REPORTABLE

IN THE HIGH COURT OF KWAZULU NATAL, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 284/2008

In the matter between:

BHEKANI MKHIZE	**FIRST APPELLANT**
SIZWE CYPRIAN MCHUNU	**SECOND APPELLANT**
THULANI CONFIDENCE HLATSHWAYO	**THIRD APPELLANT**
BHEKOKWAKHE ELLIOT HLATSHWAYO	**FOURTH APPELLANT**

and

THE STATE	**RESPONDENT**

APPEAL JUDGMENT

NDLOVU J

[1] On 10 June 2010 we heard submissions from both counsel for the State and the defence in this appeal. At the conclusion thereof I proposed an order upholding the appeal and setting aside both the convictions and sentences in respect of all four appellants. My Brother Koen agreed and the order was made accordingly. We then indicated that the reasons for our decision would follow. The reasons are now fully set out hereunder.

[2] There were originally seven accused who appeared before the Ladysmith District Magistrate's Court charged with robbery. Prior to the

commencement of the trial the charge was withdrawn against accused 6 and proceeded against the remainder of the accused. Upon arraignment they all pleaded not guilty and briefly outlined the basis of their defence in terms of section 115 of the Criminal Procedure Act 51 of 1977 ("the CPA") which defence I shall refer to in due course during the analysis of the defence case. At the conclusion of the trial accused 5 and 7 were found not guilty and acquitted. Then remained accused 1, 2, 3 and 4 who were all convicted as charged. Thereupon the trial Magistrate invoked the provisions of section 116 of the CPA and referred the matter to the Regional Court, also sitting at Ladysmith, for sentencing.

[3] After the Regional Magistrate was satisfied that the proceedings before the district court were in accordance with justice, further evidence on the issue of sentence was adduced before the Regional Court which culminated in the four remaining accused being sentenced as follows:

> "8 years' imprisonment in respect of accused 1, 3 and 4 each; and
> 10 years' imprisonment in respect of accused 2."

[4] With the leave of the Court below (the Regional Court) the four accused (the appellants) then appealed to this Court against their convictions and sentences.

[5] Before proceeding I should point out that it was brought to our attention that the third appellant, Thulani Confidence Hlatshwayo, had since passed away on 3 January 2009 which then meant that the appeal would be proceeding in respect of the first, second and fourth appellants.

[6] During their trial before the district Court all the appellants (together with their erstwhile co-accused) were not legally represented after their election to conduct their own defence. However, during the sentencing phase before the Regional Court all four appellants (together with former third appellant) were then legally represented.

[7] At the outset I must express my agreement with the defence counsel that the State's case was not of the quality that justified the conviction of the appellants. The evidence adduced on behalf of the State was full of discrepancies in the form of contradictions, inconsistencies and inherent improbabilities. It is a fundamental principle of our law in criminal proceedings that the onus is on the State to prove the guilt of an accused beyond reasonable doubt and that there is no duty on the accused to prove his or her innocence. *(R v Ndhlovu* 1945 AD 369 at 380; *R v Dhlumayo* 1948(2) SA 677 (A) at 680). I am not satisfied that the trial Magistrate properly applied this principle in the present case. In *S v Kubeka* 1982(1) SA 534 (W) the Court observed:

> "The rule that the State is required to prove guilt beyond a reasonable doubt has on occasion been criticised as being anomalous. On the other hand, the vast majority of lawyers (myself included) subscribe to the view that in the search for truth it is better that guilty men should go free than that an innocent man should be punished."

It was, therefore, not sufficient for the trial Magistrate simply to recite and verbalise this principle during the judgment, as he did. This criticism equally applied to the issue of the cautionary rule which the trial Magistrate also referred to in his judgment. In my view, there was no evidence that the cautionary rule was also properly applied. I will deal with these matters in due course.

[8] In terms of the charge sheet the State alleged that "on or about 13 January 2007 and at or near Peacetown in the district of Klip River, the accused did unlawfully and intentionally and with force and violence take from Muzi Mazibuko the following property 1 x cellphone, 1 pair of takkies, being his property or in his lawful possession and did rob him of the same"

[9] When the complainant was allegedly attacked and robbed of his items he was in the company of some people who included Philani Mthabela and Celani Buthelezi. These two people were called to testify for the prosecution. This was therefore the type of case where corroboration was to have been reasonably expected of the evidence of the complainant and the said two

companion witnesses. However, that was not the case. Instead, in his judgment the trial Magistrate stated, in part, as follows:

> "The complainant Mr Mazibuko, is a single witness regarding to what exactly happened after the motor vehicle was stopped … What may be said is that the evidence of a single witness has to be approached with caution." (See page 259 of the record.)

[10] The considerations aforesaid by the trial Magistrate immediately raised some concern as to why the prosecution case was treated as one based on the evidence of a single witness when there were two other witnesses who, in the ordinary circumstances, would have witnessed the incident and therefore corroborated the complainant. It did not appear that their evidence was disregarded completely, otherwise I do not think that the trial Magistrate would have declared them, as he did, to be "frank and honest witnesses" if he did not seriously consider their evidence. The fact that the two witnesses might not have corroborated the complainant in certain material respects did not, in my view, justify the trial Magistrate to declare the State's case as based on the evidence of a single witness.

[11] Indeed, the bottom line, it seemed to me, was that there were some instances where the other two witnesses either materially contradicted the complainant or did not support his version at all on a given point. I mention some of these shortcomings:

11.1 It was common cause that the complainant, Mthabela and Buthelezi were walking along the road when the motor vehicle (in which the appellants and others were) appeared. According to both the complainant and Mthabela the motor vehicle (which was a bakkie with a canopy) simply drove straight to them in a manner which indicated it wanted to collide with them. As a result, the complainant and his group moved away from the road to avoid the collision. If this happened as described by the complainant and Mthabela it was strange why Buthelezi said the motor vehicle never wanted to collide with them. According to him the vehicle simply stopped and approximately ten

people alighted and, appearing in a fighting mood, they proceeded towards the witness' group, which included the complainant.

11.2. Who was carrying the iron rod? According to the complainant it was accused 1 who hit him (the complainant) with the iron rod. Further, it was apparent from the complainant's evidence that accused 1 was not the driver of the motor vehicle, as the following was his answer to accused 1's cross-examination:

> "We were off the road at that stage. And I wouldn't have gone to the driver's side because I didn't know the driver as well as the motor vehicle. The person that I knew, it was you. And I wanted to know as to why did you hit me." (Page 104 line 24 to page 105 line 2 of the record.)

11.2.1 In other words, according to the complainant, the person who carried the iron rod and hit him with it was not the driver of the vehicle and that person was accused 1. On the contrary, Mthabela's evidence suggested that the driver of the motor vehicle carried the iron rod. The following appeared from his evidence:

> "Then many boys alighted from the motor vehicle and one of them alighted from the driver's side. Then that boy was carrying the iron rod." (Page 118 lines 6-8 of the record.)

11.2.2 However, it was noted that Mthabela later somewhat contradicted himself on this aspect. When he was cross-examined by accused 1, the following appeared in Mthabela's response:

> "Did you see me alighting from the motor vehicle carrying that iron rod, which door did I use to go out of the motor vehicle? --- You used the passenger's door to alight from the motor vehicle." (Page 122 lines 15-17.)

11.2.3 It may be pointed out that the complainant's suggestion that accused 1 was not the driver was in fact supported by the defence whose evidence was that the driver was accused 2. The relevance and significance of this aspect was not about the discrepancy as to who the driver was, between accused 1 and accused 2. The discrepancy was about the identity of the person who

allegedly carried the iron rod, between accused 1 and accused 2. In my opinion, it was a material discrepancy because it raised some doubt as to the credibility of evidence in relation to the allegation of any person having alighted from the motor vehicle carrying an iron rod at all and with which that person hit the complainant.

11.3 During his evidence-in-chief Mthabela responded as follows to the prosecutor's specific question:

> "Do you know accused 1 --- Yes I know him, I saw him."
> (Page 121 line 1.)

The same question was posed to Mthabela by accused 1 and this was how the witness (Mthabela) responded:

> "Do you know me? --- No, I don't."

Therefore, *ex* facie the record, this was a contradiction on Mthabela's part. Then which is which? Was accused 1 known to Mthabela prior to the incident or was Mthabela seeing accused 1 for the first time on the night in question? This was an important aspect on the question of identification on which unfortunately, from his contradictory responses, the trial court was left in the dark as to what the position really was.

11.4 In his assessment of the complainant's evidence the trial Magistrate observed, in part:

> "The complainant was not too much convincing or perhaps I should use the words was not very sure who actually searched him. Initially he stated that it was accused 2 and accused 3 that searched him when accused 1 was holding him. But during questioning – during cross-examination he laconically stated that accused 4 also participated in the search." (Page 260 lines 15-20.)

It was not clear which version of the complainant's evidence the trial Magistrate accepted (and the reasons therefor) on the issue of who

searched him. I refer hereunder to the relevant passages in the record where the discrepancies on this particular aspect appear.

11.4.1 The implication of accused 4 by the complainant was contradicted by his earlier evidence-in-chief when he answered the prosecutor's question as follows:

> "Was there anything that was done by accused 4, accused 5 and accused 7 to you that you can tell this Court --- I don't know what they did." (Page 101 line 25.)

11.4.2 During cross-examination of the complainant by accused 3, the following appeared from the record:

> "Did I search you? --- No, those that I still remember I have pointed them out.
> What did I do to you? --- You can ask your co-accused as to what led you to be here.
> I didn't do anything to you. What I know is that I picked up the cellphone while you were there down with the driver (that is, accused 2)." (Page 109 lines 22-25, page 110 line 1.)

11.4.3 The trial Court had heard it correctly when the complainant testified in his evidence-in-chief that he was searched by accused 2 and 3 (see page 101 lines 21-23) but when the Court wanted to confirm this evidence with the complainant at a later stage, this was what happened:

> "You said accused 2 and accused 3 searched you? --- Accused 2 and accused 4 searched me.
> Ja but that was your evidence in chief. Do you understand? --- Yes.
> My concern is that you initially said that people who were in the company of accused 1 that you could still remember is accused 4 and accused 2. But later on during your evidence in chief, you said the persons that searched you when accused 1 was holding you was accused 2 and accused 3. --- Accused 3 is the person whom my phone was recovered.
> Just repeat that, I don't understand. --- Accused 3 is the person Your Worship of which my phone was recovered from.
> Accused 3 is the person in whose possession the phone was recovered.
> Interpreter : As the Court pleases.
> Court : So you did not see him on the day of the incident? --- No I didn't see him. But according to what he said, he was in the company of them.
> No Mr Mazibuko, just answer my question. Your evidence is that you don't know what role accused 3 played? You did not see him? --- No." (Page 111 lines 10-20.)

11.4.4 From the above passage it appeared that the complainant ended up not only saying that accused 3 did not search him but that he did not even see accused 3 at all on that day.

[12] When they testified in their defence the appellants stuck to what they indicated to the Court as the basis of their defence (in terms of section 115 of the CPA) earlier in the trial. According to their defence version they were travelling in a bakkie with a canopy at the back which was driven by accused 2. Seated in the cab with accused 2 were accused 1 and one Thulani Mtshali who was not arrested. The rest of the people, including the third and fourth appellants, were seated in the bin at the back of the vehicle. The vehicle had travelled up to a point where accused 1 (the first appellant) was to alight to proceed to his home which was close by. After the vehicle had stopped and the first appellant was about to alight, the complainant who had been walking along the road with a group of people came straight to the vehicle and to the driver's side. The complainant confronted accused 2 (the second appellant) about his (the second appellant's) alleged bad driving. When the second appellant asked as to what wrong he had done, the complainant swore at the second appellant calling him by his mother's private parts. Thereupon the complainant opened the driver's door and pulled the second appellant out of the vehicle onto the ground and started throttling the second appellant. The appellants denied that the first appellant ever assaulted the complainant with an iron rod or at all.

[13] It was common cause that the complainant's cellphone was recovered from the third appellant. His explanation was that he had picked up the cellphone from the ground at the scene and he did not know to whom it belonged. He had thought that it possibly belonged to the second appellant. He said so because the second appellant was the one who was underneath when he (the second appellant) and the complainant were grappling on the ground and that it was possibly during that time that the cellphone dropped out from the second appellant. He had then left and proceeded home with the intention that on the following morning he would make enquiries about the ownership of the cellphone.

[14] Concerning the recovery of the pair of takkies, the evidence of the State witness Emmanuel Mazibuko established that this item was found from another person who was not amongst the appellants or, for that matter, anyone among the seven who stood trial. This appeared from the following passage of Mazibuko's evidence:

> "Yes and then? --- I went to accused 1 to ask for those items for him. Yes? --- He told me that those items were on accused who is not present here in court.
> Yes? --- That person gave me takkies.
> What kind of takkies were those and who was the person who was owning them? --- It was my takkies, it was black and white in colour.
> Belonging to whom? --- Belonging to the complainant." (Page 133 lines 4-11.)

[15] My assessment of the trial Magistrate's evaluation of the evidence gave me the impression that the Magistrate tended to condone the material discrepancies in the prosecution case whilst on the other hand attaching weight to whatever discrepancies he found in the defence version. For instance, when it pertained to the State case, he made remarks such as:

> "However contradictions *per se* do not lead to the rejection of a witness' evidence. They may simply be indicative of an error. Not every error made by a witness affects his credibility." (Page 260 lines 10-12.)

[16] On the contrary, when it pertained to the defence case, I see remarks such as:

> "All four of them showed on a number of occasions to be composed, deliberate and unblushing liars, there were so many contradictions in their evidence." (Page 261 lines 13-15.)

[17] As alluded to by me earlier, it was not sufficient for the trial court simply to restate the principle of the State having the burden to prove the guilt of an accused beyond a reasonable doubt as well as the principle that the evaluation of the evidence of a single witness required great circumspection in terms of the cautionary rule. All this must have been borne out by the manner the trial Magistrate actually evaluated the evidence presented at the trial. Granted, there were indeed some contradictions and other discrepancies in the defence case. However, in my view, these would not have cured the poor

quality of the evidence presented on behalf of the prosecution. For that reason, it seems to me unnecessary even to refer to those discrepancies.

[18] Finally, it is necessary for me to comment on the patently unfair and inappropriate manner in which the trial Magistrate handled the proceedings, particularly, when he at times dealt with the first appellant. The Magistrate exhibited blatant rudeness and harassment towards the appellant concerned. It was clear, from the Magistrate's sporadic reactions, that the first appellant might indeed have been speaking softly as to have justified a request for him to raise his voice. However, the over-reaction of the Magistrate in this regard was, in my view, completely unwarranted. This was arguably a valid ground on which the fairness of the trial could have been challenged. Several court decisions have reiterated the importance of presiding officers guarding against such improper tendencies. See *S V De Villiers* 1984 (1) SA 519 (O); *S v Gidi and Another 1984 (4) 537 CPD;* S *v Sallem* 1987 (4) SA 772 (A); *S v Gwebu* 1988 (4) SA 155 (W); *S v Abrahams and Another* 1989 (2) SA 668 (E); *Tshona and Others v Regional Magistrate, Uitenhage and Another* 2001 (8) BCLR 860 (E); *S v Le Grange and Others* 2009 (2) SA 434 (SCA). It is apposite to refer to some of the relevant occasions where the trial Magistrate made these unwarranted outbursts. (I quote from the trial record):

> "Now repeat what you are saying and talk loudly please. Really listen here, I don't like shouting at people but what can you do if people are inviting me to do that? Right from day 1 we were begging you to speak up. If you don't want to tell us what happened, why don't you just shut up and sit down? I'm talking loud or do you think I'm crazy? Jesus, this is really irritating. Now what do you want to say? --- I was not carrying that iron rod when I alighted from the motor vehicle." (Page 160 lines 12-18.)

> "Because this witness said I phoned him. Surely a motor vehicle is far, how can you ask a person who is far with the motor vehicle, ask him a question if you don't phone him? Stand back sir, we'll proceed on another day. My nerves are finished now." (Page 161 lines 10-14.)

> "That's nonsense, you are not talking loud. I can't even hear what you are saying. This is really irritating. Every time you are in court I must remind you to talk loudly. If you were a child I would have given you a hiding. I don't know what to do with an old man like you. This is really irritating." (Page 162 lines 13-16.)

> "Stop this nonsense of yours and open your mouth please. Ja? --- I was seated on the left side of the motor vehicle." (Page 176 lines 24-25.)

The trial Magistrate concerned is therefore sternly advised to desist from conducting himself in a similar manner in the future.

[19] Concerning the appeal we were therefore of the view that the State failed to prove its case beyond a reasonable doubt against all four appellants, including the late third appellant. On that basis, both the convictions and sentences could not stand. It further seemed to us that, even though the third appellant was then deceased, the order setting aside the convictions and sentences should also apply to his case for the purpose of setting straight his criminal record.

[20] Accordingly, we made the following order:

1. The appeal by all four appellants is upheld.
2. Both convictions and sentences in respect of all four appellants are set aside.

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NDLOVU J

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KOEN J

Date of hearing: 10 June 2010
Date conviction and sentence set aside: 10 June 2010
Date reasons for judgment furnished: 16 July 2010