

NOT REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: A70/2011

DATE: 09/06/2011

DELETE WHICHEVER IS NOT APPLICABLE	
REPORTABLE: YES/NO OF INTEREST TO OTHER JUDGES: YES/NO REVISED	
_____ DATE	_____ SIGNATURE

In the matter between:

VILAKAZI, JOSEPH

First Appellant

NGOBO, BONGA VINCENT

Second Appellant

and

THE STATE

Respondent

JUDGMENT

C. J. CLAASSEN J:

- [1] The appellants, both members of the South African Police Service, stood trial in the Regional Court in Alexandra on one count of robbery, it being alleged that on 1 May 2009 at Olifantsfontein Main Road, Randburg, they assaulted Siphiwe Nqobo, and with force and violence took from him R450 in cash. They were legally represented and pleaded not guilty but were both found guilty as charged on 20 October 2010. On 6 December 2010 both were sentenced to ten years' imprisonment, three years of which were conditionally suspended.

- [2] Application was made for leave to appeal the conviction and sentence, which was refused. The petition addressed to the Judge President, however, succeeded and leave to appeal both the convictions and sentences for both the appellants was granted by this court.

THE VERSION OF THE STATE

- [3] The State tendered only the evidence of the complainant. He testified that he was about to take the on-ramp to Pretoria from Olifantsfontein road. He was driving in Olifantsfontein Road from west to east. He stopped at the first pair of robots. At that robot he then turned right into, what he called a hairpin bend, to get onto the highway leading towards Pretoria, when suddenly he saw the lights flashing of a police motor vehicle.
- [4] He then stopped. The second appellant approached him and asked to see his driver's licence. The second appellant also wanted to know whether he was drinking. He actually admitted that he had had a few drinks. At that point he had already alighted from the motor vehicle. He returned to it to collect his wallet from the inside of his vehicle. As he alighted, R450 was visibly sticking out of his wallet. He was trying to locate his licence, which was also in the wallet, when the second appellant snatched the R450 cash out of his wallet.
- [5] The complainant then argued with the second appellant over the money. According to the complainant the second appellant told him that the money was not enough and he then suggested to the complainant that they should go to an ATM so that the complainant could draw more money.
- [6] He continued to remonstrate with the second appellant who then threatened to take him to Hillbrow for a blood test. The complainant demanded to know why he could not be taken to Midrand for a blood

test as they were quite close to Midrand. The second appellant then said he was arguing a lot and instructed him to get into the van. As he complied with this instruction, the first appellant alighted from the van. The first appellant did not involve himself with the argument and did nothing to the complainant. Second appellant was the only one who dealt with him.

- [7] It was then decided to let him go and the complainant then went his way. However, he decided to report the incident to the Midrand police. He proceeded to that police station and wanted to speak to a senior officer. At the police station he only found a junior officer and he decided to return the following Monday to speak to a senior officer. On that Monday he returned to the Midrand police station but was still unable to see a senior officer. He returned again the next Thursday upon which occasion he was able to speak to Captain Chetty. He made a statement to Captain Chetty.

THE APPELLANTS' VERSION

- [8] The versions of the two appellants are mutually destructive of the complainant's version. In short, their version boils down to an allegation that the complainant actually crossed over the first set of robots, crossed over the main road and then turned down towards his right into a one way road, which is the offramp for traffic from Pretoria by way of another hairpin bend leading to Olifantsfontein Road.
- [9] They saw this vehicle attempting to go down the one way road and then making a U-turn. They stopped and shouted at the driver to get out of his vehicle. The first and second appellant alighted from their police van simultaneously with the first appellant alighting from his vehicle. The first appellant allegedly took out his R5 rifle and merely stood guard while the second appellant walked towards the complainant.

- [10] Some discussion took place. The second appellant then wanted to inspect the complainant's licence. He took his torch, looked at the licence disc and shone it into the motor vehicle. This conduct apparently enraged the complainant. It caused an argument and a scuffle. According to the second appellant he became enraged when the complainant insulted him by stating that police like him are criminals and take money unlawfully from people.
- [11] The second appellant then grabbed the complainant by his clothes and told him to stop it. Eventually the two policemen decided to let him go and each returned to their own vehicle.
- [12] At the police station the appellants were interrogated as to what had happened. They merely stated that they had "difficulty with a driver".

THE CASE AGAINST THE FIRST APPELLANT

- [13] In my view, the court *a quo* misdirected itself in convicting the first appellant. On the State's own evidence the first appellant did not associate himself in any way with the conduct of the second appellant. The evidence supports this conclusion. I quote from the court record:

"COURT: Was there a physical confrontation between you and him (the second appellant) ?

No, no, no, we did not fight.

After he – you say he grabbed your wallet – yes.

And then did he take out the money? – Yes. It was in fact ... I reached out for my wallet my driver's licence sits in, it is always kept there. As I was trying to pull it out he then grabbed my wallet with my driver's licence inside and then – and they took the money out and there was R450, and he said the money was little for...[intervenes]

What did he then do with the money?

He took the money. He took the money with him.

Yes, after he took the money what did he do with it?

He may have kept it in his pocket. I did not...[intervenes]

You did not see what he did?

No, I did not see what he did with it.

Right, after he took it did he gave you back the wallet?

Yes.

And what did you do with it then?

That was after when he was saying I must go.

No.

Then he was letting me go.

No, no, where were you when he grabbed the wallet?
I was standing there because the wallet was in my hand.
So after he stopped you, you got out of your vehicle.
Sorry?
After he stopped you, you got out of your vehicle.
Yes, I did.
And did you go to the police vehicle?
When he asked for my driver's licence, I went back into my car.
Yes.
And?
Yes, my wallet stays underneath my steering wheel so I reached for it. I was outside, I reached for it. I then opened it to take out the driver's licence, that is when he grabbed it.
And then?
After that we argued a bit about it. He then ended up insisting that I must get inside the van so they could take me to Hillbrow. So I did comply. That is when accused 2 came out. Then he decided to say, no I must go."

[14] Now it is obvious from this quote that on the complainant's version the first appellant remained in the vehicle and only came out after the scuffle and after the complainant was asked to get into the van.

[15] Clearly this evidence does not incriminate the first appellant at all. Even less does it establish any kind of common purpose with the conduct of the second appellant. On the contrary, it is indicative that he totally disassociated himself with the actions of the second appellant. The first appellant's testimony that he got out of the motor vehicle and stood guard with an R5 rifle, was an obvious attempt by him to protect the second appellant. In so testifying, he purportedly placed himself in a position where he would be able to confirm that he saw no money changing hands. Thus he would be able to corroborate the second appellant's testimony in this regard. As the junior officer, it is quite probable that he was influenced by the second appellant, as the senior, to adhere to this untruthful version.

[16] Of course, the mere fact that an accused gives a false rendition of events does not necessarily lead to a finding of guilt as being the only reasonable inference to be drawn. In this regard reference may be made to **S v Mtsweni** 1985 (1) SA 590 (A) where the head note reads as follows:

“Although the untruthful evidence or denial of an accused is of importance when it comes to the drawing of conclusions and the determination of guilt, caution must be exercised against attaching too much weight thereto. The conclusion that, because an accused is untruthful, he therefore is probably guilty must especially be guarded against. Untruthful evidence or a false statement does not always justify the most extreme conclusion. The weight to be attached thereto must be related to the circumstances of each case. In considering false testimony by an accused, the following matters should, *inter alia*, be taken into account: (a) the nature, extent, and materiality of the lies and whether they necessarily point to a realisation of guilt; (b) the accused’s age, level of development and cultural and social background and standing insofar as they might provide an explanation for his lies; (c) possible reasons why people might turn to lying, eg, because, in a given case, a lie might sound more acceptable than the truth; (d) the tendency which might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an admission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth.”

- [17] In my view, the standing of the first appellant as the junior to the second appellant and the latter’s influence over the first appellant, are sufficient reasons to doubt the veracity of the first appellant’s version, and to reject it as not being correct. In light of the complainant’s evidence, it is obvious that the first appellant had no role to play in the commission of this crime. In my view, the conviction and sentence against the first appellant must therefore be set aside.

THE CASE AGAINST THE SECOND APPELLANT

- [18] I now come to the case against the second appellant. Both counsel for the State and for the defence agreed that the State’s version did not establish a crime of robbery against the second appellant. Snatching money from somebody’s hand without warning does not establish robbery but theft. In my view, this attitude is correct, and the conviction and sentence on robbery should be set aside. However, I am of the view that the State did succeed in proving beyond a reasonable doubt that the second appellant committed theft of R450.
- [19] It was submitted on behalf of the second appellant that the whole incident occurred as a result of a U-turn allegedly made by the complainant. In evidence the complainant denied making a U-turn. According to him his conduct gave no reason for the police to stop him.

He was supported in this version by the testimony of the first appellant who categorically stated that they did not stop him because of a U-turn. According to the first appellant they stopped him to inspect the vehicle. In this regard the record stated the following:

“So that means you never suspected the complainant was stealing the car, which means that the reason you stopped him is that he was, according to you, making a U-turn on the barrier line, that is the reason. No, that is not the reason.”

[20] A little later, under cross-examination, the first appellant said the following:

“Why did you stop him?
Because we were suspecting the motor vehicle.”

[21] This, in my view, constitutes unambiguous evidence in support of the complainant’s version that he did not make a U-turn. However, the statement he made to the police on the Thursday seems to indicate that he told them that he did make a U-turn. He was heavily cross-examined as to this contradiction between his statement to the police and his evidence in court. If one, however, considers the area where this incident took place then turning right at the point where the complainant said he turned right, meant that he would first drive in a southerly direction towards Johannesburg and then by means of the hairpin bend turn to a northerly direction towards Pretoria. It may very well have been that the “hairpin bend” was translated as a U-turn in the statement, and that in the complainant’s mind when reading the statement, reference to the U-turn in the statement was a reference to the hairpin bend. It is common cause that it is necessary to travel on this hairpin bend to get onto the highway leading towards Pretoria.

[22] All in all, I am of the view that the criticism levelled at the complainant in regard to this so-called contradiction did not justify a finding that his credibility was dented. After heavy cross-examination he conceded that reading the statement *ex post facto* it does indicate that reference was made to a U-turn. However, as explained above, that does not mean

that it correctly recorded his version. He categorically stated it constituted an error. This evidence remained uncontradicted as the officer who recorded his statement was not called to reject the complainant's evidence that the statement contained an error.

[23] Furthermore taking into consideration that he knows the road well, that he often travels that road, one would not expect him to have made an error in regard to whether or not he made a U-turn on a one way road. In my view, that contradiction is not a material contradiction, if it is a contradiction at all. The probabilities regarding the correct interpretation of the complainant's statement favour the State's version.

[24] Finally, the second appellant himself did not state that the complainant completed making a U-turn. His evidence was to the effect that the complainant "attempted" to make a U-turn but did not in fact complete the U-turn. The second appellant's version that an alleged U-turn executed by the complainant caused the incident must therefore be rejected as false beyond reasonable doubt. Once the *causa causans* for the incident on the second appellant's version is rejected, his entire testimony lacks credibility. If indeed the complainant did execute a U-turn, one would have expected the second appellant to mention that when he was questioned about the incident by his colleagues at the Midrand Police Station. Merely stating that they had "difficulty with a driver" is a far cry from stating that the driver executed a U-turn when driving down a one-way road in the wrong direction which led them to suspect the car as having been stolen.

THE PROBABILITIES

[25] The evidence was that the complainant actually went to the police station three times; (i) later that evening; (ii) the next Monday; and (iii) again on the following Thursday. Why would the complainant go to all that trouble if the police merely inspected his vehicle and found his licence and licence disc to be in order? Why would he go to all that

trouble if the second appellant merely grabbed him by his clothes while there was no assault or attack of any kind? In my view, the only reasonable answer to these questions must be that something more sinister or serious occurred than that to which the first and second appellant testified.

- [26] Furthermore the evidence of the first and second appellants conflicted in numerous aspects. The second appellant even contradicted himself in a number of instances. I am not intending to deal with each of these instances, because they are dealt with in the judgment of the court *a quo*. I need only associate myself with the magistrate's judgment where the following is stated:

"Now from both of these accused' evidence there is no way that they could have and did have suspected that this man wanted to make a U-turn. That they have testified themselves they could not have. What is clear is that they stopped this person and from thereon they contradicted each other on basically all the aspects that they have testified about, and it is clear especially from accused 2 that he was making up his story how(sic) far (he) went in his testimony, and to this end that he even allowed him to make his U-turn to go away(sic) in a road that he did not want to go in the first place. It is clear that these versions by both the accused are fabricated versions. It is one that it is clear that it did not take place, and as said before the probabilities does(sic) not favour them in this case. The probabilities are there that there is more than just a mere altercation between two people. So the court can safely say that the accused's version as they have tendered it to this court is false and should be rejected as such."

- [27] I am therefore of the opinion that the second appellant is indeed guilty of theft.

SENTENCE

- [28] As I have already set aside the conviction and sentence for robbery, this court is at large to sentence the second appellant afresh. The question is what would be the appropriate sentence in the circumstances of this case? The second appellant is a 44-year old man and married with children. He has been a member of the police for a long time. This conviction would obviously cause him to lose his employment as a police officer. That of course is a punishment in itself, for which of course he has only himself to blame. He has also been in

custody awaiting trial for nine months, and according to the authorities one must take into account that such period of incarceration amounts to almost double that time in prison because of the poor treatment which awaiting trial prisoners receive at the hands of the Department of Correctional Services.

[29] But on the other hand, he was a policeman. He must have known better. This type of crime committed by police officers is so prevalent that members of the public are afraid of the police. They often think it safer to avoid the police altogether. The concept of a policeman being the friend of the public, there to assist and protect them, has become a distant dream unrelated to the reality on the ground. The police service in South Africa has been subjected to a lot of justified criticism in the news and media. The public's trust which is supposedly to repose in the South African Police Services has been severely curtailed by the type of crime evident in this case. It is therefore this court's duty to impose sentences which reflect the public's distrust in the honesty and fidelity of police officers such as the appellant in this case.

[30] What then would be a fit and proper sentence in this case? It is trite that a fit and proper sentence should fit the crime, the criminal, and also take into consideration the needs and views of the community. It should also have sufficient deterrent and rehabilitative attributes, blended with a measure of mercy.

[31] Taking into consideration all of these circumstances I am of the view that an appropriate sentence would be two years' imprisonment, half of which is suspended for a period of five years on condition that the accused is not convicted of the crime of theft committed during the period of such suspension.

[32] The following order is issued:

1. The appeal by the **first appellant** against his conviction and sentence is upheld and the judgment of the court *a quo* is set aside and substituted with the following:

“The accused is acquitted and discharged.”

2. The appeal by the **second appellant** against his conviction and sentence is upheld and the judgment of the court *a quo* is set aside and substituted with the following:

“The accused is found guilty of theft of R450-00 and sentenced to 2 (two) years’ imprisonment, half of which is suspended for 5 (five) years on condition that the accused is not found guilty of theft committed during the period of suspension.”

THUS DATED AND SIGNED AT JOHANNESBURG THIS 12th DAY OF JULY 2011.



C.J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree:



p/p R. STRYDOM
ACTING JUDGE OF THE HIGH COURT
Counsel for the Appellants: Mr J. C. Kruger (Attorney)
Counsel for the State: Adv M. P. Moleko