THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case no: 344/05
REPORTABLE

In the matter between:

Jimmy H CHARZEN First appellant

Brian M MSIBI Second appellant

and

The STATE Respondent

Before: Cameron JA, Jafta JA and Maya AJA
Appeal: Friday 24 February 2006
Judgment: Thursday 9 March 2006

Criminal law – Evidence – Identification – Error in description of attacker – Error unignorable, and not explained – Doubt created about other aspects of identification – Absence of physical evidence (fingerprints or retrieved items) creating reasonable doubt

Neutral citation: This judgment may be cited as S v Charzen [2006] SCA 6 (RSA)

JUDGMENT

CAMERON JA:

[1] This appeal turns on the reliability of identification evidence. On Tuesday 23 January 2001 at Chiawelo in Soweto, three armed men committed a bloody robbery at the home of the complainant, Mr Alexius Lambert Amtaika, a political science lecturer at Vista University. They took his Audi A4 motor vehicle, a wallet containing R600 in cash, a mobile phone, books, cassettes and a blue baby seat. One of the robbers threw his eleven-month old daughter, who had been strapped into the seat, from the car before they left. In the course of their depredation two of them shot the complainant – seemingly quite gratuitously, for he offered no resistance. He suffered five gunshot wounds to his legs and was fortunate not to undergo an amputation.

[2] Two days later, on Thursday 25 January 2001, two men were arrested in Eldorado Park in connection with the Chiawelo robbery. Since the investigating officer was not called to testify, we do not know the circumstances of their arrest, nor (so far admissible) what led to it. We only know that on 8 February 2001, after the complainant was discharged from hospital, an identification parade was held at Protea Police Station in Soweto. Amongst nine other persons, three

suspects in connection with the Chiawelo robbery were on parade. They were the two appellants and one Julius Hlongwane, who had apparently been arrested earlier.

[3] The complainant identified two persons at the parade as the two robbers who shot him. They were Brian Musa Msibi and Jimmy Hlangabeza Charzen, the two appellants. He could not identify the third. His wife, who fled the scene, distressed but unharmed, was unable to make any identification at the parade, and was not called to testify.

[4] In June 2002 Msibi and Charzen stood trial in the Protea Regional Court in Soweto as accused 1 and 2 on charges of robbery and attempted murder, together with associated arms and ammunition counts.[1] There were only two state witnesses: the complainant, and inspector Luthuli, who was in charge of the identification parade. Neither accused offered any plea explanation, but both testified in their own defence. They denied involvement in the robbery. The regional magistrate, Mr H Badenhorst, convicted both of robbery, and accused 2 (who

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[1] Since the order in which the appellants appeared at the trial created some confusion in the high court, and since the order in which they are cited in the appeal has been reversed, it seems clearest to refer to them as at the trial.

the complainant said fired four of the five shots) in addition of attempted murder. Both were convicted of unlawful possession of arms and ammunition. Applying the minimum sentence provisions of the Criminal Procedure Act 51 of 1977, he sentenced accused 1 to effective imprisonment of 20 years, and accused 2 to 32 years.

[5] The Johannesburg High Court (Masipa J, Tshiqi J concurring) dismissed the appeals against conviction, but ordered that accused 2's twelve-year sentence on the attempted murder charge run concurrently with the other sentences, thus making both accused's effective sentence 20 years. The high court granted accused 2 leave for this further appeal against conviction and sentence. Shortly before the hearing, accused 1 obtained similar leave.

[6] Before us, as in the high court, the principal question was the adequacy of the complainant's evidence identifying the accused as the two robbers who shot him; and to appreciate the argument on their behalf it is necessary to set out the state's case in more detail.

State case

[7] The complainant was the sole witness to the robbery. He testified that he arrived at his home and parked his car in the garage. His wife and daughter were with him. As he was locking and immobilising the vehicle, he heard his dog barking and saw three armed men entering his property. One – whom he identified as the first accused – ordered him to hand over his keys. While accused 1 was searching him, a second robber – whom he identified as accused 2 – shot his dog. Accused 1 ordered him to lie down, but while he was trying to do so, accused 1 shot him in his right foot. He fell to the ground. Accused 2 then came forward and fired four further shots at him: in his left hip and calf, and on his right leg and ankle. A third robber was at or near the gate, but did not enter the garage. The two robbers dragged him outside, where they left him lying face up. Accused 1 could not start the car. He returned and fired further shots into the ground next to the complainant, who explained to him what had to be done. The car started. As accused 1 reversed he threw the toddler out (she landed on the complainant's chest), picked up his two accomplices, and sped off.

[8] The complainant testified that he had ample opportunity to identify two of the robbers. He saw accused 1 at close range

several times, and had considerable time to look at accused 2 while he was lying face-up outside his garage, pleading for mercy. The third he could not identify: the man did not enter the garage, but retired to the gate to keep a look-out.

[9] During the complainant's ten-day stay in hospital (the date unfortunately does not appear from the record), Inspector Swanepoel took a sworn statement from him. Swanepoel did not testify, so we do not have his account of the complainant's apparent physical and mental state, but in cross-examination the complainant affirmed that the statement recorded accurately what he told Swanepoel and that its contents were confirmed with him before he signed.

Was the complainant's identification of the accused reliable?

[10] The complainant was emphatic that his identification was accurate. He related that when asked in hospital whether he could identify his attackers, he told Swanepoel, 'Yes, even in a million years I'll be able to identify them.' During cross-examination he stated that not only did he have time 'to look at them thoroughly, but I had physical contact with them, verbal contact with them, and eye contact with them'. 'All I was interested [in] is to look at their faces, because I knew that

maybe I will survive ... to help the police in drawing the identikit of the people who came – who invaded my home, took my car and shot me.' What is more, as the magistrate pointed out in his judgment, and the high court emphasised on appeal, the complainant was a good witness: clear, coherent, specific and verbally expressive.

[11] But, as our courts have emphasised again and again, in matters of identification honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance can be 'dangerously unreliable', and must be approached with caution.[2] This case illustrates the risks.

[12] In his statement to Swanepoel, the complainant ascribed one feature only to each of his attackers, whom he had never seen before. The first – identified as accused 1 – was a 'man with

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[2] DT Zeffertt, AP Paizes and A St Q Skeen, *The South African Law of Evidence* (2003) page 142.

dreadlocks'. The other – accused 2 – 'had a light complexion'. The trial confirmed that accused 2 was light in complexion. But neither at the identification parade, held some sixteen days after the robbery, nor at trial did accused 1 have dreadlocks. His hair was short.

[13] On its own, this would not be remarkable, for dreadlocks ('a Rastafarian hairstyle in which the hair is twisted into tight braids or ringlets')[3] are eminently removable; and indeed a criminal may deliberately remove them to try to mask his identity. What is significant is the complainant's response when challenged on the apparent absence of dreadlocks. His response suggested that there may have been no dreadlocks at all:

> 'He was putting on something like you know, something like that lady has on. It's a – it was something like a hat, but – yes, of that type, yes.'

This proved to be a woollen hat, as worn by a person in court, pulled down to the hairline. After conceding that 'dreadlocks and that hat … are totally different things', the complainant proceeded:

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[3] Concise Oxford Dictionary.

‘Well, to me what he was wearing is not very important. To me the face mattered most, because I knew that I cannot go for identity parade to identify somebody who has got dreadlocks, or who has got a hat. To me, what matters most is the face. You cannot identify someone by a hat or dreadlocks. The face matters most.’

[14] The complainant’s observation is correct: facial characteristics are a more reliable and enduring source of identification than variable features such as hairstyle or clothing. But that assertion – propounded repeatedly during his cross-examination – underscores the significance of his mention of the dreadlocks. If they were immaterial to his recollection, why did he mention them at all? On the other hand, if they were material, but there were no dreadlocks, his error is unignorable.

[15] The mystery was not cleared up during the complainant’s evidence, for he neither insisted that there were dreadlocks during the robbery (which must have been shaved off later), nor conceded that he had made an error: instead, he attempted to minimise the importance of what was in his statement by insisting on the irrelevance of non-facial features. In keeping with this approach, counsel for the State urged us on appeal to find that the complainant was an impressive witness overall,

and that the dreadlocks were immaterial. But they cannot be dismissed, for the complainant's statement mentions them twice; and his very articulacy as a witness, and the precision of his recall in other respects, make the unaccounted error the more obtrusive. It unavoidably raises the question of how reliable his recall was in other respects. And it makes it the more regrettable that the police officers who arrested the accused were not called to testify, since they would have been able to relate whether accused 1 had dreadlocks two days after the robbery. We shall never know.

[16] If the complainant did err, his error may be explained in another feature of his evidence, namely the time at which the attack occurred. He testified very specifically that he returned at about 19h15, having left home at 18h30 to fetch his spouse in Coronationville. In his police statement, too, he gave the time as 19h15. When quizzed about visibility at this hour, he recorded that there was no electric light inside his garage, but that (a) the sun was still shining; and (b) the street lights outside were on. When the cross-examiner suggested a contradiction, he insisted that in his area the streetlights could be on at any time.

[17] Yet, if the complainant was correct about the time, we must take notice that more than a month after the summer solstice in Gauteng the sun has already set by 19h15, and that dusk is settling in. The absence of electric illumination inside the garage would have deepened the gloom in which the complainant faced his attackers. While outside there would have been more light, the unsettling uncertainty must obtrude that he may have mistaken the nature and appearance of his first attacker's headgear because the light was bad. And if that is so, then there must be a measure of perceptible doubt also about his identification of his attackers' faces.

[18] This is an unhappy conclusion, for by their own admission the two appellants are friends; and the chance that from a twelve-person line-up the complainant would have wrongly picked out two persons so connected, who were arrested on the same occasion, in each other's company, must be statistically small. But the dreadlocks issue raises unavoidable doubt about the reliability of the identification on its own.

[19] This is inevitable mainly because the only evidence the state called about the robbery was the single testimony of the complainant. There was no physical evidence: not a fingerprint, not a recovered cellphone, nor wallet, nor purse,

nor baby seat: nothing to connect the accused to the crime and thus to provide a measure of objective assurance against the pitfalls of subjective identification. The greatest assurance of guilt must lie in such evidence, rather than in identification on its own, which as this case shows can be beset by error and misdescription and doubt, in which case possibly and even presumably guilty persons must walk free.

[20] The appeal must succeed. The order of the court below is set aside. In its place there is substituted:

'The appeal succeeds. The accused are acquitted of the charges.'

E CAMERON
JUDGE OF APPEAL

CONCUR:
JAFTA JA
MAYA AJA