THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 224/2008

In the matter between:

NHLANHLA WISEMAN MAVININI **Appellant**

and

THE STATE **Respondent**

Neutral citation: State v Mavinini (224/2008) [2008] ZASCA 166 (1 December 2008)

BEFORE: **Cameron JA, Kgomo AJA and Mhlantla AJA**

HEARD: **Thursday 20 November 2008**

DELIVERED: **Monday 1 December 2008**

SUMMARY : Evidence – proof – beyond reasonable doubt – moral certainty of guilt – Sentence – maximum sentence imposed under Act 105 of 1997 – inappropriate

ORDER

On appeal from : High Court, Pietermaritzburg (Patel and Moleko JJ), sitting on appeal from the regional court at Newcastle.

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds.
3. The sentence imposed by the magistrate is set aside. In its place there is substituted:
   'The accused is sentenced to fifteen (15) years' imprisonment.'

JUDGMENT

CAMERON JA (Kgomo AJA and Mhlantla AJA concurring)

[1] When does a question about a witness's evidence give rise to a doubt? And what makes a doubt become reasonable? And when does reasonable doubt point to acquittal? This case invites these reflections. The appellant was convicted of robbery in the Newcastle Regional Court (Mr TCL Colditz) and sentenced to twenty years' imprisonment. His appeal to the High Court in Pietermaritzburg (Patel J, with whom Moleko J concurred) was dismissed, as was his application for leave to appeal to this court, which later, however, itself granted the necessary leave.

[2] On Friday evening 25 August 2000, the Pritraj family was travelling from Gauteng to KwaZulu-Natal. As night fell they checked into the Amajuba Lodge in Newcastle with their fourteen month-old baby. Shortly after they took occupation of room 15, there was a knock at their door: 'Room service'. But it was not. It was a robbery. When Mr Surjan Pritraj opened the door, three men burst in, two brandishing firearms. His wife and baby were

made to lie on the bed. He was forced to the floor. A blow to the back of his head with one of the robber's firearms later required medical stitching. And the robbers proceeded to take everything. The family was not just robbed, but 'robbed clean' – as the magistrate noted in passing sentence, they were left with just about only the clothes on their backs. The robbers took their luggage, clothes, shoes, watches, wedding rings, jewellery, mobile phones (complete with chargers) and cash. They even nabbed the hotel's television set and telephone apparatus. Then they made off in the family's 1996 green Audi A4 motor vehicle with registration number DRP 053GP.

[3] The very next evening, the South African Police Service's crime intelligence centre in Newcastle received information that led the police to house 2892 in Section 3 of Madadeni, Newcastle's township. There they found two men sleeping in a room in which they also discovered much of the loot. The rest was elsewhere in the house. The two men were later arraigned with the appellant as accused 1 and 2. Accused 1 died in the course of the trial. Accused 2, who the arresting officer conceded was charged (like accused 1) only because he was found in the same room as the stolen property, was given the benefit of the doubt and acquitted.

[4] The appellant though was convicted. During the same raid, his identity document, or a copy of it, as well as a logbook for a bakkie registered in his name were found. At the trial, one of the occupants of house 2892, Ms Ntombikababa Charity Tshabalala, testified that he had been staying there with his girlfriend.

[5] But that is not why he was convicted. His conviction arose from the green 1996 Audi A4. Evidence was led at the trial that the appellant was seen driving a green Audi A4 (its front adorned with a false number plate, and the back bearing the number 'DRV 053GP') just outside house 2892, shortly before it was raided – but that when he saw the police he sped away, eluding pursuit. Ms Tshabalala testified that earlier that same evening a vehicle, whose make she could not identify, but green in colour, was at the house. Less than a week later, the complainant's Audi was recovered in Springs, Gauteng. When he identified it to the police, it had false number plates.

[6] The magistrate accepted that the appellant had been driving the complainant's vehicle, and inferred from the proximity in time (less than 24 hours) that the appellant's possession was so closely connected to the robbery itself that in the absence of other explanation he must have been one of the robbers. The appellant does not attack this part of the magistrate's reasoning, for if he was indeed seen in the Audi so soon after the robbery, such recent possession, together with his elusive conduct, and the false front number plate, overwhelmingly suggests criminal involvement in the robbery. What he disputes is the preceding premise: that he was seen in the Audi at all.

[7] This requires us to consider in detail the pivotal evidence leading to his conviction, that of Superintendent Mahash Singh Ragunanan. He testified that on the evening after the robbery an informer's evidence led him to house 2892. Contrary to the information given, the stolen green Audi was not there, but after

questioning a group of females standing opposite, he got back into his state vehicle and waited outside the house. While so seated, he noticed two vehicles approaching from the rear. The front vehicle slowed next to his, as if to turn into house 2892. Ragunanan alighted. He saw that it was a green Audi with front registration number Mthambo ZN (his informer had given him the names of the suspects connected with the stolen Audi as that of the appellant and one Thami Mthambo, whose name featured frequently during the trial as part of the accused's version). He was one and a half metres away, and noticed the appellant was the driver. He shouted to him to stop, and drew his firearm – but could not fire because of the women opposite. The vehicle sped off. He observed its rear registration was DRV 053GP. He got back into his vehicle and set off in pursuit, but in vain.

[8] Two questions arise from Ragunanan's evidence. The first is whether the incident to which he deposed took place at all, or whether (as was argued at the trial, and again on appeal) it was a later fabrication. The second is whether, if the incident happened, his identification was reliable. These questions must be considered separately.

Was Ragunanan's identification of appellant fabricated?

[9] Doubt arose about the authenticity of the incident for the following reasons. As mentioned earlier, the first two accused were arrested when house 2892 was raided on the night of 26/27 August, the day after the robbery. Accused 3 and 4 were arrested in Gauteng less than a week later in the events that lead to the recovery of the complainant's Audi. But the appellant (accused 5)

was arrested only in May of the following year. That was because Ragunanan made a formal statement for the docket only on 22 March 2001, seven months after the incident at house 2892 (the delay until the May arrest seems to have been because the appellant was in custody in Volksrust on other charges, which were later dropped).

[10] Probed in cross-examination, Ragunanan stated that he told the officer in charge of the scene at house 2892, inspector Fouché, that very evening that he had spotted the appellant in the vehicle, but 'unfortunately I left for special duties away from town, and only returned in March'.

[11] Perhaps surprisingly, this statement was left hanging: Ragunanan was not cross-examined about it at all. The lawyer who elicited this answer (who had been representing three of the accused from the outset of the trial, and stepped in also for accused 5 when his predecessor left during the earlier cross-examination of Ragunanan) did not challenge the authenticity of the 'special duties'. He did not ask what they were, where they had to be performed, when they started, when they ended, or what they entailed so as to inhibit making an earlier statement.

[12] Before the high court and in this court, appellant's counsel sought to impugn Ragunanan's claim as inherently improbable. The obvious objection is that no basis was laid for this in cross-examination. The imputation is that Ragunanan was lying, that there was in truth no reason why he could not make a statement immediately, and that the seven-month delay pointed to fabrication.

This is not only speculative; it is unfair. A cross-examiner who later suggests that a witness is lying on a particular point must generally confront the witness with the imputation.[1] If a single question had been asked, Ragunanan might have been able to explain his 'special duties' in detail and with perfect conviction.

[13] But this is not a civil trial between Ragunanan and the appellant, and it is not Ragunanan's rights that are at issue here. It is the appellant's. His right not to be wrongly convicted must trump Ragunanan's right not to have his evidence unfairly impugned ex post facto. The general requirement that a witness must be confronted with damaging imputations[2] is not a formal or technical rule. It is a precept of fairness. That means it must be applied with caution in a criminal trial: if, despite the absence of challenge, doubt arises about the plausibility of incriminating evidence, the accused should benefit.

[14] One exception to the confrontation requirement is where a witness's tale is so far-fetched and improbable that it can be rejected on its own standing without the need for cross-examination.[3] That exception should clearly be applied with greater liberality in determining whether the state has proved its case against an accused beyond reasonable doubt.

[15] But are there circumstances here to suggest that we should doubt Ragunanan's unchallenged evidence that he was called

[1] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 61.
[2] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 64-65.
[3] *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 64.

away on special duties and that this was why he did not make a statement immediately? There should be at least some basis for rejecting the witness's unchallenged evidence out of hand – whether it arises from some intrinsic feature of the evidence itself or from other evidence at the trial. Here there is no basis at all. It is not inherently implausible that a policeman is called away on special duties. Nor is it inherently implausible that this could delay his statement.

[16] Alert to possible doubt arising from Ragunanan's evidence, the magistrate recalled both Fouché and Van Zyl (the investigating officer, to whom Fouché handed the case docket on the Monday). Fouché confirmed that Ragunanan had told him that he had seen the appellant driving the Audi.[4] He affirmed that this was *before* he handed the docket over to Van Zyl, although he could not remember whether it was during the events at house 2892 itself or on the Sunday. His evidence thus corroborated that of Ragunanan. As the magistrate pointed out in his judgment, it was admissible and highly relevant to the imputation of recent fabrication.

[17] Though his evidence was more equivocal, Van Zyl on being recalled likewise confirmed that after the incident Ragunanan told him that he had seen the appellant in the vehicle that evening. He also explained that he asked Ragunanan for a statement, but that

[4] 'COURT Okay. So what did Ragunanan tell you? – He told me that when the vehicle had driven past he had seen who the driver was, and that he had recognised the person as accused 5.
Was a statement taken from Ragunanan? – Not immediately then, he was asked for a statement, but I, due to something that only he can explain, the statement was only obtained at a later stage.'

as Ragunanan's junior he could not insist on one.[5] It further appeared that Van Zyl first wanted a sworn statement, so as to procure a warrant of arrest, before arresting the appellant: hence the delay.

[18] One detail should be added to all of these. It transpired during the trial that the police officers were from differing units. Those who combed the scene and effected the arrests were from the dog unit. Fouché and Van Zyl were from the murder and robbery unit. Ragunanan was from the intelligence division. Because of the lack of cross-examination on the relevant point, the difficulties this may have created for coordination and communication were not explored.

[19] In these circumstances the fabrication claim cannot in my view be sustained. The evidence as a whole, fairly considered, indicates that Ragunanan went away on special duties, and that this triggered the delay in his statement. The magistrate, who was alert to the doubt, and saw all the witnesses, accepted the honesty and reliability of Ragunanan, Fouché and Van Zyl on this point. In my view, despite some attempt on the appellant's behalf to suggest that the latter two conspired dishonestly to corroborate Raguanan's evidence, he was correct to do so.

[20] It should perhaps be added that there has been no complaint about the quality of the appellant's legal representation.[6] Indeed,

[5] 'Vir my as ['n] junior offisier kan ek seker nie vir 'n senior offisier dwing om – vir hom te sê wanneer om 'n verklaring te maak nie. By my is hy verre my senior, ek kan nie vir hom sê … wanneer – daar is wel verskeie kere vir hom gevra vir 'n verklaring, maar …'

[6] The Bill of Rights s 35(3) guarantees every accused person the right to choose and be represented by a lawyer.

while the cross-examination was not of Kentridgean stature, its deficiencies did not impair the appellant's right to a fair trial.[7]

Was Ragunanan's identification reliable?

[21] The next question is whether the requisite degree of credence can be attached to Ragunanan's identification of the appellant. As already indicated, Ragunanan caught no more than a quick night-time glimpse of the driver of the Audi A4. But it was at a close span (about 150cm), directly under a street-light; and he added when the magistrate questioned him that the interior light of the vehicle was on. This detail, too, was not challenged in Ragunanan's cross-examination, and much was sought to be made of it on appeal, leading to speculative debate about reasons and likelihood;[8] but in my view without challenge there is simply no warrant for subverting Raguanan's evidence on this point.

[22] More important to the reliability of his identification is the fact that Ragunanan testified that he had known the appellant for some five years before the incident. This detail was raised in cross-examination, though the challenge was ineffectual. The cross-examiner sought to probe by way of follow-up whether Ragunanan knew where the appellant lived. This boomeranged when Ragunanan proceeded to itemise knowledge of the appellant's 'various residences', in sections 1 and 3 Madadeni, plus 'unconfirmed information in Johannesburg as well'. Ragunanan also stated that on the night in question he had been to both the

[7] See *S v Tandwa* 2008 (1) SACR 613 (SCA) para 7 (the right to legal representation is a right of substance, not form; it entails a right to competent representation – that is, of a quality and nature that ensures that the trial is in substance fair).

[8] Patel J in the high court, for instance, thought it was not unlikely that a driver of a stolen car, unfamiliar with its instrumentation, would have the interior light on.

appellant's Newcastle residences. His knowledge of the appellant and his likely whereabouts was therefore established. Indeed, it emerged from the evidence of other police officers that they too knew the appellant and had had dealings with him because of his involvement in other cases and charges (and that they had been to look for him on previous occasions at house 2892).

[23] Against this background, despite the fleeting opportunity and night-time conditions, Ragunanan's identification was not without inherent plausibility. It certainly called for an answer. Yet the appellant countered it with nothing. He chose not to testify. That was his right.[9] Yet he must bear the consequences of exercising it. His choice to remain silent in the face of evidence clearly implicating him in criminal conduct suggests that he had no answer to it.[10] For Ragunanan's evidence was pre-eminently (as Heher JA put it in *S v Chabalala*)[11] 'capable of being neutralised by an honest rebuttal'. The rebuttal void clinches the impact of Ragunanan's evidence. This leads to the inference that the appellant was driving the green Audi A4 on the night after the robbery, with false number plates, and that he fled when the police confronted him. That conduct, unexplained, together with the evidence linking the appellant with the place where the stolen goods were recovered, results in the overwhelming conclusion that he was himself involved in the robbery.

[24] I should add that before us counsel for the appellant sought to make something of differing references in the record to the

[9] Bill of Rights s 35(3)(h) – every accused person has the right to a fair trial, which includes the right 'to remain silent, and not to testify during the proceedings'.
[10] See *S v Tandwa* 2008 (1) SACR 613 (SCA) paras 53-56.
[11] 2003 (1) 134 (SCA) para 21.

Audi's registration number. The exhibit list, confirmed by the complainant, indicated that it was DRP 053GP. In Ragunanan's evidence, the number is rendered as 'DRV 053GP'. It is plain that this must have been either a slip of the tongue or a transcription error. This was however compounded when the magistrate in his judgment referred to the registration number as 'VLV 053GP'. Before us, counsel sought to make capital of this, but was unable to offer any rational basis, other than mis-speaking or a transcription error, for where 'VLV' came from. It is clear that the magistrate intended to refer to the same vehicle, identically registered, as the one stolen from the complainant, which Ragunanan saw the night after, and which was recovered in Springs less than a week later. The error has no significance.

[25] It follows that despite the somewhat curious features of the case the appellant's conviction was correct. Especially having regard to the fact that he chose not to testify, the features raise doubt, but not reasonable doubt, about his guilt.

[26] It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the accused. Though the notion of 'moral certainty' has been criticised as importing potential confusion in jury trials,[12] it may be helpful in providing a contrast with mathematical or logical or 'complete' certainty. It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for

[12] See the decision of the Supreme Court of the United States of America in *Victor v Nebraksa* (92-8894), 511 US 1 (1994), accessed on 27 November 2008 at http://www.law.cornell.edu/supct/html/92-8894.ZO.html.

convicting the accused, but to vouch that the integrity of the system that has produced the conviction – in our case, the rules of evidence interpreted within the precepts of the Bill of Rights – remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.

[27] In my view that level of certainty exists about the appellant's guilt.

Sentence

[28] The magistrate sentenced the appellant to twenty years' imprisonment. This was the maximum sentence for robbery under the applicable legislation.[13] The magistrate was clearly right in considering that the minimum sentence provisions applied, since there were aggravating circumstances (firearms were used) and since a motor vehicle was taken.[14] There has been no attack on his conclusion that there were no substantial and compelling circumstances justifying a lesser sentence than fifteen years.

[29] In terms of the proviso to s 51(2) of Act 105 of 1997 (which applied when the appellant was sentenced on 15 March 2002),[15] 'the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection'. The magistrate considered the maximum appropriate. He pointed out that the family had suffered the fright of intrusion and been

[13] Criminal Law Amendment Act 105 of 1997.
[14] Section 51 of Act 105 of 1997, read with Part II of Schedule 2.
[15] See now the Criminal Law (Sentencing) Amendment Act, 38 of 2007.

robbed ‘clean’, and that the complainant had received a blow to the head.

[30] These circumstances, while serious, do not justify the maximum sentence. They constitute reasons why the minimum sentence of fifteen years, and not a lesser sentence, was appropriate. The circumstances did not call for an exemplary sentence, which the maximum entails. That in my view would be disproportionate to the circumstances of the offence (see *Vilakazi v The State* [2008] 4 All SA 396 (SCA), (576/07) [2008] ZASCA 87 (2 September 2008)).

[30] Recounting the circumstance of the robbery, the magistrate in referring to the appellant remarked that ‘‘People like that don’t deserve any mercy’. That was wrong. Although the appellant was not a first offender, his previous convictions (for theft in 1989 and 1992, when he was aged 20 and 23, both resulting in sentences of strokes with a light cane) were a decade and more old at the time of sentencing. He deserved a measure of mercy. That meant the minimum, and not the maximum, should have been imposed.

[29] In the result:

1. The appeal against conviction is dismissed.
2. The appeal against sentence succeeds.
3. The sentence imposed by the magistrate is set aside. In its place there is substituted:
   ‘The accused is sentenced to fifteen (15) years’ imprisonment.’

E CAMERON
JUDGE OF APPEAL

Appearances:

For the appellant:	Mr PJ Loubser Instructed by: Southey, Steyn & Mphela Attorneys, Newcastle Mphobole & Ishmail Attorneys, Bloemfontein
For the respondent:	Ms D Barnard Instructed by: Director of Public Prosecutions, Pietermaritzburg & Bloemfontein