

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A236/2006

DATE:

24 OCTOBER 2008

5 In the matter between:

UNATHI GAYI

FIRST APPELLANT

MIKE MASHABA

SECOND APPELLANT

versus

THE STATE

RESPONDENT

10

JUDGMENT

THRING, J

15

At approximately 11:00 p.m. on the 7th January, 2003, the complainant in this matter, one Gumedede, his girlfriend, one Nobuthulazi, or Mitzi, one Menzi Duma, since deceased, and one Umlungisi were asleep in two separate rooms in a dwelling in Mont Clair, Mitchell's Plain, when four unknown men broke into the house and robbed them at gunpoint of a number of articles, including car radios, a television set, video players, hi-fi sets, a CD player, other electronic sound equipment, clothing, a cellphone, R3 000,00 in cash, two identity books and a Ford Escort motor vehicle which belonged

jp

/...

to one Buthelezi, who was absent at the time but who normally resided at the house. The following day the police arrested the two appellants and also two other men. All four of them were charged in the regional court of robbery with aggravating circumstances. The first appellant was accused No 1, the second appellant was accused No 3 and one Simphiwe Jacobs was accused No 2. He died during the trial, before the verdict, and no more need be said about him. One Prince Mangolwane was accused No 4. For the sake of convenience I shall refer to the appellants and the other accused by their accused numbers as they were arraigned at the trial.

They all pleaded not guilty to the charge. They were all represented at the trial by an attorney.

15

Accused Nos 1, 3 and 4 were apparently all found guilty as charged, and each of them was sentenced to seven years imprisonment. I say apparently, because the magistrate's conclusion at the end of her judgment is rather curiously worded as follows:

20

"They are charged with robbery with aggravating circumstances and therefore I am going to judge all three of them."

25

However, be that as it may, with the magistrate's leave, the appellants appeal to this Court against both their convictions and sentences.

5 As regards the two appellants, accused Nos 1 and 3, as well as accused No 4, the magistrate in her judgment relied on three features of the evidence which she found connected them all to the robbery. These were:-

- 10 (1). Their identification by the complainant, Gumede;
- (2). The presence, on the day after the robbery, of accused Nos 1 and 3 at a certain house at Lower Crossroads where they lived, where the police found some of the
15 allegedly stolen items, and the presence of accused No 4, later on the same day, at another house at Lower Crossroads where he lives and where the police found certain other items which had allegedly been stolen from Gumede's house;

20

- (3). The fact that certain items of clothing worn by accused Nos 1 and 4 on their arrest on the 8th January, 2003 allegedly belonged to Gumede and to another occupant of the complainant's house, the said Buthelezi, and were
25 among the stolen goods.

Accused Nos 1, 3 and 4 all gave evidence in their defence in which they disavowed complicity in the robbery and sought to explain away the features to which the magistrate refers. They all put up alibis for the evening on which the robbery was
5 committed.

The magistrate appears to have found the accused to be unworthy of much credence as witnesses and to have concluded that the state had proved its case against them
10 beyond reasonable doubt, inasmuch as the version of the accused could not reasonably possibly be true. In fact she found that they were lying witnesses.

Part of the absence of clarity in the evidence may be
15 attributable to poor interpreting. Gumede and Buthelezi are both Zulu-speaking, whilst the interpreter seems to have been a Xhosa, but seldom in nearly 40 years at the Bar and on the Bench have I had the misfortune of having to read the record of a case in which the evidence for the prosecution has been
20 presented to the Court in such a haphazard, undisciplined, inept and inadequate fashion as was done here. Any prosecutor worth his or her salt would have been ashamed, I think, of the state's performance in this case. Simple matters, such as what was stolen from the witnesses and what was recovered, and who owned what, are mired in bottomless

morasses of confusion and uncertainty. After reading and re-reading the transcript of their evidence a number of times, I still have very little idea of what the two principal state witnesses, Gumede and Buthelezi, were trying to convey to the Court during substantial portions of their evidence. How the magistrate could have made a coherent tale out of it, as she seems to have tried to do, I do not know.

As to the first feature relied on by the magistrate as implicating the four accused, that is, Gumede's identification of them during the robbery, the evidence seems to be the following. Gumede is a single witness on this aspect. He was fast asleep when he was woken up by the robbers. As he puts it, he was "in shock". This of course is perfectly understandable. The four robbers were complete strangers to him, none of whom he had ever seen before. The robbers immediately ordered the witness to put his head under a blanket, presumably so that he would not be able to identify them. This he did. From under the blanket he says that he could not see the robbers, nor did he peep out from under the blanket to observe them. He says that everything happened very quickly. The witness was unable to give the police a description of the robbers, nor of their clothing. In any event, according to Gumede, the two appellants, accused Nos 1 and 3, spent most of their time in the house ransacking the room

next door, which was occupied by Menzi Duma and Umlungisi, and not in the room occupied by the witness.

On the day after the robbery, Gumede and Buthelezi were
5 summoned to the Nyanga Police Station. They were told by the police that four suspects had been arrested and that they must come to the police station to identify them. In the police cells they were shown the four accused, and only the four accused. At that point Gumede claims to have "recognised"
10 the accused as the four robbers. He claimed in his evidence that "I only knew their faces". He was unable to point to a single other characteristic of any of the men which stood out for him as an identifying feature. He did say that during the robbery the lights of the house were switched on.

15

In her judgment the magistrate said nothing about the merits or demerits of any of the three prosecution witnesses. From this it may be inferred, I think, that the impression which they made on her as to reliability was neither very good nor very bad.

20

The dangers of uncorroborated evidence of identification are legion and trite. Mr Pothier, for the appellants, has referred us to the well-known passage in the judgment of Holmes, J A in S v Mthetwa, 1972(3) SA 766 (AD), where the learned Judge
25 of Appeal said the following at 768A to C:-

“Because of the fallibility of human observation,
evidence of identification is approached by the
Courts with some caution. It is not enough for the
5 identifying witness to be honest: the reliability of
his observation must also be tested. This depends
on various factors, such as lighting, visibility, and
eyesight; the proximity of the witness; his
opportunity for observation, both as to time and
10 situation; the extent of his prior knowledge of the
accused; the mobility of the scene; corroboration;
suggestibility; the accused’s face, voice, build, gait
and dress; the result of identification parades, if
any; and, of course, the evidence by or on behalf of
15 the accused. The list is not exhaustive. These
factors, or such of them as are applicable in a
particular case, are not individually decisive, but
must be weighed one against the other, in the light
of the totality of the evidence, and the
20 probabilities.”

The magistrate says nothing in her judgment about the risks
attaching to evidence of identification. One wonders to what
extent she was aware of them. However, be that as it may,
25 Gumedede’s identification of the four accused is clearly fraught

with problems, no matter how honest a witness he may have been. Thus, he was in a state of shock, having just been woken up; he must have had only a very short and limited opportunity to observe the robbers before his head went under the blanket, hence his inability to describe them to the police; the robbers were complete strangers to him; most important of all, the following day he was asked by the police to come and identify four arrested suspects at the police station. Human nature dictates that the witness probably expected them to be the culprits. In my view, these shortcomings in Gumedede's evidence render his identification of the four accused open to large doubt, and must render it unreliable.

The evidence of the two appellants and of accused No 4 denying complicity in the robbery may well be equally or even more unreliable, but that is insufficient, in my view, to cure the manifest weaknesses in Gumedede's identification.

I conclude that the magistrate placed far too much credence on the identification evidence, which, as I have said, stands alone.

I turn next to the second feature relied on by the magistrate, i.e. the finding by the police the day after the robbery of some of the stolen items at the houses occupied by the two

appellants and by accused No 4. This evidence was given by an Inspector Stephanus. He says that at about 11:30 a.m. on the 8th January, 2003 he saw accused No 3 behaving suspiciously outside a certain house in Lower Crossroads. He went into this house and found accused Nos 1 and 2 inside. He then searched the house and found two car radios which he suspected had been stolen. These were not identified by either Gumede or Buthelezi as their property. Behind the house, he said, was what he called a "plakkershut", which he also searched. In this hut he found a number of other items, which he suspected were stolen goods, including an amplifier, a CD player, a hi-fi set, two speakers, a vehicle jack and wheel spanner, and Buthelezi's identity book. Save for the last item, none of these articles were identified by either Gumede or Buthelezi as having been stolen from them.

Inspector Stephanus then proceeded, he says, to another address in Lower Crossroads where accused No 4 lives. He found the latter there. In this house he also found three video players, a Blaupunkt hi-fi set with two speakers, an identity book and two bags of clothes. Save for the Blaupunkt hi-fi set and speakers, which were identified by Buthelezi as his property, none of these items were identified as having been stolen from Gumede or from Buthelezi.

The difficulty which the prosecution has with Inspector Stephanus's evidence, which might otherwise have been very cogent in implicating accused Nos 1 and 3 in the robbery, is that, with the single exception of Buthelezi's identity book, not one item mentioned by Stephanus in his evidence as having been found at the house occupied by accused Nos 1 and 3, or in the hut behind it, was positively identified as his property by either Gumedede or Buthelezi.

Stephanus compiled a list of the property which he had found at the two houses, a so-called SAP299, which property he says was returned to Gumedede and Buthelezi. This list was placed before the Court. This list, however, was not shown to Gumedede during his evidence, nor did he clearly identify any of the articles which were stolen from his house as being amongst the items mentioned on the SAP299 list. It ought not to have been difficult for Gumedede to have identified at least some of his property in the witness box had the prosecution case been conducted properly. Instead, a *lacuna* exists in the prosecution case in this regard. In fact, at one point during Buthelezi's evidence, the magistrate voiced her suspicions as follows:-

"The Court has a strong suspicion that you took things that did not belong to you on that day,

because all the stuff was there and you just said,
'It's ours', and some of the stuff was not yours."

In her judgment the magistrate said:-

5

"Now all items that were recovered from the house
of accused No 1 and 3 were identified by
Mr Gumede and Mr Buthelezi as being stolen or as
belonging to them and being part of the items that
had been stolen the night before, that is plus-minus
12 hours before the recovery. Now these items,
according to Stephanus, were recovered from the
main house and from a shack that was at the back
of the house."

15

Later in her judgment she also said the following:-

"Now accused 1 and 3 do not dispute that Inspector
Stephanus made the recovery at their place. They
also do not dispute that the goods belonged to the
complainant and that some were recovered from the
house and others from the shack."

20

These are fundamental misdirections. As I have said, it is not
true that all the items recovered from accused Nos 1 and 3's

house were identified by Gumede and Buthelezi as having been stolen or as belonging to them, nor is it correct to say that accused Nos 1 and 3 did not dispute that the goods belonged to the complainant. Of the items listed on the SAP299 form, Buthelezi was able to identify as his property only the Blaupunkt hi-fi set and speakers, some compact discs, and his identity book. Inspector Stephanus says that the identity book was found in the hut behind the house occupied by accused Nos 1 and 3, and that the Blaupunkt hi-fi set and speakers were found in accused No 4's house. He did not say where the compact discs were found. As I have said, Gumede was not asked to identify any of the items listed on the SAP299 form.

15 It is moreover quite clear from the cross-examination of Gumede and Buthelezi that the defence did in fact place in issue the ownership of the articles found in the respective houses of the accused.

20 As for the single article which was unquestionably identifiable, i.e. Buthelezi's identity book, this, as I have said, was found by Inspector Stephanus in the hut behind accused No 1 and 3's house. Their explanation was that this hut was rented at the time by one Xholani. It was not occupied by them, they said. Inspector Stephanus was cross-examined about Xholani.

The following passage occurs in his cross-examination:-

5 “ En hulle het aan u gesê Xholani bly agter, dis sy
plek? --- Mevrou dis moontlik dat hulle gesê het
daar bly 'n Xholani, maar ek het, ek kan nie, ek
praat onder korreksie, maar ek is baie amper
doodseker ek het nie 'n persoon daar kom soek nie.
Ek was besig om met gewone patrollie toe die man
se optrede verdag (onduidelik).

10 Maar u het vir die Hof gesê hulle het gesê die
eienaar van daardie hut of plakkerhuisie was nie
daar nie? --- Dis korrek, ja.

U sê u was doodseker? --- Amper doodseker.”

15 Later he testified further as follows:-

20 “ Hulle sê u het gesê dat die hut of die plakkerhuis
hier behoort aan Xholani, Xholani is nie daar, hy's
weg? --- Dit is moontlik dat die eienaar van die
woning se naam wel Xholani is, en hulle het my
meegedeel dat hy nie op die oomblik daar was nie.”

Whether or not Inspector Stephanus was looking for Xholani
that day, as is suggested by accused Nos 1 and 3, the
25 existence of Xholani was clearly not an afterthought or a

subsequent fabrication on their part, for Stephanus conceded that he was told by them that the owner of the hut was absent and that the name Xholani might have been mentioned by accused Nos 1 and 3.

5

The magistrate seems to have rejected the accused's evidence about Xholani as false, along with much of their other evidence, but there is no direct evidence to contradict what accused Nos 1 and 3 said in this regard. Indeed Stephanus goes some way to conceding that it might be true, at least to the extent that the hut was occupied by a tenant at the relevant time. Whether or not his name was Xholani is immaterial. If the hut was occupied by a tenant, the link between accused Nos 1 and 3 and the robbery via Buthelezi's identity book, which was found in the hut, is of course broken. In my view the magistrate erred in rejecting the reasonable possibility that the hut was occupied at the relevant time by somebody other than the accused.

20 Lastly, there is the evidence on which the magistrate relied that some of the clothes being worn by accused Nos 1 and 4 at the time of their arrest was the property of Gumede and Buthelezi. Buthelezi says that when he went to the Nyanga Police Station on the 8th January, 2003, he found accused No 25 1 wearing his, Buthelezi's, trousers. He says that he was able

to identify them because he had just had them dyed and the dyer had left an indelible number on them with his name on it. He was unable to say what the number was, nor were the trousers handed in as an exhibit before the Court. In cross-examination he said that they were Rockport jeans. Accused No 1 was made to remove these trousers, says Buthelezi, and to return them to him at the police station. Gumedede was present when this happened, he says. However, none of this is borne out by the evidence of either Gumedede or of Inspector Stephanus. Gumedede does not mention Buthelezi getting his trousers back from anyone. In fact his rather garbled evidence is as follows:-

“You say accused No 2 was wearing your clothes and the others were wearing the other people's clothes. Mr Interpreter, that's what (indistinct) please? --- Yes, that is correct, others were wearing the others' clothes.”

If Gumedede had seen accused No 1 being made to remove his trousers and hand them over to Buthelezi, one would expect him to have remembered it and to mention it in his evidence. Perhaps more important, there is no mention of Buthelezi's trousers on the SAP299 list drawn up by Inspector Stephanus. If this garment had formed part of Buthelezi's stolen property

which was returned to him by the police, there is no reason why it should not have featured on the list. Better still, the trousers should have been handed in as an exhibit and listed as such in the so-called SAP13 register. No such register
5 appears to have been opened in this case.

In his evidence, albeit that it may not be worth a great deal in view of its numerous shortcomings, accused No 1 denied that he was wearing Buthelezi's trousers or that he was made to
10 remove them. He said that he was wearing a black tracksuit with yellow and green stripes. Inspector Stephanus was not cross-examined on this point.

In my view there are too many question marks hanging over
15 Buthelezi's evidence about this trousers for it to have been accepted by the magistrate as true beyond reasonable doubt. This link between accused No 1 and the robbery is just too tenuous to rely on.

20 The prosecution did not see fit to call either Gumede's girlfriend, Nobuthulazi, nor Umlungisi as witnesses. Both of them were present during the robbery and they may or may not have been able to give corroborative evidence as to the identity of the robbers. The reasons advanced by the
25 prosecutor at the trial for not calling these people do not

impress me.

Be that as it may, the state's case against accused Nos 1 and 3 suffers from the shortcomings which I have mentioned, some of which appear to have escaped the magistrate.

At the same time it is apparent from a reading of the record that all three of the accused who gave evidence were poor witnesses, and the magistrate was undeniably correct in finding that they lied in certain respects. They are very probably guilty of this robbery: but strong probability is of course not proof beyond reasonable doubt. The edifice of the prosecution case is sufficiently shaky in my view as to render the conviction of accused Nos 1 and 3 unsafe. The demerits of their evidence are insufficient to supply the deficiencies in the state case.

In my judgment the appeal against their conviction must accordingly succeed.

20

The position of accused No 4 is somewhat different. In his house Inspector Stephanus found the Blaupunkt hi-fi set and loudspeakers which were positively identified by Buthelezi as having been stolen from him the night before. Other than to deny falsely that the articles had been found there, accused

jp

/...

No 4 had no explanation to offer for the presence of this piece of stolen property in his house.

The identification of accused No 4 by Gumedé is no more
5 reliable than his identification of accused Nos 1 and 3. Whilst going some way to connect him with the robbery, accused No 4's possession of the stolen hi-fi set does not in my view go far enough to justify the inference that he was beyond reasonable doubt one of the robbers. The possibility cannot
10 be excluded, in my view, that he came into possession of this article in some other way.

As to the reliance by the magistrate on accused No 4 being
found wearing a garment or garments belonging to either
15 Gumedé or Buthelezi, there is no evidence of this on the record.

In my judgment, accused No 4 was wrongly convicted by the
magistrate of the robbery. He is, however, guilty on the
20 evidence of a contravention of the provisions of section 36 of the General Law Amendment Act, No 62 of 1955, which is a competent verdict on a charge of robbery. The section reads as follows:-

25 "Any person who is found in possession of any

goods other than stock or produce as defined in section 1 of the Stock Theft Act, 1959, Act No 57 of 1959, in regard to which there is a reasonable suspicion that they have been stolen, and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft."

10 Exercising this Court's powers of review under section 304(4) of the Criminal Procedure Act, No 51 of 1977, it should in my view set aside the conviction of accused No 4 and substitute an appropriate conviction of contravening section 36 of the General Law Amendment Act.

15

On that basis, sentence must be imposed afresh on accused No 4. At the time of the offence he was a youth of 17 years and some ten months of age. He had no previous convictions. He left school in standard eight, having had an unfortunate childhood without a father. Direct imprisonment is generally not appropriate under such circumstances. In my view, a totally suspended short period of imprisonment would be adequate in the circumstances.

25 Accordingly the following order is made:-

1. The appeals of accused Nos 1 and 3 against their convictions are upheld and their CONVICTIONS AND SENTENCES ARE SET ASIDE.

5

2. On review, the conviction of accused No 4 is also SET ASIDE and for it is substituted a CONVICTION OF CONTRAVENING THE PROVISIONS OF SECTION 36 OF THE GENERAL LAW AMENDMENT ACT, NO 62 OF 1955.

10

The sentence of accused No 4 is also SET ASIDE, and for it is substituted the following: SIX (6) MONTHS IMPRISONMENT, SUSPENDED IN ITS ENTIRETY FOR FIVE (5) YEARS on condition that the accused is not convicted of robbery, theft or any other crime of which the accused may be found guilty as a competent verdict on either such charge, committed during the period of suspension.

15



THRING, J

I agree.

10

W.J. VAN DER MERWE, AJ