THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 244/2002

In the matter between :

NDIVHULO RONALD TSHIKOPO Appellant

and

THE STATE Respondent

Before: **Vivier, Streicher JJA & Shongwe AJA**
Heard: **5 May 2003**
Delivered: **5 May 2003**

J U D G M E N T

TRANSCRIPT OF REASONS ORALLY DELIVERED IN OPEN COURT ON MONDAY 5 MAY 2003 BY STREICHER JA AND CONCURRED IN BY VIVIER JA AND SHONGWE AJA

STREICHER JA:

The appellant, together with four other accused, was charged in the Venda Provincial Division with one count of murder, 12 counts of robbery with aggravating circumstances, two counts of housebreaking with intent to steal and theft, three counts of attempted murder and one count of theft. He was eventually found guilty only on count 4, a charge of robbery with aggravating circumstances, and sentenced to 5 years imprisonment. With the leave of the Venda Provincial Division he now appeals against his conviction.

The state's case against the appellant was based on the evidence of one witness, a Mr Nevhulaudzi. He testified that he used to supply liquor to shebeens. On 4 August 1992 he was collecting money from the shebeens. When he stopped at a place called Mbaleni, the home of one Nyawaasedza to collect money, two men got into his vehicle, one on the driver's side and the other on the passenger side. The one on the driver's side pushed him to the middle of the seat and the one on the passenger side pointed a gun at him. They assaulted him and drove off. A scuffle ensued during which the vehicle veered off the road and all three of them fell out. The attackers then drove off with his vehicle and R18 000 which he had collected. In his evidence in chief Nevhulaudzi did not identify any of his attackers. As a result he was initially not cross-examined by the appellant's legal representative. However, after his

cross-examination by the legal representatives of the other accused and his re-examination the judge *a quo* questioned him. During this questioning Nevhulaudzi at first said that he had not seen his attackers' faces and that it was therefore impossible for him to identify them. He also confirmed that he had told the public prosecutor that he had not seen the faces of his attackers and that he did not know who they were. But, eventually he did identify the appellant and one of his co-accused, accused 1. He did so only after having referred to the fact that he had spoken to a police officer; that he heard that Nyawaasedza had given information to the police; and that the police officer had shown him some photographs. He stated that he was called as a witness 'because the law must have seen something' which 'tells him that these people or these robbers are the ones who robbed' him of his money. After the examination by the judge *a quo* Nevhulaudzi was cross-examined by the appellant's legal representative. During this cross-examination Nevhulaudzi said: 'And the other thing that confirms that these are the people who attacked me, was because on the date I came to court here, I went home and the very same evening I had a dream and the dream was about the attack that I went through in 1992 and I saw those faces again and it confirmed that those were the people who attacked me.' It should be borne in mind that the trial took place some six years after the robbery. Cross-examined by the legal representative for accused 1 Nevhulaudzi testified that he previously said that

he had not seen the faces of his attackers because he 'feared that they might come and kill' him. At the conclusion of Nevhulaudzi's evidence the judge *a quo* said: 'Thank you very much for exercising your civic duty to come to court to testify as you did, Mr Nevhulaudzi. Thank you very much . . .'

The appellant denied that he took part in the robbery. He said that he did not know accused 1 and that he had not seen Nevhulaudzi before he entered the witness box. Asked why Nevhulaudzi would implicate him he answered that he did so because there was nobody else to implicate.

The court *a quo* found that Nevhulaudzi must have seen his attackers and accepted his explanation as to why he initially testified that he could not identify them. Regarding Nevhulaudzi's reliance on his dream for his identification of the appellant, the court *a quo* said that 'since this court is not an interpreter of dreams, this part of the evidence is left open by this court'. It rejected the appellant's evidence. The only reason given by the court *a quo* for doing so was that the appellant was unable to offer an explanation why he had been pointed out.

That the judge *a quo* on the evidence of Nevhulaudzi and in the face of the denial by the appellant could have been satisfied beyond reasonable doubt of the appellant's guilt is shocking. The conviction of the appellant is so blatantly wrong that nothing further need be said in this regard. Quite correctly the state supported the appellant's submission that he should have

been acquitted.

The record of this appeal consists of 35 volumes. The content thereof relevant to this appeal could easily have been bound in three volumes. In these circumstances the legal representatives of the appellant should not be allowed to recover from the appellant or the Legal Aid Board more than the costs that would have been incurred had the record consisted of three volumes.

The following order is accordingly made:

1 The appeal is upheld.
2 The conviction and sentence of the appellant on count 4 are set aside and the appellant is acquitted on this count.
3 The legal representatives of the appellant may not recover from the appellant or the Legal Aid Board more than the costs that would have been incurred had the record consisted of three volumes.

STREICHER JA

VIVIER JA)
SHONGWE AJA) **CONCUR**