IN THE HIGH COURT OF SOUTH AFRICA

(BISHO) **CASE NO: CA&R 2/04**

In the matter between:

VUKILE WAKANI First Appellant

LUDWE BALENI Second Appellant

and

THE STATE Respondent

APPEAL JUDGMENT

EBRAHIM J:

Introduction

[1] The appellants were convicted in the Regional Court of Mdantsane on five counts of robbery with aggravating circumstances (as defined in section 1 of the Criminal Procedure Act 51 of 1977). On count 1 the appellants were each sentenced to eighteen years imprisonment and on counts 2, 3, 4 and 5 to fifteen years imprisonment, which was ordered to run concurrently with the sentence imposed on count 1. Each appellant was consequently sentenced to an effective term of imprisonment for

eighteen years. The appellants now appeal against both the convictions and sentences.

The grounds of appeal

Ad the convictions

[2] The Notice of Appeal enumerates ten grounds of appeal in respect of the convictions. In essence, however, there are only two grounds of appeal. These are directed at the identification of the appellants as being two of the three perpetrators of the crimes, and the rejection of their alibis.

Ad sentence

[3] In regard to sentence three grounds of appeal have been specified. Firstly, that the sentence was inappropriate and severe; secondly, that the seriousness and general prevalence of the crime of robbery had been over-emphasised; and thirdly, that all the counts should have been treated as one for the purpose of sentence.

The State case

[4] A brief summary of the evidence tendered by the State was that shortly after midnight on 1 October 2002 three men, armed with firearms, arrived at the home of Mrs Lillian Noturand Nkwenkwana. These men then robbed her and her son, Lelethu Nkwenkwana, and Mr Sivuyile Buqa, Mr Lukhanyiso Mthwa and Mr Mbulelo Sontlaba, who were also present, of various personal items and cash. One of the perpetrators had also threatened to shoot Lelethu Nkwenkwana if Mrs Nkwenkwana did not

hand over money to them. At some stage, too, one of them assaulted Mrs Nkwenkwana by kicking her. After they were searched and their personal possessions and cash taken, the robbers locked them in a toilet. From inside the toilet they heard a shot being fired as the robbers were leaving. Although the complainants differed slightly on how long the entire episode had lasted, it appeared that the perpetrators had taken not less than 30 minutes to carry out the robbery. The following day, at about 7:00pm at a nearby shebeen, Lelethu Nkwenkwana saw the appellants and identified them as being two of the three individuals who had robbed him and the others.

Analysis of the submissions on appeal

The issue of identification

[5] The attack against the regional magistrate's finding that the appellants had been identified correctly as the perpetrators is three-fold. Mr Sandi, who appeared for both the appellants, submitted, firstly that there was inadequate lighting in the rooms of the house, where the robberies had taken place, to permit reliable identification. Secondly, there had been insufficient time for the witnesses to observe the perpetrators. Thirdly, the contradictions in the evidence of the state witnesses were serious enough to raise a doubt that the appellants were the actual perpetrators.

[6] It was submitted therefore that Lelethu Nkwenkwana's identification of the appellants as two of the three individuals who had committed the robberies could not be accepted as being reliable. Accordingly, the

magistrate had erred in concluding that the appellants had been properly identified as the perpetrators.

[7] I find no factual basis for the submission that 'the Court a quo erred in finding that there was sufficient opportunity and light in the house for the State witnesses, in particular Lelethu and Lillian, to be able to see clearly and positively identify the robbers'. The fact that the lighting in the dining room and the bedroom may have been inadequate was not raised during cross-examination of Lelethu Nkwenkwana. It was also not canvassed with Mrs Nkwenkwana. During cross-examination of the witnesses, Sivuyile Buqa, Lukhanyiso Mthwa and Mbulelo Sontlaba, it was alluded to but the questions were merely exploratory and of a very limited nature. At no stage did the questioning reveal that the lighting was inadequate.

[8] The finding of the court *a quo* that Lelethu Nkwenkwana was a reliable and credible witness has been attacked. Mr Sandi submitted that the regional magistrate should have found that he had lied about having an opportunity to look at the robbers when they were searching the people in the bedroom. His mother's testimony that he did not have such an opportunity should have been accepted as the truth of what occurred.

[9] The aforesaid submission was based on the following question and reply during cross-examination of Mrs Nkwenkwana:

'Mr Mputa: If I can rephrase, lady, did he look threatened by this man or he – his assailant usually gave him some chance to look around and observe what was occurring?

L N Nkwenkwana: He was gun-pointed there, he was not given a chance to look around.'

[10] On a proper reading of Mrs Nkwenkwana's testimony, and that of her son and the other witnesses, the pointing of the firearm at his head was one of a series of actions on the part of the perpetrators during the course of the estimated 30 minutes that it took to carry out the robbery. The evidence does not indicate that the firearm was pointed at his head for the entire duration of the robbery. This aspect was never canvassed with any of the witnesses, least of all with Lelethu Nkwenkwana.

[11] The evidence, as a whole, establishes that he had sufficient opportunity for observation. He saw the appellants, albeit briefly, in the company of the third person when they entered the dining-room, which was lit by an electric light. Shortly thereafter this person took him to the bedroom where the appellants were with the others. This bedroom was lit by four candles located on a cupboard, some 1,2 metres high.

[12] It was then that the first appellant pointed the firearm at his head and threatened to shoot him if his mother did not hand over the money she had secreted on her person, and his mother complied. The first appellant was obviously very close to him at this stage. Then, while the second appellant was searching everyone and taking their money and personal belongings he had an opportunity of observing the second appellant. The first appellant was now standing at the door and his firearm was pointed at all of them and not, it would appear, at the head of

Lelethu Nkwenkwana only. It was confirmed by Mrs Nkwenkwana that it was the first appellant who pointed the firearm at her son's head and the second appellant who was searching everyone. These activities, it should be remembered, the witnesses testified had carried on for at least 30 minutes, if not longer.

[13] There is no foundation for the submission that Lelethu Nkwenkwana had lied about the opportunity he had to observe the perpetrators. The evidence does not substantiate this. Although he and his mother may have differed on whether he was allowed to look around this does not justify the conclusion that he lied and that his evidence should be rejected. They corroborated each other in material respects and the other witnesses, in turn, corroborated their evidence. I find no basis for holding that this testimony was false.

[14] In regard to the events of the following day, at the shebeen, Mr Sandi was constrained to concede that both the appellants had in fact provided corroboration for Lelethu Nkwenkwana's version of events. Counsel was further constrained to concede that Lelethu Nkwenkwana had indeed identified the first appellant on the basis of a specific physical feature, namely that his upper front tooth was missing. During cross-examination Mr Sontlaba had confirmed this identifying feature. Lelethu Nkwenkwana had also recognised the second appellant as the person who had searched each one of them in the bedroom. In the first appellant's possession was a woollen hat that he recognised as the property of

Mbulelo Sontlaba, who identified the hat as his. Subsequently he again identified both the first and second appellants at an identification parade.

[15] Despite an attempt by the appellants' legal representative at the trial to bring into question the validity of the identification parade, an admission was later made in terms of s 220 of the Criminal Procedure Act 51 of 1977 that it had been properly constituted. Moreover, it has not been suggested by counsel for the appellants that their identification at the identity parade was tainted and could not be relied upon.

[16] Mr Sandi's criticism of the regional magistrate's assessment of Lelethu Nkwenkwana as a credible witness is ill-considered. The regional magistrate was alive to discrepancies between the evidence of Lelethu Nkwenkwana and that of his mother. These concerned some of the actions of the first appellant and the third co-perpetrator and were obviously not of a material nature. In respect of the identification of the perpetrators, however, they did not contradict each other. I am not persuaded that there are any grounds for disturbing the regional magistrate's assessment of Lelethu Nkwenkwana as a credible witness. See *S v Robinson and Others* 1968 (1) SA 666 (AD) at 675G-H and *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426e-g.

[17] I am satisfied that the identification by Lelethu Nkwenkwana and Mrs Nkwenkwana of the appellants as two of the three persons who perpetrated the robbery may safely be relied upon. This identification

was reliable and trustworthy and the court *a quo* did not err accepting same. There is no merit in this ground of appeal.

The alibi defences of the appellants

[18] In his heads of argument Mr Sandi criticised the approach adopted by the regional magistrate in assessing the alibi defences of the appellants. He submitted that it appeared that the court *a quo* had placed the onus on the appellants to prove that their alibis were true. However, when asked to substantiate this during argument Mr Sandi conceded that the trial court had not erred in its approach. He conceded further that the respective versions proffered by the appellants were open to criticism. In spite of this, however, he contended nevertheless that the appellants should not have been convicted. The State's evidence had been so poor that their alibis should not have been rejected.

[19] There is no merit in the submission that the State's case was poor. The evidence, when assessed as a whole, established a strong case against both the appellants and manifestly called for a reply from them.

[20] It is evident from the regional magistrate's judgment that his approach to an assessment of each appellant's alibi cannot be criticised. He properly applied his mind to the totality of the evidence and his impression of the witnesses in order to determine whether or not the alibi of each appellant was reasonably possibly true. See *R v Biya* 1952 (4) SA 514 (AD) and *R v Hlongwane* 1959 (3) SA 337 (AD).

[21] The appellants were inconsistent in their testimony and neither the first appellant nor the second appellant proved to be satisfactory witnesses. Although conceding this, Mr Sandi still maintained that this did not prove that the appellants were the perpetrators of the robberies.

[22] There were numerous contradictions, inconsistencies and improbabilities in the first appellant's account of events. It was materially different from that which his attorney had put to witnesses. He claimed that Lelethu Nkwenkwana had identified accused no. 3 as one of the perpetrators even though this was never put Lelethu during cross-examination. His description of what had transpired when he was arrested at the shebeen was also different. His explanation of how he came into possession of the hat was contradictory and improbable and patently untrue.

[23] The position in respect of the first appellant's alibi was no different. His recollection of dates and events was vague. He stated that he had accompanied his sister and her sick child to the doctor but was unable to provide the child's name. When his mother testified in corroboration of his alibi it emerged that he had accompanied his cousin, and not his sister, to the doctor. Further, his cousin and not the child had been sick. In my view the regional magistrate cannot be criticised for rejecting his alibi. I do not find any merit in this ground of appeal.

[24] The position in respect of the second appellant's alibi is similar. His brother's testified that they went to sleep the particular evening shortly

after 8:00pm and only awoke the following morning at 6:30am. However, as his brother was asleep the entire night he could not confirm that the second appellant had not been away for part of the night. His evidence failed to confirm the second appellant's whereabouts at the time the crimes were committed. In my view the regional magistrate did not err in concluding that the second appellant's alibi was not reasonably possibly true. Consequently, this ground of appeal cannot be upheld.

Sentence

[25] The contention that excessive or malicious force was not used is not supported by the facts. The first appellant pointed a firearm at the head of Lelethu Nkwenkwana and threatened to shoot him if his mother did not hand over the money in her possession. This was a threat of violence of a grievous nature directed at his person and instilled fear in Lelethu Nkwenkwana and his mother. The fact that no actual physical injury was inflicted does not, in my view, diminish the gravity of the threat.

[26] The submission that the court *a quo* erred in finding that there was an absence of substantial and compelling circumstances that justified the imposition of a lesser sentence than that prescribed for the offence is ill-conceived. It is evident that the regional magistrate took cognisance of the manner in which the robbery was carried out and the personal circumstances of the appellants. His conclusion that substantial and compelling circumstances did not exist was based on the facts before him. I find no indication that he misdirected himself or that he has erred

in reaching this conclusion. It follows that this ground of appeal against the sentence cannot be upheld.

[27] Since the appellants have not shown that the regional magistrate misdirected himself the sentences imposed by the court *a quo* cannot be disturbed and must stand.

Conclusion

[28] In the result, the appeals of both the first and the second appellant are dismissed and the convictions and sentences are confirmed.

Y EBRAHIM
JUDGE OF THE HIGH COURT, BISHO **17 November 2004**

I concur

D VAN ZYL
JUDGE OF THE HIGH COURT, BISHO **17 November 2004**

Heard on:	3 September 2004
Judgment delivered on:	November 2004
Counsel for the Appellants:	Adv N J Sandi
Attorneys for the Appellants:	Nomjana Attorneys MDANTSANE
Counsel for the Respondent:	Adv G Walters