Case No 444/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DAVID SIHLANGU MBONGWA	Appellant
and	
THE STATE	Respondent

CORAM : E M GROSSKOPF, KUMLEBEN et HOWIE JJA

DATE OF HEARING : 8 September 1994 DATE OF

JUDGMENT : 23 September 1994

J U D G M E N T

HOWIE JA/................

HOWIE JA :

Appellant was convicted in a regional Court of armed robbery and sentenced to eight years' imprisonment. He appealed to the Natal Provincial Division against the conviction and the sentence. The appeal was dismissed but leave was granted to appeal to this Court solely against the conviction.

It is common cause that the robbery was committed between midnight and 1 a.m. on 14 March 1991 by two men who held up the two nightwatchmen on duty at an office of the Department of Development Aid at Ntuzuma, near Durban. After the nightwatchmen had been tied up and were being guarded at gunpoint by one of the intruders, the other cut his way with a grinding machine through the strongroom door and then into the two safes installed there. The safes were found empty but a trunk which stood in the strongroom and contained about R264 000,00 in cash was plundered. The bulk of the money was made up of R50 banknotes.

The essential issue is whether appellant was proved to have been one of the robbers.

Four mornings after the robbery, two members of the South African Police, Lance-Sergeant Crouse and Constable Jonker, acting on information concerning a firearm, searched a shack at Mfolo in Soweto, Transvaal, occupied by appellant. They found no firearm but in his presence they found in various places in the kitchen section R65 000,00 in R50 notes. R60 000,00 of it was contained in six packets of R10 000,00 each, stored in a microwave oven. Appellant was unemployed at the time. Suspecting the money was unlawfully obtained, the two policemen detained appellant for questioning.

They took him to a Captain Calitz of the Soweto Murder and Robbery Squad and sought the latter's advice. After speaking to appellant Calitz ordered a further search of the shack. This revealed that the microwave oven, as well as a TV set and loudspeakers found there, had all had their

serial numbers removed. Appellant was duly arrested on a charge of possession of suspectedly stolen property.

Information available to Calitz led him to contact the South African Police criminal investigation head office in Durban. In that way he learnt of the robbery at Ntuzuma and not long afterwards appellant was handed over to the officer investigating this case.

On 23 March 1991 one of the nightwatchmen, Thembinkosi Buthelezi, pointed out appellant as one of the robbers at an identification parade at the Kwa Kashu police station. The other nightwatchman also attended the parade but was unable to identify anyone.

The main prosecution witnesses were Buthelezi, Calitz, Crouse, Jonker and Detective Constable Ncube. Ncube was in charge of the identification parade.

Buthelezi said in evidence-in-chief that he was at an outside lavatory when he heard his colleague, Biyase, calling nearby. When Buthelezi responded, he found Biyase

confronted by the robbers who then proceeded to tie up the two watchmen. According to Buthelezi it was dark at this spot. Once the office had been broken into they were ordered inside. No light was burning in the office but with the aid of lights on the adjoining verandah Buthelezi focused his attention on the man operating the grinder as he went about breaking into the strongroom. The latter, whom Buthelezi subsequently purported to identify at the identification parade and alleged in evidence was appellant, wore a balaclava cap on his head but it was rolled up and merely fulfilled the function of a hat. Accordingly it did not cover his face and the witness was able to see the man's features and in particular that, but for a moustache, he was clean-shaven. He also noticed that the robber, whom he had never seen before, was well built and of medium height.

Under cross-examination Buthelezi said that he did not pay particular attention to the other robber because he

assumed that Biyase would do so. Questioned specifically regarding his observation of the safe-breaker, Buthelezi said that as he worked away at the strongroom door the left side of the man's face was in view and now and again he would look at the watchmen. Buthelezi said that because the balaclava cap was rolled up, the man's forehead protruded. The witness noticed that the grinder caused sparks to fly but in the context of his evidence this was at a stage when the offender concerned had already broken into the strongroom, where it was completely dark, and he was busy on one of the safes. He did not state that the sparks had any material effect on the state of the available illumination within the office.

To summarise Buthelezi's evidence up to this point, where they first encountered the robbers outside it was dark and he made no claim to have noticed appellant's appearance then. However, he was later able to observe and take note of appellant's appearance inside. This was so,

despite the balaclava cap, for the reason that it was rolled right up and light from the verandah shone into the office.

There then occurred a significant turnabout in Buthelezi's account. He claimed that when they were first confronted outside, appellant's balaclava cap was rolled up. Then, after they had been bound with wire, appellant went off somewhere - apparently to fetch the grinder and other equipment. When he returned, the balaclava cap was rolled down over his face and it stayed that way until the robbers made their escape.

It was then pointed out to Buthelezi that the only time he could have seen appellant's face when it was not obscured was outside where they first met and where, on his own admission, it had been dark. His evidence proceeded:

> "Yes, but because of the moonlight and the source of light from the verandah you could see a shadow, I mean where I was with the other man. The others were at the garage. You could see a shadow? --- You could see Biyase but

you couldn't see who the man is.
And these two people were standing with Biyase? ---
Yes, the other man was pointing a gun at Biyase. And if you couldn't see Biyase's face then presumably you couldn't see the face of the people next to him?
--- You couldn't say if it was him if you were still
far but if you were about from here to the microphone stand you could see that it was Mr. Biyase."

The distance indicated by the witness does not appear from the record but the significance of the quoted passage is twofold. Firstly, it indicates a belated attempt by the witness to rely on moonlight, which had not been mentioned before, and to refer to the verandah lights in a context in which they had not been relied on in his earlier evidence. Secondly, even accepting his altered account of the opportunities for identification, it requires little emphasis that however much these various forms of illumination might have assisted him to recognise Biyase, whom he knew (and even that was apparently only at a very short distance) , they would hardly have enabled him to make a reliable identification of a stranger. The point was

driven home later in his evidence when he agreed with the proposition that "it was so dark there that it was difficult to recognise faces".

When Buthelezi was asked what portion of appellant's face was visible once the balaclava cap was pulled down, he claimed that the cap was loose and indicated, so the record reads -

> "right above the eyes, right down the side of the face below the mouth".

Apart from the fact that this description conflicted with his evidence-in-chief, Buthelezi went on to concede that the only opportunity he had to observe the unobscured face of the safe-breaker was outside where they were tied up.

Referred to events at the identification parade, Buthelezi said he recognised appellant despite his having no distinguishing features worth mention. He added -

> "I was able to recognise the accused upon my arrival when I turned towards him. Because when he saw me.

he was shocked."

Asked to describe appellant's reaction, Buthelezi gave a demonstration which was described by the interpreter for the record. It reads as follows:

> "the witness sort of opened his eyes bigger and sort of taken one step or one pace backwards with his body moving slightly to the back ... (t)urned."

Buthelezi said that appellant also avoided looking at him. He added subsequently that he did not point appellant out merely because of the letter's reaction. It was put to the witness by the attorney defending appellant that he would deny having reacted in the manner recorded but although appellant did testify, the foreshadowed denial was not forthcoming.

As far as appellant's possession of R65 000,00 is concerned, Jonker, Crouse and Calitz all testified that the explanation which appellant offered was that he had earned the money dealing in mandrax tablets. They denied the

allegation put to them in cross-examination to the effect that he had told them it constituted the proceeds of a stokvel operation. Their evidence did not coincide in other respects but in the view 1 take of the matter those inconsistencies are not significant and it is unnecessary to detail them.

As regards Ncube's evidence, he said that Buthelezi walked along the parade line, retraced his steps and then pointed out appellant. He was not asked about appellant's reaction as described by Buthelezi.

In his own evidence appellant advanced a belated alibi that he was at home in Soweto on the night in question and he presented a laboured and unconvincing description of the alleged stokvel scheme. In my opinion the magistrate was justified in concluding, as he did, that appellant's evidence was not reasonably possibly true in these respects.

The crucial question in this case, however, is whether

Buthelezi's identification was beyond reasonable doubt reliable. Germane to that issue is whether that identification was reinforced whether by the pointing out at the identification parade, by appellant's possession of the extraordinarily large sum of money found in his shack or by his untruthful evidence.

As regards the value of Buthelezi's evidence, the magistrate did not deal with the contradictions and inconsistencies to which I have referred or with Buthelezi's concession that the only time he saw appellant's face uncovered was at the spot outside where the hold-up occurred and that the darkness there was such as to make it difficult to recognise someone. He also overlooked the fact that the witness recalled the intruder in question as being taller than himself and of light complexion. Judging by the photographs of the identification parade neither characteristic fits appellant.

The magistrate found also that the illumination which assisted Buthelezi purportedly to recognise appellant inside the office emanated partly from the sparks caused by the grinder while the strongroom door was being cut. This finding was not supported by the evidence. The witness did not allege that the sparks improved visibility. And, as I have already pointed out, the sparks were caused when the robber concerned was already inside the strongroom, where they obviously contrasted very noticeably with the darkness. In these circumstances to regard the sparks as having been any aid to identification at all would be unjustified.

The magistrate also referred to the marked and patent assurance which Buthelezi displayed in testifying. Although the judgment reveals the magistrate's awareness that this feature did not necessarily rule out a mistake on the part of the witness, it was obviously something which made a strong impression on the magistrate for he

repeated it twice. Unfortunately the salutary lesson of experience is that this particular factor can be dangerously misleading especially when one is convinced, as the magistrate was, of Buthelezi's honesty.

Two of the other considerations which weighed with the trial Court were the length of time for which Buthelezi had the safe-breaker under observation and the assertion by the witness that he expected to be asked for a description later and he therefore did his best to assemble the necessary mental picture. The ostensible force of those factors is materially weakened, however, by his inability to give any description of the other robber (whose features were not obscured at any stage and who was very often far closer to him than the man with the grinder) and his strange assumption that his colleague would take good note of the second man. All in all, because of the state of the light and the inevitable apprehension which the two victims must have felt - they pleaded for their lives at one stage

the circumstances were hardly conducive to reliable identification.

As some corroboration of Buthelezi's evidence the magistrate took into account appellant's reaction on the identification parade. I am unable to find that this aspect warrants an inference adverse to appellant. Although in many, if not most, criminal cases one must -before finding guilt - construe an accused's words and conduct in the light of the reasonable possibility of his being innocent of any crime, that precaution can be dispensed with here. In all probability, but at least as a reasonable possibility, one can infer that appellant came by the money in the shack illicitly. The size of the amount, his proffered explanation to the police, his possession of suspectedly stolen goods and his mendacity in Court all warrant such inference. Accordingly one must proceed on the basis that he had indeed done something unlawful to acquire the money. That being so, I consider

that he would probably have been just as apprehensive on the identification parade if that unlawful conduct did not comprise the present robbery as he would have been if it did. He would in either event have been susceptible to display the alarm which Buthelezi observed: he might have recoiled from being pointed out whatever his crime. In the circumstances the behaviour seen by Buthelezi does not strengthen the State case. In fact it provides an answer to the State's suggestion that it was a remarkable coincidence that the witness pointed out the very man who had just been found in possession of a very large sum of money. This coincidence argument loses its force if it is reasonably possible, as I think it is, that the pointing out was prompted by appellant's obvious discomfort.

As to the possession of the money as an independent feature in the case, it was not identified as having come from the complainant. It could have emanated from a robbery or other crime perpetrated on the Witwatersrand.

It would be taking judicial nescience too far to ignore the occurrence and frequency of major crimes in that area. And the fact that the money was all in R50 notes is not really significant. At the time in question that was the largest banknote denomination. Any bank, institution or government department possessing very large sums of cash would understandably hold much of it in the largest denomination simply for convenience of storage.

And the reason which led to appellant's being handed over to the Kwa Mashu police is obscure. There was no evidence at that stage to link him to the present crime as opposed to any other. Whether this was the only major unsolved crime involving the loss of a considerable sum of money in the country within the week preceding appellant's arrest and whether the police draw any realistic inference or merely acted on a hunch one does not know. Whatever the reason, it is impossible to conclude that it assists in drawing an inference adverse to appellant.

To sum up. The evidence of the single identifying witness was materially defective and its inadequacies were not cured, either by the pointing out or any other factor, sufficiently for one to conclude that his purported identification of appellant was beyond reasonable doubt reliable.

The appeal must therefore succeed.

The following order is made:

1. The appeal is allowed.

2. The conviction and sentence are set aside.

C.T. HOWIE JUDGE OF APPEAL E M GROSSKOPF JA]

] CONCUR

KUMLEBEN JA]