THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 665/2009

In the matter between:

THULANI NGCAMU **First Appellant**

SIFISO SHANGE **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: *Ngcamu v The State* (665/09)[2010] ZASCA 70 (26 May 2010)

Coram: MTHIYANE, MHLANTLA JJA and SALDULKER AJA

Heard: **13 May 2010**
Delivered: **26 May 2010**

Summary: **Appellant identified as the driver of a getaway vehicle during a robbery – raising alibi defence – alleging that he was hijacked shortly before the robbery while**

driving the same vehicle – question on appeal – whether there is a reasonable possibility of his version being true.

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Gorven J and Pillay AJ sitting as court of first instance):

1 The appeal against the conviction of robbery with aggravating circumstances (count 1) and attempted murder in respect of Dingaan Elphas Mabuza (count 3) is dismissed.

2 The appeal against the conviction on count 2 ─ the attempted murder in respect of Tobias Dumisani Mhlongo ─ is upheld, and paragraph 1 of the order of the court a quo is substituted with the following:

'1 The appeal of both appellants against their conviction and sentences in respect of count 2 is upheld.'

JUDGMENT

MTHIYANE JA (Mhlantla JA and Saldulker AJA concurring)

[1] The appellant, Mr Thulani Ngcamu and a co-accused, Mr Sifiso Shange (second appellant in the court below) were convicted in the regional court, Durban, on one count of robbery with aggravating circumstances, two counts of attempted murder and two counts of unlawful possession of firearms. They were both sentenced to 15 years' imprisonment for the robbery with aggravating circumstances, 5 years' imprisonment for the attempted murders and 3 years' imprisonment for the unlawful possession of firearms, taken together for the purpose of sentence. The two 5-year sentences for the attempted murders were ordered to run concurrently with the 15-year sentence imposed on the

charge of robbery with aggravating circumstances, which meant that each one of them would serve an effective term of 18 years' imprisonment.

[2] The appellant and his co-accused, as the first and second appellants, appealed to the KwaZulu-Natal High Court, Pietermaritzburg (Gorven J and Pillay AJ) against both their conviction and sentence. The appeal succeeded partially. Their conviction and sentence in respect of the robbery with aggravating circumstances and the charges of attempted murder were confirmed but the conviction for the unlawful possession of firearms was set aside. In respect of the latter charges, the court found that sections 4[1] and 5[2] of the Firearms Control Act 60 of 2000 which the appellant and his co-accused allegedly contravened, only came into effect on 1 July 2004. It therefore followed that the conviction for a contravention of these sections on 9 February 2004 had to be set aside and so, too, the 3-year sentence imposed therefor. The sentences imposed by the magistrate for the robbery (15 years) and the attempted murders (5 years for each count) were upheld. The court ordered the two 5-year sentences to run concurrently with the 15-year sentence imposed by the magistrate on the charge of robbery with aggravating circumstances. The court granted leave to the appellant and his co-accused to appeal to this court against their conviction only. The appellant's co-accused however passed on before the hearing of this appeal. The present appeal therefore only concerns Mr Ngcamu, who was the first appellant in the court below and it is convenient in this appeal to refer to him simply as 'the appellant'.

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[1] Section 4 sets out a list of 'firearms and devices [that] are prohibited and may not be possessed or licensed in terms of this Act', subject to certain exceptions.

[2] Section 5 sets out a list of 'devices [that] are not regarded as firearms.' Although the firearms found in possession of the appellant and his co-accused, fell within the prohibited 'devices' the State had the difficulty that the operative sections (4 and 5) which made it an offence to possess only came into effect on 1 July 2004.

[3] The charges of robbery with aggravating circumstances and attempted murder arose from an incident at a BP filling station and garage in Clare Estate on the morning of 9 February 2004. At about 10:15 Mr Dingaan Mabuza and Mr Tobias Mhlongo employed by Coin Security, a cash-in-transit company, arrived at the above premises. Mhlongo alighted from the vehicle in order to remove the cashbox from the drop-safe containing cash and replace it with an empty cashbox. Mabuza remained at the wheel. While Mhlongo was on the forecourt he was accosted by two men armed with firearms. They pointed their firearms at him and took the laden cashbox and his firearm from him by force. They then ran to a silver-grey Honda Ballade which was parked on the edge of the garage forecourt with its doors open. It is not clear how many occupants were in the vehicle after the two robbers entered. There was however one other person in the vehicle, the driver.

[4] As the vehicle moved away Mabuza gave chase. He suspected that the vehicle belonged to the appellant. It was a Honda Ballade, the same make as the appellant's and bore the same colour, the only difference being that it had 'ND' (Durban) registration plates, whereas the appellant's vehicle was Mpumalanga registered, with 'MP' registration plates. As he continued the chase, one or more persons in the Honda fired shots at him. Mabuza returned fire, shattering the Honda's rear window and causing the driver of the Honda to turn and look behind towards Mabuza. Mabuza then recognised the driver as the appellant, whom he knew well.

[5] Mabuza's chase was unsuccessful as he lost the getaway vehicle in the traffic. The vehicle was subsequently found abandoned in Clermont, a township near Durban. Upon inspection by Inspector Duma Makhaye of

the Pinetown Police he found that 'ND' registration plates were stuck on top of its original plates bearing registration number CMT 412 MP, with which the police were able to trace the appellant as the owner. Makhaye handed the matter over to the Serious and Violent Crimes Unit, which took charge of the case. Upon searching the vehicle, Inspector Thabethe of that Unit found a Coin Security metal seal underneath the driver's seat and some personal documents belonging to the appellant, which displayed his residential address: 26 Gillian Court, 6 Mc Arthur Street, Durban.

[6] Inspector Thabethe, the investigating officer, thereafter made several attempts to contact the appellant, without success. He visited the appellant's apartment on two occasions but could not find him. He left messages for the appellant to contact him but the appellant did not respond. About a week later on 15 February 2004, Thabethe and other police officers visited the appellant's apartment and arrested him for the robbery and the other related charges referred to above.

[7] In his defence the appellant denied that he was the driver of the Honda Ballade used in the robbery. He admitted that the vehicle belonged to him but alleged that it had been taken away from him by force in a hijacking, on the morning of 9 February 2004 ─ the day of the robbery ─ at about 08:45 at Dududu. The robbery took place at about 10:15 that morning. Indeed it was common cause that he had reported the hijacking incident at Amanzimtoti Police Station that day at about 14:30. The hijacking complaint was later transferred to the Scottburgh Police Station, as Dududu fell within Scottburgh.

[8] Both the magistrate and the high court rejected the appellant's version that he had been hijacked as a red herring and accepted Mabuza's identification of the appellant as the person who was driving the Honda Ballade used in the robbery. The question in this appeal is whether there is a reasonable possibility that the appellant's version might be true. Of course if that is the case, then it would mean that Mabuza was mistaken, and that the appellant was not the driver of the getaway vehicle.

[9] Counsel for the appellant submitted that the evidence of Mabuza had to be approached with caution given the fallibility of human observation. He drew attention to a number of features in the evidence which gave rise to the possibility that Mabuza might have made a mistake in his identification: He said Mabuza was describing a mobile scene through an armoured glass; there was exchange of gun fire; the getaway vehicle was not very close; and the appellant was in the front seat during the chase.

[10] It is true as was laid down by this court in the classical case of *S v Mthetwa*[3] that because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. In this regard Holmes JA said:

'It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility, the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be

[3] 1972 (3) SA 766 (A) at 768 A-C; See also D T Zeffertt A P Paizes and A St Q Skeen *The South African Law of Evidence* 5ed (2003) p 142.

weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R. v. Masemang*, 1950 (2) S.A. 488 (A.D.); *R. v. Dladla and Others*, 1962 (1) S.A. 307 (A.D.) at p. 310C; *S. v. Mehlape*, 1963 (2) S.A. 29 (A.D.).'

In the present matter and on the totality of the evidence I do not think that there is any possibility of Mabuza having been mistaken as to the identity of the appellant. He and the appellant had worked together for Coin Security until approximately a week before this robbery and had on occasion been, a crew together in the same Coin Security vehicle. They were friends and came from the same area, which was attested to by the appellant himself in his evidence. In response to a question in cross examination he said of his relationship with Mabuza:

'He is my friend, we grew up together. We drink together. We attend functions together'.

There can therefore be no question that Mabuza and the appellant knew each other well.

[11] The factors mentioned by counsel taken singly or cumulatively do not detract from the reliability of Mabuza's evidence of identification of the appellant. The incident occurred in broad daylight; although there was an exchange of gunfire Mabuza did not feel threatened because he was seated in a bulletproof vehicle; his view to the vehicle was not impeded by the armoured glass as suggested by counsel; he was able to observe an 'ND' registration plate that was stuck on the original registration plates of the Honda; if he could observe the registration plates without any difficulty ─ and this was not disputed ─ there is no logical reason why he could not identify the face of somebody who was well known to him. During the chase Mabuza was as close as 8 to 10 metres from the Honda and his view was not obstructed in any way especially after its rear view windscreen was shattered by the shots he fired at it. It is true as counsel

argued that the scene was mobile but it is clear that the events were not taking place at such a frenetic pace that Mabuza could have made a mistake as to what was happening. Counsel's submission that Mabuza had to make split-second observation is clearly an over exaggeration.

[12] In my view on a conspectus of all the evidence in this case, the conclusion is unavoidable that the appellant participated in the robbery using his own vehicle. When he realised that he had been identified he opened a false charge alleging that he had been hijacked, which never occurred.

[13] It is little wonder that his version that he was hijacked does not bear scrutiny. It is riddled with serious flaws. According to the appellant, he was hijacked in the early morning at 08:45 but he only reported the incident at 14:30 in the afternoon at Amanzimtoti Police Station, which was further away from the scene of the robbery. Although the Dududu main road where he was hijacked is only some 3 to 4 kilometres from Scottburgh Police Station, he for some inexplicable reason, elected to report the incident at Amanzimtoti Police Station in a different area, a long way away from Scottburgh, some five hours later, despite the fact that he got a lift from the scene of the robbery to convey him to Amanzimtoti Police Station. It is also not clear why it took him so long to report the incident.

[14] The appellant's conduct after the hijacking reflects an inexplicable lack of interest in contacting the police. After the recovery of his vehicle soon after the robbery, police left messages at his apartment for him to contact them but he failed to do so. The police only managed to track him down when they arrived at his apartment on 15 February 2004 when he

was eventually arrested. When asked about the reason for his failure to respond to messages left by the police he replied that he did not know why the members of the Serious and Violent Crimes Unit were looking for him, a not so convincing response. Why should it matter which police unit was looking for him ─ if he had laid a complaint with the police concerning his vehicle and he was to be informed that it had been recovered? It seems as if the appellant was trying to keep as far away from the police as possible ─ strange behaviour for someone who in the ordinary course of events would have been delighted that his vehicle had been recovered and so soon after the hijacking.

[15] Another strange feature of this robbery, mentioned by the magistrate in his judgment, is that the false registration plates were stuck over the original plates. On the probabilities it is unlikely that the hijackers would have done this if they wished to use the vehicle to commit a robbery. In all probability they would have ripped off the original registration plates and replaced them with false registration plates before using the vehicle and this would have enabled them to avoid early detection. What the robbers did here, on the appellant's version, as found by the magistrate, correctly in my view, is consistent with the conduct of an owner who did not want his vehicle to be lost in the system once it is recovered. This conclusion is reinforced by the finding in the vehicle of the appellant's documents with his address on them. I agree with the magistrate that the appellant threw a red herring to the investigating officers on his robbery charge by having to report the case of a hijacking at Amanzimtoti Police Station, which never occurred.

[16] The high court's rejection of the appellant's version is also unassailable. It found that the appellant's version if true, required the

coming together of the following unlikely coincidences. The appellant's vehicle is hijacked that morning. It is then used within a short time as the getaway vehicle in the robbery. By chance the victims of that robbery are his former employers, whose employment he had left a few days before. One of the robbers in this robbery is armed with a weapon which is a standard issue to the employees of Coin Security. What is more, the driver of the getaway vehicle turns out to be somebody who looks remarkably like him, so much so, that Mabuza who knew the appellant well and in consequence could not be easily mistaken. On this identification, by mistake misidentifies this driver as the appellant. Pillay AJ correctly concluded, in my view, that the combination of circumstances is so far fetched that the hijacking version cannot reasonably possibly be true. The conclusion reached by both courts below in their rejection of the appellant's version can therefore not be faulted.

[17] Counsel for the appellant also criticised Mabuza for not informing the investigating officer, Inspector Thabethe at the scene, that the person whom he had seen driving the getaway vehicle was the appellant. What counsel overlooked is the fact that Mabuza had immediately informed the controller Rashid by radio control from the scene that the person he saw driving the getaway vehicle was the appellant.

[18] I am satisfied that both of the courts below were correct in accepting the evidence of Mabuza in his identification of the appellant as the driver of the Honda Ballade used by the robbers and in their rejection of his version that he was hijacked.

[19] I also do not have any difficulty with the conviction on the charge of attempted murder in respect of Mabuza. Shots were fired at him from

the getaway vehicle in order to discourage him from pursuing the Honda Ballade. It matters not that he was in an armoured vehicle and that he did not believe that he was at risk of injury or death from this gunfire as the bullets could not penetrate the armoured vehicle. The shooter had the requisite criminal intent even if they were attempting the impossible.

[20] What troubles me however is the conviction of attempted murder charge in respect of Mhlongo (count 2). There was no evidence that the robbers fired any shots at him. In his evidence Mhlongo repeatedly stated that the shots from the Honda Ballade were not directed at him but at Mabuza who was driving the armoured vehicle. When questions were put to counsel for the State as to the basis upon which the appellant was convicted on this count, she was driven to concede, correctly in my view, that the conviction thereon was not sustainable. Accordingly the appellant's appeal against the conviction on this count is good and the conviction thereon falls to be set aside.

[21] In the result the appeal against the conviction on the counts of robbery with aggravating circumstances and the attempted murder in respect of Mabuza fails but the appeal against the conviction on the count of attempted murder in respect of Mhlongo succeeds.

[22] Accordingly the following order is made:

1. The appeal against the conviction of robbery with aggravating circumstances (count 1) and attempted murder in respect of Dingaan Elphas Mabuza (count 3) is dismissed.
2. The appeal against the conviction on count 2 ─ the attempted murder in respect of Tobias Dumisani Mhlongo ─ is upheld and

paragraph 1 of the order of the court a quo is substituted with the following:

'1. The appeal of both appellants against their conviction and sentences in respect of count 2 is upheld.'

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K K Mthiyane
Judge of Appeal

APPEARANCES

APPELLANTS: P Misselhorn

Instructed by Legal Aid Board, Pietermaritzburg
Legal Aid Board, Bloemfontein

RESPONDENT:	(Ms) A A Watt Instructed by The Director of Public Prosecutions, Pietermaritzburg The Director of Public Prosecutions, Bloemfontein