CASE NO 230/99 **REPORTABLE**

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

D MOHLATHE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM : F H GROSSKOPF, SCOTT *et* PLEWMAN JJA
HEARD : 26 SEPTEMBER 2000
DELIVERED: 29 SEPTEMBER 2000

Further evidence in support of application for condonation for late filing of heads of argument in Court below admitted on appeal - circumstances justifying admission of such evidence - identity parade - need to ensure that non-suspects be similar to suspects in general appearance - desirability of photograph to enable Court to see for itself.

J U D G M E N T

SCOTT JA/.....

SCOTT JA:

[1] The appellant was convicted on two counts of robbery in the Regional Court. He was sentenced to 10 years imprisonment on each count but eight years of the sentence on the one was ordered to run concurrently with the sentence on the other so that in the result the effective period of imprisonment imposed was 12 years. Both counts related to incidents in which female motorists were robbed of their vehicles at gun point. Originally the appellant (who was accused 2 at the trial) was charged with four counts of robbery. However, one of the counts (count 1) was withdrawn before the commencement of the trial. He was acquitted on count 2 but convicted on counts 3 and 4. As to his fellow accused, accused 1 was convicted on counts 2 and 4 (and acquitted on count 3), while accused 3 and 4 were convicted on counts 2, 3 and 4.

[2] The appellant noted an appeal to the Witwatersrand Local Division

against both his conviction and sentence. Counsel's heads of argument were filed 13 days late. The appellant's application for condonation of the late filing was refused by the Court *a quo* without reference to the merits of the appeal and the appeal was struck from the roll. The present appeal is against that order and is without the leave of the Court of *a quo*, such leave being unnecessary. (See *S v Gopal* 1993 (2) SACR 584 (A).)

[3] The dates and events relevant to the application for condonation in the Court *a quo* are recorded in the judgment of Blieden J as follows:

> "1. On 11 June 1998 the appellant was informed that the appeal would be heard on 6 November 1998, which is today. On the same date and in the same notice, the appellant was informed that his heads of argument were to be filed on or before 6 October 1998, such being the date fixed in terms of Rule 8(1) of the Rules of the High Court (Transvaal Provincial Division and Witwatersrand Local Division).
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> 2. On 8 October 1998 as the appellant's heads of argument had not been filed by the due date referred to in the above paragraph, the respondent served a notice to have the appeal struck off the roll and this notice was served on the appellant's attorney and counsel.

3. On 19 October 1998, some thirteen days out of time the appellant filed his heads of argument with the respondent and the court.

4. On 29 October 1998 the respondent filed its heads of argument. In these heads of argument the *in limine* point was taken that as the appellant had not filed any application for the condonation of its late filing of his heads of argument the appeal should be struck off the roll.

5. On 4 November 1998, that is two days before the dates fixed for the hearing of this appeal, the present application for [condonation for] the late filing of the appellant's heads of argument was served."

[4] Subsequent to the trial, the appellant's mother, acting on his behalf, terminated the services of the attorney who had represented him at the trial and engaged a new legal team to prosecute the appeal. At the time the appellant was in custody as, indeed, he still is. The application for condonation was supported by the affidavit of the appellant's mother. The sole explanation advanced for the late filing of the heads appears from the following paragraphs of her affidavit.

"8. There were several consultations with Counsel prior to October 1998 in connection with this appeal. However, shortly before 6 October

1998, the due date for the filing of the Appellant's Heads of Argument, I had a further consultation with Counsel and was presented with a rough draft of the Heads of Argument prepared by Counsel. I was not satisfied that all material points had been raised in said draft and presented Counsel with several pages of points for argument which I insisted be canvassed in the Heads of Argument.

9. I was advised by Counsel that as a result of these new points he was compelled to reread substantial parts of the record, the record being some 600 pages in length, to consider whether my points had any merit in them.

10. My insistence on this course of action as set out above, I intended to be in the best interests of the Appellant. However, because Counsel had to consider new fresh points, reread substantial parts of the record and include these points in the Heads of Argument, it resulted in same being filed late with the above Honourable Court."

[5] In dismissing the application the Court *a quo* noted its vagueness and lack of candour and emphasised that no attempt had been made to explain why the preparation for the appellant's heads of argument had only taken place shortly before 6 October 1998. It pointed out further that the appellant's attorney had not made an affidavit explaining the reason for the delay and concluded that in effect

no acceptable explanation had been furnished for the delays, including the delay in the filing of an application for condonation.

[6] In this Court counsel for the appellant (who was not the counsel who represented the appellant in the Court *a quo*) readily conceded that having regard to the explanation advanced in the Court below he was unable to contend that it had erred in dismissing the application for condonation and striking the appeal off the roll. He accordingly relied solely on the further evidence which it was sought to place before this Court by way of an application in terms of s 22 of the Supreme Court Act 59 of 1959.

[7] The evidence sought to be admitted is contained in the affidavits of the appellant himself, his present attorney, his mother and other members of his family. There is much which is of little relevance but the following are the salient facts or allegations which emerge from the affidavits.

(a) From the time of his conviction and sentence (the latter being imposed

on 23 December 1997) the appellant has been intent upon appealing against both his conviction and sentence.

(b) In early January 1998 members of the appellant's family, acting on the recommendation of a friend, approached an advocate directly, i e not through an attorney, and requested him to prosecute the appeal on the appellant's behalf. The advocate, to whom I shall refer as 'K', accepted the brief and on 13 January 1998 personally visited the appellant in prison to obtain his power of attorney to prosecute the appeal.

(c) The appellant's family paid K a total of R11 000 for his services. This amount was paid in instalments. The first, of R4 500, was paid in May 1998. The final instalment of R1 000 was paid on 8 September 1998.

(d) The appellant took an active interest in the progress of his appeal. At least on two occasions he produced hand-written notes relating to the merits of the appeal which were rewritten (and the grammar corrected) by his mother and handed

to K. The first, dated 28 May 1998, contained nothing, apart from certain references to the Constitution, which would not have been readily apparent from a reading of the record. The second, dated 8 October 1998, was no more than a repetition of something the appellant said in his evidence in chief.

(e) In response to a telephone call on 3 November 1998, the appellant's mother visited K in his chambers on 4 November 1998. (This, it will be recalled, was the day on which the application for condonation was filed.) She was given an affidavit to sign dealing with what K described as "a technical aspect". She said she paid little regard to its contents and merely did what she was told. K handed her a copy of his heads of argument which she studied at home.

(f) On reading the heads, she realised that there was to be an application for the appeal to be struck from the roll. She immediately telephoned K to arrange to see him on 5 November 1998, which she did. K told her not to worry and that it was normal practice for the courts to accept affidavits seeking condonation for

the late filing of documents.

(g) The following day, 6 November 1998, the appellant's mother and other members of his family were in court when the appeal was struck from the roll.

(h) On 9 November they consulted the appellant's present attorney. They also lodged a complaint against K with the Society of Advocates. As a result, a member of the society has been appointed to investigate the complaint. The amount of R11 000 paid to K has since been returned.

[8] The circumstances in which this Court will admit further evidence, whether on affidavit or otherwise, or remit a matter to the court of first instance for the hearing of further evidence are extremely limited and the basic requirements that must be satisfied before such a course will be adopted are well established. The formulation of those requirements by Holmes JA in *S v De Jager* 1965(2) SA 612 (A) at 613 C - D has been repeatedly quoted. It reads:

"(a) There should be some reasonably sufficient explanation, based on

allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial."

The need for circumspection is obvious. Quite apart from the interests of finality, there is always the possibility of evidence being fabricated after conviction to meet a weakness in an accused's case exposed in the judgment (*S v N* 1988(3) SA 450 (A) at 458 F - G). In the present case, of course, the evidence sought to be admitted does not relate to the guilt or innocence of the appellant but to the circumstances in which the heads of argument on behalf of the appellant came to be filed some 13 days late in the Court below. At the time the appellant was in custody. The best person to explain the delay would have been the appellant's erstwhile legal representative, K, who was engaged to prosecute the appeal and whose duty it would have been to file the heads of argument timeously. That person chose not to make an affidavit himself but instead to draft an affidavit for the

appellant's mother to sign which was hopelessly inadequate. At the time the appellant's mother relied upon him for advice and to do what was necessary to carry out his mandate with reasonable skill. By the very nature of things it is understandable that the appellant should now find himself hard pressed to provide an explanation why the evidence sought to be admitted was not placed before the Court *a quo.* The mandate of K has been terminated. His conduct in relation to this case is presently being investigated. The appellant is unlikely to obtain his cooperation in these proceedings. In appropriate circumstances this Court has the power to relax strict compliance with the requisite of a "reasonably sufficient explanation", but only in rare instances (*S v Njaba* 1966 (3) SA 140 (A) at 143 H). The present case seems to me to be such an instance.

[9] The main thrust of the argument advanced on behalf of the respondent was, however, that the new material did not assist the appellant as there was still no explanation for the failure to file the heads of argument timeously. There was also

no explanation why the application for condonation was filed only two days before the matter was to be heard. Accordingly, so it was contended, the evidence sought to be introduced was not "materially relevant to the outcome of [the application]". (See subpara (c) of the passage quoted above from *De Jager*'s case.) This brings me to the criteria to be applied when considering an application for condonation. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C Holmes JA pointed out that

> "the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides".

The learned judge continued:

> "Among the facts usually relevant are the degree of the lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation".

(See also *S v Di Blasi*, 1996(1) SACR 1 (A) at 3f - h.) Whether an explanation is acceptable or not for the purpose of granting condonation is therefore essentially a matter for the discretion of the court to be exercised in the light of all the circumstances of the case including the considerations referred to in the passage quoted above.

[10] It is true that K did not make an affidavit in which he acknowledged the fault to be his or attempt to explain that the reason for the failure was something beyond his control. What I think is clear is that the appellant's family did all that was expected of them. They could hardly have done more. Counsel for the respondent pointed out that the appellant's mother did not refute the explanation contained in her earlier affidavit of 4 November 1997 to the effect that shortly before 6 October 1998 (the date by which the heads had to be filed) she had furnished K with several pages of points which she insisted be canvassed in the heads of argument. But this does not mean that the blame must be laid at her door.

K could easily have incorporated the points briefly in his heads and filed a supplementary note later, or he could merely have done the latter and explained to the appellant's mother the importance of filing the heads timeously. In any event, if the appellant's notes annexed to the papers are anything to go by it is difficult to imagine that an advocate who had read the record would have had much difficulty in adapting his heads to accommodate some layperson's point which he thought might have merit. Presumably, neither the appellant nor his mother are trained in the law. In all the circumstances the inference is overwhelming that the late filing of the heads of argument was solely the fault of K.

[11] As was pointed out by Steyn CJ in *Saloojee And Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141 C,

> "there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered."

He warned:

> "To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity."

But the present is not a case in which the client simply left it to the practitioner to get on with the case. On the contrary, the appellant's family took a keen and active interest in the prosecution of the appeal and kept themselves informed of developments. There was nothing they could have done to avoid the heads being late. In the event, the heads were filed 13 days out of time and eight days prior to the hearing. No doubt this would have caused much inconvenience, but the delay was not inordinate. Similarly there was a delay in filing the application for condonation, but this, too, was no more than a matter of a few days. This does not seem to me to be an instance where the dilatoriness of the practitioner is to be visited on the client.

[12] In all the circumstances I have come to the conclusion that the evidence sought to be admitted is sufficient to tip the scales in favour of the

appellant at least to the extent that it would be inappropriate to refuse condonation without reference to the prospects of success. The evidence will accordingly be admitted. Whether condonation is to be granted or not must depend therefore solely on an assessment of the prospects of success of the appeal. This is the question to which I now turn.

[13] It was not in dispute that on the evening of 18 November 1996 Ms Dianne Kritzinger, the complainant in count 3, was robbed of her BMW motor car. Her account of the incident, in brief, was the following. She said that just after 7 pm as she pulled into her driveway in Jukskei Park, Randburg, she observed a white BMW motor car parked in her neighbour's driveway. She was about to alight when she was approached by two men. They were both armed with handguns. The one came to the driver's door and the other, whom she later identified as the appellant, climbed into the passenger seat next to her. She was pulled out of the driver's seat and the two robbers drove off in her car. At the same

time the white BMW pulled away, driving slowly in the opposite direction.

[14] There was a marked similarity between Ms Kritzinger's experience and that of Ms Ann Murphy, the complainant in count 4, who was robbed of her BMW motor car on 4 December 1996. She testified that at about 7.15 pm, as she pulled into the driveway of a friend in Jukskei Park, Randburg, a white BMW motor car drew up alongside her. Four men jumped out. Two came to her door; they were both armed with handguns. One of them she identified the next day as the appellant. The window of the driver's door was smashed and she was pulled out of the car. She tried to make for a nearby gate but was confronted by the other two who had come from the white BMW car. They grabbed her and ripped her watch from her wrist and two chains from her neck. The robbers then drove off in her motor car followed by the white BMW. She observed two men in the latter vehicle.

[15] An identification parade was held at the Brixton police station the next

day, 5 December 1996, at which the appellant was pointed out by both Ms Kritzinger and Ms Murphy. Their identification of the robbers was the subject of much criticism at the trial. Ms Kritzinger not only pointed out the appellant at the identification parade but also a "non-suspect" whom she said was one of the persons she saw in the white BMW. She also requested that accused 4 be asked to step forward so that she could have a better look at him. (The witnesses were required to identify persons through tinted one-way glass.) Although she refrained from positively identifying him then, she did so months later in court. Ms Murphy identified both the appellant and accused 4 at the identification parade. At the trial, however, she confused accused 4 with accused 3, pointing out the latter as the person she had identified at the parade. The constitution of the parade itself was similarly criticised, both with regard to the age and the build of the non-suspect participants. The appellant also alleged that he had been denied the right to have his attorney present.

[16] It is convenient to consider first the appellant's conviction on count 4. The evidence against him on this count strikes me as overwhelming, even if his identification by Ms Murphy is disregarded.

[17] Some time prior to the robberies the police had set up what was described in evidence as a "front" house in Olivedale where stolen vehicles were "received" at prices far below their true market value. The operation was conducted mainly by inspector Silamolela who was attached to a special investigation unit at Braamfontein. In his dealings with the underworld he was known as "Brian".

[18] On the evening of 4 December 1996 captain Ludick of the organised crime unit, Johannesburg, was at the "front" house in the absence of inspector Silamolela. He testified that at 7.30 pm a blue-grey 316 BMW motor car pulled up outside the gate. The appellant who was the driver got out of the car and came to the gate where he was met by Ludick. The appellant asked for "Brian". Ludick told him that Brian was not there and suggested that the appellant speak to him on his

cellular phone. The appellant then drove the car through the gate and parked it outside the garage. Ludick observed that the other occupants were the other three accused. The right front window was broken. All four accused then proceeded to search the vehicle and found in it various items including a handbag and a baseball bat. The appellant handed the keys of the car and also the immobiliser to Ludick and said that he would arrange with Brian for payment for the car. In the meantime Ludick had noticed a white BMW motor vehicle parked outside with two occupants. He made a mental note of its registration number. The four accused then got into the white BMW which drove away.

[19] A decision was taken to arrest the accused the next day at the "front" house when they came to collect the money for the vehicle which had been delivered to Ludick. At about 10.30 am on 5 December Ludick was on his way to the "front" house for the purpose of procuring the arrest of the appellant and the other 3 accused when he saw all four of them in the same white BMW motor car

presumably headed for the same destination. The appellant was the driver. Ludick was accompanied by sergeant Mostert, inspector Holtzhausen and superintendent Fourie. He feared that one or other of them may have been recognised as policemen and the decision was accordingly taken to arrest the appellant and his fellow accused there and then. The white BMW was stopped, its occupants first frisked for weapons and then more thoroughly searched. Ludick testified that he found a gold chain in the pocket of the appellant's jeans. Inspector Holtzhauzen confirmed having been shown the chain, although he did not actually observe Ludick finding it on the person of the appellant. The investigation officer, sergeant Ras, was called to the scene. He testified that he was handed the gold chain by Ludick who also gave him the keys to the BMW motor car which had been left at the "front" house the previous evening. Ras testified that both the BMW motor car and the gold chain were identified by Ms Murphy as the motor car and chain respectively which had been taken from her the previous evening.

[20] The appellant denied in evidence that he had participated in any of the robberies or that he had gone to the "front" house on the evening of 4 December 1996. As far as the events of 5 December were concerned, he said that he had merely been given a lift by the others and was on his way to assist his aunt whose motor car would not start. He said that he had taken over as driver from accused 3 as the latter complained that his leg was sore. The explanation offered by the other accused who gave evidence was that they similarly were innocent and were merely acting on behalf of someone known as "oupa" who had sent them to the "front" house to collect money.

[21] The trial court accepted the evidence of Ludick and rejected that of the accused (including the appellant) to the contrary. I can see no reason for interfering with this finding. It was not suggested that Ludick's identification of the appellant was merely mistaken. Nor, I think, could this be seriously contended. According to Ludick he had a conversation with the appellant on the evening of 4

December 1996. He again saw the appellant the next morning at 10.30 am when the latter was arrested. The intervening period was therefore no more than a matter of hours.

[22] It was suggested on behalf of the appellant that had he indeed been involved, it is improbable that he would have handed the vehicle over to Ludick whom he did not know. But the "front" house as a place where vehicles were purchased was known at least to accused 3 and 4 who had delivered Ms Kritzinger's vehicle to that address and received payment for it. In any event, the fact remains that Ms Murphy's vehicle which had been "high-jacked" at 7.15 pm was delivered to the "front" house some 15 minutes later and the keys entrusted to Ludick. However unwise it may have been for the robbers to trust Ludick, they must have believed that he was in the business of receiving stolen motor vehicles.

[23] Ludick was also criticised for not arresting the persons concerned on the evening of 4 December when they were still in possession of the stolen vehicle.

This criticism is misplaced. As explained by Ludick, he and sergeant Haley were the only policemen present at the time. (Haley was hiding in the house to avoid possibly being recognised.) He, Ludick, was unarmed and he had no way of knowing whether the six persons (the four appellants and the two occupants of the white BMW) were armed or not. His decision not to attempt an arrest, it seems to me, was a wise one in the circumstances.

[24] With regard to the gold chain, it was put to Ludick in cross-examination that the appellant would say in evidence that Ludick had "planted" it on the appellant and then "found" it on him at the Brixton police station. However, in his evidence in chief the appellant gave a somewhat different version. He said that while they were at the Brixton police station Ludick had approached him with the chain and asked him where it had come from. In cross-examination the appellant attempted to reconcile the two versions. His attempt was far from persuasive. In any event, according to Ras the chain was handed over to him at the place where

the appellant was arrested and before he and the other accused were taken to the Brixton police station.

[25] It follows that I am satisfied that the appellant was correctly convicted on count 4 and there can be no reasonable prospect of him succeeding on appeal. The same is true of the sentence of 10 years imprisonment imposed in respect of this count. It is true that the appellant was a first offender and only 21 years of age at the time of the offence, but the regional magistrate was fully aware of this. He nonetheless felt that the gravity of the offence was such that a sentence of 10 years imprisonment was called for. I am unpersuaded that there is any justifiable reason for interfering with this sentence.

[26] The appeal against the order refusing condonation must therefore fail in so far as it relates to count 4.

[27] I turn to count 3. The appellant's conviction on this count rested almost entirely on the evidence of Ms Kritzinger who identified him as one of the

robbers. As previously mentioned, Ms Kritzinger pointed out someone at the identification parade who was not a suspect. She also identified accused 4 at the trial as one of the robbers although she had failed to point him out at the parade. Furthermore, the constitution of the identification parade itself was in my view far from satisfactory. According to the printed form, which was completed at the time, those participating in the parade were said to be "of about the same height, build, age and appearance and were dressed more or less similar to the suspects". But this was clearly not so. The oldest of the four accused was 23. The appellant was 21 and accused 4 only 17 years old. It appears from the form, which records the ages of the suspects as well as the non-suspects, that of the 15 non-suspects, one was 40 years of age, six were in their thirties and two were 29. Sergeant Jordaan who was in charge of the parade suggested that in appearance they were all more or less of the same age. I have difficulty accepting that the difference in age between say a 17 year-old and a 40 year-old would not have been immediately

apparent. No photographs were taken so as to enable the court to judge for itself.

[28] The same difficulty arises in relation to the question of height. Two of the accused, the appellant and accused 4, were tall and slim, the latter being taller than the former. Accused 3 was very short and accused 1 somewhat taller. The appellant testified that he and accused 4 were the tallest at the parade. His evidence was to some extent supported by that of Mr Medlock who attended the parade as a witness in respect of count 2. He described accused 4 as standing out "head and shoulders above the other people in line". Jordaan sought to refute this by saying that one of the non-suspects, Rashid Kaldin was no more than a few centimetres shorter than accused 4 and that there was another non-suspect who was of the same height and build as the appellant. But not only was Rashid Kaldin described as "coloured", he was 40 years of age, almost twice as old as the appellant and more than twice as old as accused 4. The person who, according to Jordaan, was of the same height and build as the appellant, was not identified. Once

again the absence of a photograph precluded the court from seeing for itself and making its own assessment.

[29] Common sense dictates that the non-suspects participating in an identification parade should be similar to the suspect in general appearance. Indeed, as appears from the identification parade form which was used on this occasion, it is a matter of police practice that the non-suspects be "of about the same height, build, age and appearance" as the suspect and that they be similarly dressed. Where the parade includes several suspects whose general appearance is markedly different, whether on account of height, build, age or otherwise, care should be taken to ensure that there are sufficient non-suspects whose general appearance approximates that of each of the suspects. In such circumstances it may be advisable to hold more than one parade, particularly if the number of non-suspects that would be required would result in the parade being unduly large and cumbersome. If the number of non-suspects whose general appearance

approximates that of each suspect is too few, or if there are other features of the parade which may materially influence an identifying witness, the probative value of the identification will be greatly reduced. The danger in such a case is, of course, that, because the identification is made at a parade, it carries with it an assurance of reliability which is unjustified. (See *R v Kola* 1949 (1) PH H 100 (A).)

[30] In order to succeed in relation to count 3 the appellant has to show that there is a reasonable prospect of success on appeal. In the light of the unsatisfactory features of the identity parade to which I have referred and the shortcomings of Ms Kritzinger as an identifying witness the conclusion to which I have come is that condonation for the late filing of heads of argument should be granted in respect of the appellant's conviction on count 3. For the reasons given in relation to count 4, I am unpersuaded that there are reasonable prospects of

success in so far as the appeal against sentence is concerned.

[31] In the result the following order is made:

(a) The application in terms of s 22 of the Supreme Court Act 59 of 1959 to admit further evidence is granted.

(b) The appeal against the refusal of the Court *a quo* to grant condonation for the late filing of heads of argument in relation to the appeal to that Court against the conviction on count 3 is upheld and condonation for such late filing of heads of argument is granted.

(c) The appeal against the refusal of the Court *a quo* to grant condonation for the late filing of heads of argument in relation to the appeal to that Court against the conviction and sentence imposed on count 4 is dismissed, as is the appeal against the refusal of the Court *a quo* to grant such condonation in relation to the appeal to that Court against the sentence imposed on count 3.

(d) The matter is referred back to the Witwatersrand Local Division for adjudication of the appeal against the conviction on count 3.

D G SCOTT

Concur:

F H GROSSKOPF JA
PLEWMAN JA