

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
(REPUBLIC OF SOUTH AFRICA)

Case No: AR 102/2012

In the matter between:

NDUMISO QWABE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

HARTZENBERG, A.J:

[1.] The Appellant (who was Accused No 2 at the trial) along with one Sphelele Shobede (who was Accused No 1 at the trial) were convicted in the Regional Court at Eshowe on 5 March 2010 of Robbery with aggravating circumstances in that they had robbed one Khulekane Bhengu on 9 February 2008 of several items, including a Toyota Tazz motor vehicle, two mobile telephones, a men's gold necklace and a wrist watch. The Appellant, after the learned Regional Magistrate found that he had committed the offence under peer pressure from Accused No 1 and that this constituted "substantial and compelling circumstances" as contemplated in terms of s 51(3) of Act 105 of 1997, was sentenced to 12 years' imprisonment.

[2.] The circumstances giving rise to the Appellant's conviction and sentence were briefly as follows: The complainant, who was at the time employed as a security guard with Coin Security, and his girlfriend were in the complainant's house, in the bedroom during the night of 9 February 2008. The complainant saw two people storm into the room, having kicked open the door. The one intruder wore a balaclava, and the other a hat. The face of the latter intruder was however sufficiently visible to the complainant for him to identify the person by his facial features. One of the intruders carried an object looking like a small axe, while the other carried an object resembling a firearm. The electric light which illuminated the area outside the house, shone into the room, with the door open. Outside the house the area was lit. The intruders forced the complainant to hand over his motor vehicle keys. They also demanded his firearm but, since he did not have his firearm (used for his employment) with him, he was unable to comply with such demand. He was then pulled to his motor vehicle. They demanded that he show them how to operate the motor vehicle, which was a Toyota Tazz. He had purchased the vehicle in terms of an instalment sale agreement. The purchase price of the vehicle was R 52 000. With the addition of finance charges, his indebtedness in respect of the vehicle was some R 78 000. One of the assailants at that stage busied himself with starting the vehicle, while the other proceeded to remove a number of items from the bedroom. These items, together with certain items removed from the motor vehicle itself, are listed in the charge. Certain events took place during the early morning of Sunday, 10 February 2008, implicating both the Appellant and Accused No 1 in the robbery. These events

will be dealt with later. The Appellant and Accused No 1 were however only arrested during November 2008. The vehicle, it must be mentioned, was however recovered on 11 February 2008 when an unsuccessful attempt was made to arrest Accused No 1. Some of the other movable items which are mentioned in the charge were however only recovered subsequently.

- [3.] The complainant, in his evidence in chief, identified several of the items which he lost during the robbery. These included a motor vehicle sound system speakers (including two so-called sub-woofers inside the speakers) (Exhibit 1), a Nokia N70 mobile telephone (Exhibit 2A), a necklace which the complainant recognised by the "small squares" on the design thereof (Exhibit 2B), as well as a total of 8 CD's or DVD's, which included 5 CD's or DVD's which the complainant recognised as his property (Exhibit 2C). It must be mentioned that the mobile telephone was identified by the complainant with reference to a scratch he purposefully made on the telephone casing, which he identified. He also said that when the mobile telephone was returned to him, it still had his telephone numbers which he stored on the so-called "phonebook" of the instrument, and also had some of his personal photographs stored in it. The complainant's evidence with regard to the recovery and identification of the mobile telephone was corroborated by the evidence of Detective Constable Porter. His evidence was that although both Accused were only arrested some 9 months after the events described above, he, shortly after the happening of the events, traced both accused and on Monday 11 February 2011, made an attempt to arrest

Accused No 1. Accused No 1 however escaped and fled. When doing so, Accused No 1 dropped the mobile telephone as he was running away. When Porter picked up the mobile telephone he saw photographs of both Accused No 1 (then being a suspect) and the complainant on the mobile telephone. The so-called IMEI number on the mobile telephone matched the IMEI number which was given to him by the complainant. Accused No 1 eventually handed himself over at the Eshowe Police Station during November 2008.

- [4.] Constable Porter arrested the Appellant, on 12 November 2008. The Appellant was arrested at the same place where Accused No 1 had fled to. Constable Porter said that the speakers were recovered by him from one of the prosecution witnesses, one Mr Emmanuel Zibane, who confirmed that he, on 12 February 2008, purchased the speakers for an amount of R 600 from two persons, one of whom he identified as the Appellant. He paid the Appellant R 100 and said that he, that is the Appellant, should return for payment of the balance of the purchase price, later. The Appellant never returned. On 13 November 2008 Mr Zibane was approached by the Police when he handed the speakers to them. This, according to Mr Zibane happened in the presence of the Appellant. In this regard we point out that there is a conflict between the evidence of Mr Zibane on the one hand, and that of Constable Porter. The latter said that the Appellant was not present when the speakers were recovered from Mr Zibane. In my view, this conflict between the evidence of these witnesses, however, is the type of conflict one may expect, where witnesses, though completely honest and reliable

otherwise, may have forgotten certain details, more especially, having regard to the fairly long period of time which had elapsed between the happening of the relevant events and the time when they gave their evidence.

- [5.] Constable Porter also testified that when he recovered the speakers, the Appellant was at the Police Station. None of the items mentioned in the charge were recovered from the Appellant himself. What shall be explained, more fully later, is that the evidence implicating the Appellant in the robbery, is largely confined to him having been seen in the early hours of the morning of 10 February 2008, in the motor vehicle in the company of Accused No 1 and, having sold the speakers to Mr Zibane. One of the important prosecution witnesses, upon whose evidence the conviction of the Appellant vitally depended, was one Mr Ntutuko Sikwazi Mkhize. He was referred to in the evidence and in the judgment of the Magistrate as Sikwazi. I shall refer to him as Mr Mkhize. According to Mr Mkhize, the Appellant and Accused No 1 arrived at his home at approximately 04h00 on the morning of Sunday 10 February 2008. Mr Mkhize knew both of them. In fact, the relationship between Mr Mkhize on the one hand, and both Accused No 1 and the Appellant, appeared to have been a close one. Mr Mkhize described Accused No 1 as a friend. He referred to the Appellant as his neighbour. In order to complete the factual background, it must further be mentioned that when the vehicle was recovered, it was damaged. It had been driven into a drain or a ditch. It had sustained frontal and other damage, including a broken windscreen and damage to the roof. At the time of its

recovery, the movable items referred to in the charge had been removed. The speakers had also been removed from the vehicle. The speakers formed part of the sound system of the vehicle.

[6.] Counsel for the Appellant submitted that the case against him was based on circumstantial evidence and that in large measure the case for the prosecution rested on the evidence of Mr Mkhize who was essentially a single witness. He criticised the evidence of Mr Mkhize on a number of grounds and contended that such evidence was not sufficiently reliable to sustain the Appellant's conviction.

[7.] With regard to the applicable legal principles I make the following observations:

7.1. Watermeyer JA (as he then was) in **R v BLOM**¹ made the following statement which has been firmly embedded in our jurisprudence:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.**
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."**²

¹ 1939 AD 188

² At 202 - 203

- 7.2. Where a suspect, or accused who is confronted with having possessed part of the goods stolen or robbed from the complainant falsely denies such possession altogether, or gives a false explanation as to how he obtained such possession, the Court, in an appropriate case, is entitled to draw an inference against the accused that he had stolen or robbed the goods or all of the goods lost by the complainant, even if the accused is proven to have had possession of only some of the goods lost by the complainant. In this regard I draw attention to the following statement by Rumpff JA (as he then was) in **S v RAMA**³:

“The appellant was charged with theft and he falsely denied possession of the stolen watches. In my view the trial Court was entitled, in all the circumstances of the case, to draw the extreme inference, namely that of theft of the two boxes. In this connection the remarks by Malan, JA, in a minority judgment in the case of *R v MLAMBO*, 1957(4) SA 727 (AD) at p 737, are, *mutatis mutandis*, appropriate. Having dealt with the facts of that case, a murder charge, he stated:

‘If an assault – using the term in its widest possible acceptance – is committed upon a person which causes death either instantaneously or within a very short time thereafter and no explanation is given of the nature of the assault by the person within whose knowledge it solely lies, a court will be fully justified in drawing the inference that it was of such an aggravated nature that the assailant knew or ought to have known that death might result.’

I prefer, on the facts of that case, the view set out above to the view expressed in the majority judgment. In my opinion this Court should not have held that the trial Court was wrong, even though this Court, as the original *judex facti*, might not have arrived at the trial Court’s conclusion. Pursuant to that, I also agree with the following observations at p 738 by Malan, JA, in that judgment:

³ 1966(2) SA 395 (A)

‘In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused.

Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity, to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.”⁴

- 7.3. In considering whether an inference of guilt can or should be drawn against an accused from his “recent possession” of goods or movables taken from a complainant in a theft or robbery, all the relevant circumstances, including the nature of the goods or movables, and the time lapse between the time of the commission of the offence and the time when the accused was found to be in possession of the goods or movables, must be taken into account. Possession of articles of the type which are usually and easily and rapidly disposed of, within even a relatively short period of time after the commission of the offence, is less likely to give rise to an inference of guilt. On the other hand, possession of a distinctive article for which limited demand exists, even after the lapse of a considerable period of time following the commission of the offence may,

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At 400 G – 401 C

in appropriate circumstances, give rise to an inference of guilt, especially in the absence of a satisfactory exculpatory explanation for such possession.⁵

[8.] Both the Appellant and Accused No 1 were represented by the same attorney in the trial before the Regional Court. It must be assumed therefore that the Appellant and Accused No 1 had made common cause with regard to their versions of the relevant events. Important aspects of the Appellant's version of what transpired, are the following: First, he denied that he was implicated in the robbery. He denied that he was at Mr Mkhize's house early during the morning of 10 February 2008. His version when he gave evidence was that he sold the speakers to Mr Zibane for R 600. He claimed however that he did so as agent for Mr Mkhize.

[9.] Accused No 1 at the trial, while denying that the Appellant was with him during the early morning of Sunday 10 February 2008, at Mr Mkhize's house, said that it was one Vumani Hadebe who drove the vehicle on that morning. According to Accused No 1 he was satisfied that Mr Mkhize also saw Vumani Hadebe driving the vehicle. It is further important to bear in mind that the brother of Accused No 1, Vumelani Kingdom Shobede, who was called by the defence, contradicted the evidence of Accused No 1 in that he said that Accused No 1 arrived in the motor

⁵ Cf. S v SKWEYIYA, 1984(4) SA 712 (A) at 715 C - I

vehicle. According to Accused No 1's brother, upon enquiry, Accused No 1 first said that the vehicle was his sister's vehicle but later said it was a friend's vehicle. That was the morning when Constable Mncube made an attempt to arrest Accused No 1. It was also on that morning that the vehicle was recovered.

[10.] In my view, the learned Magistrate correctly found that, on the evidence, the Appellant was the second assailant who, alongside with Accused No 1 perpetrated the robbery on the complainant. My reasons are as follows: Although there are certain imperfections in the evidence of Mr Mhize, the overall assessment of that part of his evidence, to the effect that both the Appellant and Accused No 1 arrived at his house in the vehicle during the early hours of Sunday 10 February 2008, cannot be criticised. He was a friend of Accused No 1 and knew both accused. The Appellant was his neighbour. According to him, Accused No 1 drove the vehicle. The Appellant later "went home". According to him, the Appellant "came with" the speakers. In the morning, which I understand to mean later that same morning, the Appellant told Mr Mkhize that he left the speakers in a smaller building behind the main house. Both he and the Appellant went and looked at the speakers. The evidence, in my view, establishes that these were the speakers which were sold by the Appellant to Mr Zibane. This part of Mr Mkhize's evidence is inherently probable and no other plausible explanation for him being involved with the speakers, suggests itself, on the evidence. Moreover, I disagree with counsel's submission that it was improbable that Accused No 1 and the Appellant would have woken Mr Mkhize early on the

morning of Sunday 10 February 2008, when they brought some beers. It seems that Mr Mkhize and Accused No 1 and the Appellant had a close and longstanding friendship, since about 2001, and such occurrence was not unusual, as was explained by Mr Mkhize under cross-examination. Mr Mkhize's denial with regard to gambling taking place at the time is understandable. He said he was sleeping, suggesting that others may have been gambling, although he did not see them gambling or participate in the gambling. The evidence of the witness Msomi, called by the defence, it must be pointed out, is vague and on the face of it, is not to the effect that Mr Mkhize himself participated in any gambling from about 22h00 during the evening of 9 February 2008 to dawn the next morning. According to him, one Vumani arrived in the vehicle and participated in the gambling. Mr Mkhize's evidence was merely to the effect that the Appellant, during the morning of Sunday 10 February 2008 informed him that he had left the speakers at the premises, in a toilet building at the rear of the main house.

[11.] What in my view, presents an insurmountable obstacle to the Appellant, is his explanation of how it came about that he sold the speakers to Mr Zibane. According to the Appellant, Mr Mkhize, fabricated his evidence implicating him in bringing the speakers to Mr Mkhize's premises and in discussing it with him during the morning of Sunday 10 February 2008. When Mr Zibane was cross-examined by the attorney for the defence before the Regional Magistrate, it was put to him that the accused, presumably being a reference to the Appellant, had instructed the attorney that Mr Zibane gave to Appellant and amount of R 300

and not R 100. When the Appellant gave evidence he said that Mr Zibane gave the money to Sikwazi, being a reference to Mr Mkhize. On the Appellant's version, it was he, that is the Appellant, who took Mr Zibane to Mr Mkhize's house, presumably to fetch the speakers after Mr Zibane had bought them from the Appellant. The Appellant accordingly accused both Messrs Mkhize and Zibane of fabricating evidence against him. This, despite the fact that Messrs Mkhize and Zibane did not know each other. The dilemma which the Appellant had was that on Accused No 1's version, it was Vumani Hadebe who had arrived in the vehicle at Mr Mkhize's home during the morning of 10 February 2008. If, that is not so, as will be illustrated below, there is no other explanation on the evidence, apart from Mr Mkhize's version, as to how the speakers came onto his premises. For the reasons, which follow, I find that both the Appellant's denial of Mr Mkhize's version with regard to the speakers, and Accused No 1's version in relation to Vumani Hadebe, are false. Accused No 1's brother, Vumelani Kingdom Shobede, who was a defence witness (the relevant part of the record relating to his evidence having been reconstructed), contrary to the evidence of Accused No 1, said that it was Accused No 1, who on the morning of 10 February 2008, was driving the vehicle. According to him, Accused No 1 first claimed that it was his "sister's vehicle", but later said that it was his "friend's vehicle". The brother confirmed that the Police chased Accused No 1 on the morning in question. He said nothing about Vumani Hadebe's involvement with the vehicle. Moreover, another witness called on behalf of the defence, Mr Msomi, stated that the person who brought the vehicle to Mr Mkhize's house was a "boy". According

to him, Vumani Hadebe during the Sunday morning in question, sent Accused No 1 to buy liquor. According to him Vumani Hadebe then was “older” and was seen driving “different cars”. Against this must be weighed the evidence of Constable Porter as well as the evidence of Ms Bongiwe Hadebe. She is the oldest sister of Vumani Hadebe, who according to her, is also known as Siyabonga Zulu. Constable Porter explained that he investigated the claim by the Appellant that he received the speakers from Vumani Hadebe. Constable Porter said in his evidence under cross-examination on 17 November 2009 that the Appellant at the bail application stated that the speakers were given to him by Vumani Hadebe. When the Court recalled Constable Porter on 3 February 2010, he repeated this allegation, and explained the steps he had taken to investigate this claim by the Appellant. On this occasion he reiterated that during the bail application the Appellant mentioned that he received the speakers from Vumani Hadebe and that the Appellant said that Hadebe stayed in King DiniZulu. He, that is Constable Porter, established that Vumani Hadebe had been in prison and was serving a 7 years’ sentence of imprisonment. He was first detained at the Durban Westville Prison, and later transferred to the Ekuseni Prison, in Newcastle. Constable Porter, under cross-examination, further explained that the investigations revealed that Vumani Hadebe had been detained during February 2008, although he could not provide the exact date when that happened. Bongiwe Hadebe, confirmed much of the evidence of Constable Porter. She said that Vumani Hadebe was arrested during February 2008 in KwaMashu. She confirmed, in particular, that prior to that Vumani Hadebe had stayed at home, at

House 703, King DiniZulu. She stated that Vumani Hadebe was arrested towards the end of January 2008 at a time when the schools were reopening and children were “supposed to go back to school”. Her evidence on these aspects was not challenged under cross-examination. I find, as a fact, that it had been proved beyond reasonable doubt that the Appellant did indeed, during the bail application, as testified by Constable Porter, refer to Vumani Hadebe as the person from whom he obtained the speakers. I further find that the person to whom both the Appellant and Accused No 1 referred to as Vumani Hadebe, as did Mr Msomi, was indeed the younger brother of Bongiwe Hadebe. Vumani Hadebe, by 9 and 10 February 2008, on the unchallenged evidence of Bongiwe Hadebe, had already left the area, and by that time had also been arrested. The Appellant himself gave conflicting versions as to the identity of the person from whom he obtained the speakers. In the bail application he claimed, as testified by Constable Porter, that it was Vumani Hadebe. Before the learned Regional Magistrate he said it was Mr Mkhize. In my view, it was therefore pure fabrication on the part of both the Appellant and Accused No 1 to implicate Vumani Hadebe, in possessing and driving the vehicle and, particularly possessing the speakers.

- [12.] The further question which arises is what inferences may properly be drawn from the Appellant's presence in the company of Accused No 1 and being in the vehicle, on Sunday morning 10 February 2008, as well as the Applicant's conduct with regard to selling the speakers. In my view, and especially having regard to the Appellant's false denial of being present in the vehicle, with Accused No 1,

coupled with his false explanation as to how it came about that he sold the speakers to Mr Zibane, the inescapable conclusion is that the Appellant, in concert with Accused No 1, participated in the robbery of the complainant. It must further be inferred, beyond reasonable doubt, that they in fact robbed the complainant of all the items referred to in the judgment of the Regional Magistrate. There are several factors which support such inference. The motor vehicle and the speakers which were identified as having been removed from the vehicle, are of such a nature that they could not readily and quickly be disposed of. It is likely that they remained in the possession of the assailants who robbed the complainant. On Mr Mkhize's version, which I accept in this regard, the Appellant and Accused No 1 were seen in the vehicle together, within hours after the robbery took place. The Appellant was responsible for selling the speakers. He offered conflicting but false explanations as to the identity of the person from whom he obtained the speakers. These factors, taken together with all the other evidence, in my view, unmistakably point to the guilt of the Appellant and Accused No 1, who were the persons who robbed the complainant and that they did so in the furtherance of a common criminal enterprise.

[13.] In all the circumstances it has therefore not been shown that the Magistrate was wrong in his conclusion regarding the guilt of the appellant. It follows that there is no justification for interference on appeal with the conviction of the appellant.

HARTZENBERG, A.J.

I agree and it is so ordered.

VAN ZÿL, J.

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COUNSEL FOR THE STATE: Adv W. Smit, instructed by the Director of Public Prosecutions, Durban

DATE OF THE HEARING OF THE MATTER: 20 June 2013

DATE OF THE JUDGMENT: 24 June 2013