

SOUTH AFRICA / JUDGMENT

Mzondi and Others v S (A47/2011)

[2013] ZAWCHC 129 (6 September 2013)

[2013] ZAWCHC 129**COURT**

Western Cape High Court, Cape Town

BEFORE

J I Cloete, T C Ndita

CASE / FILE NUMBER

A47/2011

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Appeal No: A47/2011

In the appeal between:

BONGANI MZONDI (aka THANDO SILJULWA)First Appellant

ABRAHAM CHARLES VAN HEERDENSecond Appellant

PAUL KLAASSENThird Appellant

PHUMZILE MANGALISOFourth Appellant

XOLANI MLANJANAFifth Appellant

MAZWI TIWENISixth Appellant

LUNGA MVINJELWASeventh Appellant

and

THE STATERespondent

Court: Judge TC NditaetJudge J I Cloete

Heard: 6 September 2013

REASONS FOR ORDER DATED 6 SEPTEMBER 2013

CLOETE J:

The seven appellants, who had pleaded not guilty to six charges, were all convicted on 4 July 2011 in the Cape Town regional court on one count only of contravening s18(2)(a) of the Riotous Assemblies Act No 17 of 1956 ('the RAA'), namely conspiracy to commit robbery with aggravating circumstances, and sentenced to various terms of imprisonment. All of the appellants had been legally represented during the trial. With the leave of the trial court they now appeal against both their convictions and sentences.

S 18(2)(a) of the RAA provides as follows:

'(2) Any person who –

(a) conspires with any other person to aid or procure the commission of or to commit;

(b)...

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

Snyman: Criminal Law (5th edition) at pp 294-297 provides a useful summary of the requirements to secure a conviction in terms of s 18(2)(a), namely that:

3.1. The section does not differentiate between a conspiracy followed by the actual commission of the crime and one that is not;

3.2. There can be a conspiracy only if it is found that there was a definite agreement between at least two individuals to commit a crime. Accordingly the criminal act of conspiracy involves a finding that an actual agreement was reached, and mere knowledge of the existence of a conspiracy will not suffice;

3.3. There is no conspiracy if one of the two individuals only pretends to agree but in fact secretly intends to inform the police of the other individual's plan so that the latter may be apprehended;

3.4. The conspiracy need not be express. It may also be tacit but a tacit conspiracy can only be found to exist if the other individual consciously agrees to the scheme. A court may infer the existence of a conspiracy from the conduct of the individuals concerned, provided however that the inference is the only reasonable one to be drawn from the facts;

3.5. A conspiracy may come into being where one individual discusses and independently agrees with different people (the so-called 'umbrella spoke' conspiracy); or where each individual agrees with the next (the so-called 'chain' conspiracy). It thus follows that direct communication between all of the conspirators is not required;

3.6. Although there must be agreement, it is not necessary that there is also agreement about the exact manner in which the crime is to be committed.

The findings of the trial court with regard to the alleged conspiracy will be considered against the evidence as a whole as well as the aforementioned legal principles.

The state called seven witnesses. None of the appellants provided plea explanations. Appellants 3 and 7 elected not to testify while the other appellants testified in their own defence.

The first state witness was Ms Makone. She is a registered police informant. Her evidence was that she had received a telephone call from a person, whom she was later told was called 'Shoes', who subsequently met with her to select a house in the Summer Greens area to target for a robbery. Her role was to choose the house, identify where the occupant kept cash and explain how Shoes could gain entry. It was Shoes' plan for him and a team that he would assemble to wear police clothing and to produce a bogus search warrant to gain entry to the house.

The witness agreed and it was arranged that the crime would be committed on 20 July 2010. There was another person present at the meeting who the witness was unable to identify. He was seated in the front passenger seat of the vehicle where the meeting had taken place and had not participated in the discussion. The witness was also unable to identify Shoes as any particular appellant but thought that he might be either appellant 4 or appellant 5.

The witness testified that she thereafter informed her handler of the planned robbery and he told her to arrange a specific time for it to take place on that day. She duly did so and the robbery was scheduled for 6pm. However Shoes told her that he had vehicle problems and was also waiting for the person who kept the police uniforms. He eventually only arrived some time after 9pm. She met with him outside the 7-Eleven supermarket in Summer Greens and got into the white microbus in which he was travelling. Shoes opened the vehicle's door for her to enter and she noticed that there were about 7 – 9 people in the vehicle. Shoes showed her the bogus search warrant. Shoes and the witness agreed that after she had pointed out the house she would be dropped off and he would return to collect her after the robbery so that she could share in the spoils.

It was shortly after she had pointed out the house that the vehicle was pulled over by the police. The occupants were ordered out of the vehicle and told to lie on the ground. One person had a gun and another both a gun and a knife. The only person that she knew was Shoes. All of the occupants (including the witness) were arrested and taken to the police station.

The witness testified that during the police search of the vehicle they had found a cream coloured bag containing handcuffs, police badges and some light green police jackets. The witness denied Shoes' version that the reason why they had been travelling together was that they were going to her home so that she could pay him money that she owed him for purchasing clothing from him.

Mr Shumi was the second state witness who was called in terms of s 204 of the Criminal Procedure Act No 51 of 1977 ('the CPA'). He testified that he was one of the persons arrested. He had replaced certain parts of a white microbus earlier that day on the instructions of appellant 1 who had been driving it at the time. At about 7.30pm he was with appellant 6 who had told him that they were to go to Summer Greens. They arrived at a place next to the police station at Site B Khayelitsha where the same microbus was parked. Appellants 1, 4 and 7 were already there. He was told by appellant 6 about the intended robbery but not what his role was to be. The group, driven by appellant 1, then collected appellants 2, 3 and 5 in Delft. He was told that they had been

stranded because their vehicle had run out of petrol. One was carrying a black bag which the witness placed in the back of the vehicle. He did not say which of the men had been carrying the bag. They proceeded to Summer Greens where they met a lady at the 7-Eleven. She climbed into the vehicle and told them that she would show them the house, which she then did. While they were travelling the lady spoke to Shoes, but he could not hear everything that they were saying because he was seated too far away. He did however overhear them talking about a search warrant.

The witness identified Shoes as appellant 4. He also testified that appellants 2, 3 and 5 did not speak during the journey and that in fact no-one had discussed the planned robbery at all. His evidence was that the vehicle was stopped by the police after the house had been pointed out and that all of the occupants were arrested. It was only appellant 6 who was known to him and he could not identify Ms Makone as the lady who had given directions to the house. He did not know about the police clothing and equipment or the firearms until after his arrest when he was at the police station and the police had informed him thereof. His uncontested evidence was that after his arrest the police had assaulted him and withheld his HIV medication and that as a result he had decided to co-operate with them.

The third state witness was Mr Langenhoven. He testified that he was employed by the Department of Water Works as a foreman. On 25 December 2009 he had been robbed of a handheld radio issued to him by the Department. It was subsequently recovered by the police and returned to him during August 2010.

The fourth state witness was Inspector Hans who is stationed at the Flying Squad in Maitland, Cape Town. He testified that he was on duty on the evening of 20 July 2010 when he received information about a robbery that was to take place in the Summer Greens area. The vehicle involved was a white microbus and the registration number was provided. He and a colleague proceeded to the area and saw the vehicle approaching. They pulled the vehicle over and instructed the driver (who he identified as appellant

- 1) to switch it off. The occupants were ordered out of the vehicle and instructed to lie down on the ground.

The vehicle was searched and a black bag was found containing a firearm, two police jackets, a police belt and badge, police issue handcuffs, a holster and a handheld radio. Also found was a docket containing search warrants. All of the occupants denied any knowledge of how these items had come to be in the vehicle. Apart from the bag itself, which Inspector Hans said he had not handed in at the police station, and the docket containing the search warrants which had apparently gone missing, most of the items recovered were handed in as exhibits together with the ballistics report.

The fifth state witness was Constable Tabish. He testified that he had returned the handheld radio identified by Mr Langenhoven to him. The witness also testified that appellants 2 and 4 had previously been employed as policemen, appellant 3 as a traffic officer and appellant 5 as a police reservist.

Appellant 1 testified that he had only known appellants 6 and 7 prior to the arrest of the occupants of the microbus on 20 July

2010. At about 7pm on that day he had been with appellant 7. Appellant 6 telephoned appellant 1 and told him that appellant 4 was stranded near Delft and needed petrol or transport. Appellant 1, accompanied by appellant 7, collected appellant 6 (Shumi was with appellant 6 at the time) and they travelled to Delft where they collected appellant 4 at a petrol station. Appellant 1 later came to know appellant 4 as Shoes. They then collected appellants 2, 3 and 5 who were walking back to the stranded vehicle. They put petrol into the vehicle but it would not start, seemingly because there was not enough petrol in the tank. Appellant 4 then said that he needed to go to Summer Greens to fetch money to buy petrol for the vehicle. The others came along.

Appellant 1 then drove them to Summer Greens where he was told by appellant 4 to stop at the 7-Eleven. A lady who he had not met before but identified in court as Ms Makone got into the vehicle and spoke to appellant 4. Appellant 1 could not hear what they were saying as they were seated too far away. Ms Makone then instructed appellant 1 to drive on straight ahead. It was shortly thereafter that the police pulled the vehicle over.

Appellant 1 testified that the police found nothing on him when they searched him but he was later informed at the police station about the bag and other items that had been found in the vehicle. The vehicle belonged to his cousin. He denied that he had ever taken the vehicle to Shumi to be fixed and testified that although the vehicle had problems he had attended to the repairs himself. He had not noticed any of the men collected in Delft entering the vehicle with a bag, but could not say whether or not this was definitely the case since it had been too dark. The only bag of which appellant 1 was aware was that containing nappies and a child's clothing which he himself had previously placed in the vehicle (this bag had also been found by the police).

Appellant 2 testified that prior to the incident he had only known appellants 3 and 5. He had introduced them to each other on that day. Appellant 2 later gave evidence that he also knew appellant 4 who was previously a police officer as well. Appellants 3 and 5 had been with appellant 2 after his vehicle had run out of petrol in Delft. The three men had walked to a service station and he purchased R25 worth of petrol which was the only cash that he had on him at the time. Appellant 2 had also telephoned friends for assistance but the only one who came to his aid was appellant 4. He had arrived in the microbus along with appellant 1 and Shumi, neither of whom were known to him. They had arrived as the three men were walking back to their vehicle. They poured the petrol into the tank but the vehicle would not start properly.

Appellant 2 told the men that he would need about another R60 worth of petrol for the vehicle to start properly. Appellant 4 said that he did not have enough cash with him but he knew a lady who lived in Summer Greens who owed him money and he would make a plan to collect it from her. Appellant 2 did not trust appellant 4 to return so he decided to accompany him. Appellants 3 and 5 did not want to go with them, but appellant 2 told them to come along because he did not know how long they would be.

When they arrived in Summer Greens appellant 4 told them to stop at the 7-Eleven supermarket where a lady would meet them. When they arrived the lady was waiting. Appellant 4 spoke to her and she climbed into the vehicle. Appellant 2 did not understand what they were saying as they spoke in Xhosa. Appellant 4 told appellant 1 that the lady would direct them. As they were driving along the police pulled over the vehicle. Appellant 2 was still wearing his sandals that he had worn throughout the day. Schoeman had visited him when he was in custody awaiting trial and apologised to him. He told appellant 2 that it was because he had needed his HIV medication that he had decided to tell the police his story.

He testified that he did not know what was happening but overheard the police saying that they were looking for a search warrant and a gun. The only bag that he had seen was a black one that the lady had carried into the vehicle. The day after his arrest he was taken by the police to his vehicle to check that it had indeed run out of petrol. They put petrol in the vehicle and one of them drove it to a police depot in Bellville. Appellant 2 testified that he had been a police officer for 18 years before he resigned in 2004. At the time he had handed in all of his police issue equipment – as required by the police force –

save for a few items of his police clothing which he had kept for sentimental reasons. He also testified that the first time that he was told about the black bag and its contents was after he had been taken to the police station.

Appellant 4 (who confirmed that he is known as “Shoes”) testified that prior to the incident he only knew appellants 2 and 6. Although he had not met her personally, he knew Ms Makone because he had sold clothing to her via a friend of his called James. He had a standing arrangement with James to sell clothing on his behalf. The witness had telephoned Ms Makone because she had not paid him for the clothing despite James himself having telephoned her on three occasions for payment. She said that she would call him back to arrange for payment.

His evidence was that appellant 2 had telephoned him that day for assistance after his vehicle had run out of petrol at Delft. Appellant 4 did not have transport and decided to telephone appellant 6 who had helped him out in the past. Appellant 6 told him that he was also without transport but that he was waiting for a friend who had a vehicle and would contact him when the person arrived. It was shortly thereafter that Ms Makone telephoned him to tell him that he could come to Summer Greens to fetch the money that she owed him and that she would meet him at the 7-Eleven.

Appellant 6 then telephoned him to say that he had found transport and they arranged to pick him up at the Total garage in Site B, Khayelitsha. Appellant 6 arrived in a white microbus driven by appellant 1. There were also other people in the vehicle. After appellant 4 got into the vehicle appellant 2 telephoned him again in a panic because he had by now been waiting for assistance for a long time. They then drove to Delft. He saw appellant 2 coming from the direction of the garage carrying a petrol can. Appellants 3 and 5 were with him. The men climbed into the microbus and they drove to the stranded vehicle. They poured petrol into the tank but the vehicle would not start properly. Appellant 4 only had R20 cash on him but told appellant 2 about the lady who owed him money (R1000) which he said he would collect. Appellant 2 did not want to wait behind and he also climbed into the

microbus along with appellants 3 and 5.

Appellant 4 testified that he did not have a bag with him. On the way to Summer Greens the lady telephoned him to find out where he was as she had by now been waiting for him for a long time. When they arrived at the 7-Eleven the lady got into the vehicle and he introduced himself to her. The lady told him that the money was at her house and asked to be driven there. Appellant 4 asked appellant 1 and he agreed. They had only driven for about 50 metres when the police pulled over the vehicle. The occupants were ordered out of the vehicle and made to lie down on the ground. They were searched and told that they were being arrested for having carried out an armed robbery. It was only after his arrival at the police station that he was told about the firearms and police equipment that had been found in the vehicle. He had not seen any bags in the vehicle. The only conversation that he had with Ms Makone was when she apologised for being a bad payer and that he had had to come to her to fetch the money. They had spoken to each other in Xhosa.

Appellant 4 testified that he had been employed by the police from 2002 until 2006 when he resigned. At the time he had handed in all of his police issue clothing and equipment as required. Since then he had sold reject clothing for a living.

Appellant 5 testified that the only person he knew before the day of the incident was appellant 2. He had been returning from a visit to his girlfriend when he came across appellant 2 who told him that he had run out of petrol. Appellant 2 told him that he had telephoned a few people for assistance. Appellant 3 then arrived. He had been to see if he could obtain assistance from someone he knew in Delft but had not been able to find him. Appellant 2 then took some cash out of the vehicle's ashtray and the three men walked to the garage. They purchased petrol and on their way back to the vehicle the microbus drew up next to them. If he recalled correctly there were about five people in the microbus. Appellant 4 got out and spoke to appellant 2

but he did not hear what they were saying. Appellants 3 and 5 stood to one side. They did not have a conversation since they had only just met. Appellant 2 then told them to get into the microbus because the driver was going to take them back to the vehicle. On their arrival they put the petrol into the tank but the vehicle would not start properly. He and appellant 3 were sitting in appellant 2's vehicle when he came over to them and told them that they were all going to Summer Greens

so that appellant 4 could collect money from a lady there. Appellant 3 said that he would rather wait behind but appellant 2 persuaded him to go along because he did not know how long they would be. They then got into the microbus and drove to Summer Greens.

While they were travelling appellant 5 did not speak to the other occupants because the only person he knew, i.e. appellant 2, was sitting up front in the passenger seat. He recalled that appellant 4 took a few telephone calls on the journey. He overheard appellant 4 asking appellant 1 to slow down and saying to himself that he wondered where the lady was standing. Appellant 5 saw a lady standing at the entrance to the 7-Eleven, answering her phone. The lady then got into the vehicle.

Appellant 5 saw the lady speaking to appellant 4 but could not hear what they were saying as the vehicle's engine was idling. Appellant 4 then asked appellant 1 to drive them to the lady's house which she would direct them to. On the way there the microbus was pulled over by the police. The occupants were ordered out of the vehicle and told to lie down on the ground. They were searched and the police found two cell phones on him. They were then taken to the police vehicles and told that they were being arrested for armed robbery. He was never even shown a bag or the items that were allegedly found inside it. He was later shown some 'plastic' police clothing at the police station. The only bag that appellant 5 was shown was the clear plastic bag containing nappies which appellant 1 identified as his. The only person that he had seen carrying a bag was Ms Makone when she got into the vehicle. While he was being held in custody awaiting trial Shumi had come to visit him and appellant 2 to apologise and to tell them that he had only been thinking about his life and his HIV medication when he decided to tell the police his story.

Appellant 6 testified that he and Shumi had been friends since 2006. Prior to the incident he only knew appellants 1 and 4. On that day Shumi was with him when appellant 4 telephoned him to ask if he had a vehicle with him or access to one because he had a friend who was stranded in Delft. He said no but that there was someone who lived close to him with a vehicle and that he would see what he could do. He telephoned appellant 1 who agreed to help as they had assisted each other in the past.

Appellant 1 thereafter arrived accompanied by appellant 7. Appellant 6 arranged with appellant 4 that they would collect him at the Total garage. On their way to Delft appellant 4 asked appellant 6 to find out from appellant 1 if it would also be all right if they drove to Summer Greens for him to collect money from a lady. Appellant 1 again agreed. They then came across two or three men carrying a container holding petrol. Appellant 4 told them to pull over and that these were the men who he wanted to help. Appellant 4 got out of the vehicle and went towards the men. He later returned to the microbus with the men and they drove on to the stranded vehicle. They put petrol into the tank but it would not start. They then got back into the microbus (appellant 6 had remained seated in the microbus throughout) and appellant 4 then asked appellant 1 to proceed to Summer Greens so that he could fetch money from the lady.

On their way to Summer Greens appellant 6 spoke only to his friend Shumi who was sitting next to him. He was also listening to music on his cell phone. As they got near to Summer Greens appellant 6 heard someone talking about the 7-Eleven. Appellant 4 was speaking on his cell phone and then asked the driver to stop as he had seen the lady that he was coming to collect money from. The lady got into the microbus carrying a bag. She spoke to appellant 4 but appellant 6 did not hear what they were saying. Appellant 4 told appellant 1 to drive and that the lady would give him directions.

As they were driving the police pulled over the microbus. The occupants were ordered out of the vehicle and told to lie down on the ground. They were informed that they were being arrested for robbery with aggravating circumstances, put into the police vehicles and taken to the police station where they were shown some police clothing. Appellant 6 had never mentioned a robbery to Shumi. He had not seen a black bag in the microbus. He had not seen any of the appellants getting into the microbus with a bag. He had not spoken to appellant 3 at all in the time leading up to the arrest.

It was the evidence of all of the appellants who saw Ms Makone enter the vehicle with a bag was that it was a lady's bag. It was furthermore the uncontested evidence of Shumi as well as all of the appellants that they were severely assaulted by the police after their arrest. Appellant 6 testified that he understood why Shumi had agreed to make a statement to the police. It was to prevent any further assault and to secure his HIV medication.

There was also the evidence of two state witnesses who were called after closing argument to clear up certain aspects about the firearm that the police alleged was found in the microbus. Significantly however the state did not adduce any direct evidence linking any of the appellants to this firearm when it would no doubt have been a simple matter for fingerprints to have been taken, especially in light of the evidence of Constable Williams who was one of the arresting officers. He testified that he

was the officer who had searched the vehicle. He thought that he had seen one of the occupants of the microbus remove something

resembling a firearm from the front of his pants and throwing it over the back seat before they were all ordered out of the vehicle.

Although Williams claimed that the firearm had been found on top of the other items in a bag, this evidence does not satisfactorily

explain the state's version that the firearm was found inside the bag.

It was also his testimony – contrary to that of all of the other witnesses – that there had been a considerable number of carrier bags in the vehicle when it was searched. His evidence was further that the firearm and police clothing and equipment had been found in two separate bags, one in the rear of the vehicle and the other in the front; and that a multi-tool had been found on one of the appellants, which had included a knife. He could not identify either the occupant who was alleged to have thrown away the firearm or the person on whom the multi-tool was found.

Williams had only found empty docket covers and papers elsewhere in the vehicle, one of which was a partially completed search warrant which had not been issued by the police and did not contain any address of a property to be searched. Further, and despite even the evidence of the 204 witness Shumi, Williams claimed to have shown each and every occupant of the vehicle the items that had been found when they were still at the scene.

In convicting the appellants the learned magistrate reasoned as follows. Both Ms Makone and Shumi were able to give a chronological version of events and did not contradict themselves; she was unable to find any inherent improbabilities in their versions. The two arresting officers had also been able to properly describe what had happened. There were only 'minor differences' between the versions of these four state witnesses, which the learned magistrate found related only to where the occupants had been seated in the microbus, where they lay after they were ordered out of the vehicle; and the colour of the bag. She also found that Ms Makone and Shumi corroborated each other 'totally' on their versions as to what took place inside the vehicle, what was planned, what was shown to them and at what stage the police had stopped them.

On the other hand she reasoned that appellant 1 could not explain how Shumi had known about the mechanical problems with the microbus. He could not provide a satisfactory explanation about why he had ferried the various appellants about when there was no direct benefit for him to have done so. The same applied to the other appellants who had allegedly agreed to help each other out. Further, there was no reasonable explanation for why appellant 2, in the knowledge that he had telephoned around for assistance, left the vehicle unattended instead of waiting there for assistance to arrive, and instead walked with appellants 3 and 5 to the garage, and thereafter travelled with appellant 4 and the others to Summer Greens. In addition on appellant 4's version he knew that he had insufficient cash on him and it did not make sense that he would have gone to appellant 2's assistance armed with that knowledge without first collecting the money that he was owed by Ms Makone. It was also nonsensical that appellant 2, who had placed his trust in appellant 4 to help, would not have trusted him to follow through on his offer after he had collected the money from Summer Greens.

The learned magistrate also found that it was highly improbable that the occupants of the microbus who were sitting in such close proximity to each other would not have been able to hear everything that the others were saying. She found that appellant 4's explanation concerning the money owed to him was so improbable that it had to be rejected. In her view none of the seven appellants could offer a satisfactory explanation for their presence in the microbus and indeed appellants 3 and 7 had given no explanation at all. It was accordingly the learned magistrate's view that the only reasonable inference to be drawn was that all seven appellants had been involved in the conspiracy to commit armed robbery.

I am in respectful disagreement with the findings and conclusions of the trial court. There was no proof of any definite agreement between at least two individuals to commit a crime. The only evidence was that of Ms Makone and Shumi. Ms Makone's testimony does not prove the existence

of a definite agreement between herself and the other (unidentified) party given that, on her own version, she secretly intended, and in fact informed, the police of the allegedly planned armed robbery. In addition, on Shumi's own version, he only had mere knowledge of an intended robbery in which he and appellant 6 were apparently to be involved; and the details of what was allegedly conveyed to him by appellant 6 cannot be elevated to the status of a definite agreement between them.

There was furthermore no testimony that could reasonably have led the trial court to conclude that one of the appellants had individually and independently agreed with all of the others to commit the robbery; nor that each of the appellants had agreed with the next to do so. The learned magistrate's finding that Ms Makone and Shumi had corroborated each other about 'what was planned' in the microbus is simply not supported by the evidence of these two witnesses.

That leaves a consideration of whether the state had proven the existence of a tacit conspiracy. As previously stated, it is necessary for the state to prove beyond a reasonable doubt that the existence of a tacit conspiracy is the only reasonable inference to be drawn from the facts.

I cannot agree with the learned magistrate's finding that there were no inherent probabilities in the versions of the state witnesses Ms Makone and Shumi. First, it is highly improbable that Ms Makone would have met with someone who was planning a robbery without even asking his name. Second, it is equally improbable that she would not have been able to identify the man who she thereafter arranged to meet and travelled with in the microbus before it was pulled over by the police. The best that she could offer during her testimony was that she had been told by an unidentified person after the arrests that her alleged co-conspirator had the nickname of Shoes; and she was unable to identify him in court other than to say that she thought that he might be appellant 4 or appellant 5.

It was furthermore Shumi's own evidence that he was unable to identify which of appellants 2, 3 and 5 had been carrying the black bag. This too is improbable. After all, one of the men had allegedly passed the bag to him when entering the microbus and he had travelled with the same man for some distance to Summer Greens. One must also be extremely cautious in considering the veracity of Shumi's testimony in light of his uncontested evidence about the assaults that he had suffered at the hands of the police and their withholding of his HIV medication; as well as the unchallenged testimony of appellants 2 and 6 that he

had visited them in custody to apologise to them for the statement that he had made to the police thereafter.

It also cannot be said, as found by the learned magistrate, that the two arresting officers who testified had been able to properly describe what had happened. A consideration of their evidence as detailed above reveals a number of glaring material inconsistencies. I will highlight a few, namely, how many bags were found in the vehicle; where the police clothing, equipment and weapons were found; whether any weapon was found on one of the – unidentified – occupants during the search after they were ordered out of the vehicle; the existence or otherwise of the search warrant or warrants and where they were located in the vehicle; and whether or not the

items seized had been shown to the appellants at the scene.

There were also material inconsistencies between the evidence of the police officers and Ms Makone, who claimed that after the occupants were ordered out of the vehicle she had noticed that not one, but two of them were in possession of firearms and yet another a knife. Ms Makone was also the only state witness who testified that the bag found in the vehicle was cream in colour. The testimony of the appellants that Ms Makone had entered the microbus carrying a bag was not challenged by the state. Both Shumi and Inspector Hans had testified that the bag was black in colour and Constable Williams placed the items in two separate bags, one in the front and the other at the rear of the vehicle. The bag itself, as well as the docket with the search warrants, had simply disappeared into thin air after the appellants were arrested. Even on Shumi's own version he too had not been

shown any of the items allegedly seized until after arrival at the police station. I have already dealt with the absence of an

explanation by the state as to why fingerprints were not taken from the weapon found in the vehicle. The same applies to the police equipment seized.

Although the learned magistrate acknowledged that the onus lay on the state to prove the guilt of the appellants beyond a reasonable doubt, she unfortunately appears to have ignored all of the abovementioned inconsistencies and improbabilities and instead, it would seem, effectively placed the onus on the appellants to prove their innocence beyond a reasonable doubt. This is evident from her analysis of their respective versions as set out above.

However, close scrutiny of their evidence shows that the appellants' versions of the events of that day corroborated each other in all material respects. The chronological detail provided is unlikely to have been possible to recall so long after the event unless it contained at least a significant degree of the truth. There was also the unchallenged evidence of appellant 2 that he was still wearing his sandals when he was arrested, which is hardly indicative of a person who plans to commit an armed robbery; as well as his uncontested evidence that on the day after the arrest he had been taken by the police to his stranded vehicle to check that it had indeed run out of petrol, which the police found to be the case.

It is against this background that I am unable to agree with the learned magistrate that the state had proven beyond a reasonable doubt that the only reasonable inference to be drawn from the facts was that the appellants tacitly conspired to commit an armed robbery. As such they are entitled to the benefit of the doubt and their convictions must be set aside.

J I CLOETE

NDITA J

I agree.

T C NDITA

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