further asked why he did not submit proof in the form of documentation to show that he was studying throughout the trial and responded that he did not bring any document to court.

[46] The trial court in its judgment found that the appellant failed to provide a reasonable explanation which would create reasonable doubt in the court's mind. The defence witnesses' testimonies were not credible and reliable as they were vague, fabricated and could not help the court to reach a reasonable conclusion. Therefore, the benefit of doubt cannot be granted to the appellant. Based on the aforementioned evidence that was led, the *court a quo* was of the opinion that the state has proven its case beyond a reasonable doubt and the appellant was found guilty on a charge of housebreaking with the intent to steal and theft.

[47] It is a fundamental principle in our law that in a criminal trial, the state bears the onus of proving the guilt of an appellant beyond reasonable doubt. The appellant is presumed innocent and does not carry any burden to prove his innocence; than his version need only be reasonably possibly true should he decides to give explanation or to testify. However care should be taken that proof beyond doubt does not mean proof beyond any shadow of doubt.[5]

[48] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an appellant may be convicted of any offence on the single evidence of any competent witness. This court considered the provisions of that section in *S v Noble*[1] and held that, when evaluating the uncorroborated evidence of a single witness, caution must be exercised. It is trite law that the exercise of caution should not be allowed to displace common sense.[2] The court must be satisfied that the witness is credible and

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[5] *S v Auala* 2008 (1) NR 223 HC at 236.

his/her evidence should be of such nature that it constitute proof of the guilt of an appellant beyond reasonable doubt.

[49] Besides recognising that the complainant was a single witness in relation to the incident of housebreaking with the intent to steal and theft, and that s 208 of the Criminal Procedure Act was considered, the judgment is silent on what the trial court's approach to such evidence was. Given the established case law on how the evidence of a single witness should be approached and assessed, the presiding magistrate cannot be forgiven for merely stating that the defence witnesses' testimonies were not credible and reliable as they were vague, seemed fabricated, without discussing the assessment of the evidence which led to the conclusion that the complainant was a credible witness. The correct approach is that the complainant's evidence should have been approached with caution where it is uncorroborated.

[50] In *S v HN*[6] the court stated that:

'the evidence of the single witness need not be satisfactory in every respect as it may safely be relied upon even where it has some imperfections, provided that the court can find at the end of the day that, even though there are some shortcomings in the evidence of the single witness, the court is satisfied that the truth has been told'.

[51] Furthermore, Judge Beck in his article Prosecutors *Bulletin*[7], advises that:

'In assessing the quality of the single witness' evidence (in order to decide whether X should be convicted on the basis of this evidence,) the court should take the most attentive note of the witness. It should take particular note of his apparent character, his intelligence, his capacity for observation, his powers of recall, his objectivity and things like that. The evidence should be carefully weighed against the objective probabilities of the case, and against all the other evidence which is at variance with it. The court must have rational grounds to conclude that the evidence of the single witness is reliable and trustworthy and is a safe basis for convicting X.'

[52] It is common cause that the evidence against the appellant is solely based on the complainant's evidence who was the only witness present when the appellant allegedly committed the offence of housebreaking with the intent to steal and theft.

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[6] *S v HN* 2010 (2) NR 429 (HC) at 443E – F.

[7] Criminal Defender's Handbook, July 2016: Prosecutors *Bulletin* Vol. 1 No 1 at page 18.

[53] It is trite that before placing any reliance on the evidence tendered by a single witness, any other corroboratory evidence is a pre-requisite. In case the complainant was the only witness and there is no independent witness to corroborate his evidence. He is a single witness and admitted to have not seen the appellant prior to the alleged incident. He allegedly only saw the appellant on the night in question on the night in question when he flashed his light in his face, in the darkness and thereafter identified him from a number of identity documents he was presented by the contractor, who is the father of the appellant. According to his evidence, the person fled the scene, after asking him why he flashed the light in his face. The complainant further admitted that his wife was the only person who knew the employees of the contractor as she was on site daily, yet she was not asked to attend an identification parade, neither asked to testify during the trial.

[54] It appears that the complainant only considered the various identity documents send to him the next day, to identify the culprit. No other factors were considered. Under the circumstances, the evidence of identification presented by the complainant does not give an impression that he was truthful and reliable. He identified him by flashing him with the light.

[55] As regards the identification of the appellant, the two defence witnesses maintained that he was not an employee of his father, but a student coming from school. He accompanied his father to collect his employees. Reference was made in *S v Mthethwa*[8] where the correct approach to the assessment of evidence of identification is set out. The relevant part inter alia reads as follows:

> 'That because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested, that depends on various factors. It further states that these factors must be weighted one against the other, in the light of the totality of the evidence and the probabilities. The court should be satisfied not only that they are honest, but also that their identification of the appellant is reliable.'

[56] The *court a quo* was not only faced with a single witness's evidence, but was also presented with mutually destructive versions. What remain to be considered is

[8] *S v Mthetwa 1972 (3) SA 766 (a) at 768 (A-C).*

the version of the complainant linking the appellant to the commission of the crime and that of the appellant and his witnesses denying to have had a hand in the commission of the offence. The court must have a good reason for accepting one version over the other.

[57] When considering the uncorroborated version on the identification by the complainant and the corroborated version on the identification by the appellant, the court a quo was faced with two mutually destructive versions and stood guided by the approach followed in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others*[9]. On the one hand, is the evidence of the complainant implicating the appellant as the one who committed the offence, whilst on the other hand, the appellant disputes the allegations. In these circumstances, the court has to apply its mind not only to the merits and demerits of the respective witnesses, but also to consider the probabilities of the case.

[58] In the same vein, it cannot be said with certainty that the evidence of the appellant and his witnesses is without shortcomings, however, no onus rests on the appellant to convince the court of the truth of any explanations he had given, even if that explanation is improbable. What is required is for the court to be convinced that such explanation is not only improbable, but false beyond reasonable doubt.[10] The test remains, whether there is a reasonable possibility that the appellant's evidence may be true and, in applying that test, the court need not even believe his story. It is sufficient if the court is satisfied that there is a reasonable possibility that it may be substantially true.[11] I agree and endorse the above *dictums* in those cases.

[59] It appears from the judgment, that the *court a quo* did not pronounce itself on the aspect of the identification of the appellant by the complainant and the application of s 208 of the Criminal Procedure Act 51 of 1977. The *court a quo* only relied on the uncorroborated version of the complainant. In light of the conclusion ultimately reached, this court was required to decide the matter based on the principles in the matter of *Mthethwa* and *Stellenbosch Winery*[12].

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[9] *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET Cie and Others* 2003 (1) SA 11 (SCA).
[10] *R v Difford* 1937 AD 370 at 373.
[11] *S v Jaffer* 1988 (2) SA 84 at 89D.
[12] Supra.

[60] Applying the above principles to the present facts, and after considering the merits and demerits on both sides, and the probabilities based on the established facts, I find that the evidence of identification presented falls significantly short of satisfying the required standard of proof rendering it unreliable. I further find that the failure by the *court a quo* to treat the evidence of the single witness with caution stands to be faulted, thus the appellant is entitled to the benefit of the doubt.

[61] In the result, and for the reasons set out above, I make the following order:

1. The appeal is upheld and the conviction is set aside.
2. It is ordered that the appellant be released from custody forthwith unless lawfully detained.
3. Matter regarded as finalised and removed from the roll.

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P CHRISTIAAN

JUDGE

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D USIKU

JUDGE

APPEARANCES:

Appellant: S Kanyemba

Of Salomon Kanyemba Legal Practitioners,

Windhoek.

Respondent: B Lilungwe

Office of the Prosecutor-General,

Windhoek.