THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No 99/10

In the matter between:

MLUNGISI MDLONGWA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Mdlongwa v The State* (99/10) [2010] ZASCA 82 (31 May 2010)

Coram: Mthiyane and Mhlantla JJA and Saldulker AJA

Heard: 12 May 2010

Delivered: 31 May 2010

Summary: Robbery with aggravating circumstances – State relying on dock identification of appellant – facial comparison made by expert from photograph taken ex post facto and video footage of the bank recorded during the robbery. Identification of the appellant as one of the robbers sufficiently established. Appeal dismissed and conviction and sentence of twenty years' imprisonment confirmed.

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Swain J and Radebe AJ sitting as court of appeal):

The appeal against the conviction and sentence is dismissed.

JUDGMENT

SALDULKER AJA (MTHIYANE AND MHLANTLA JJA concurring)

[1] The appellant, Mr Mlungisi Mdlongwa, and four other persons were charged in the Regional Court in Dundee, with robbery with aggravating circumstances, unlawful possession of firearms and ammunition. The appellant and accused five were convicted of robbery with aggravating circumstances and acquitted on the other charges. The appellant was sentenced to 20 years' imprisonment. His appeal against both the conviction and sentence was dismissed by the KwaZulu–Natal High Court (Swain J and Radebe AJ concurring). The court granted him leave to appeal to this court, against both the conviction and sentence.

[2] The charges arose from an incident on 11 February 2004, at about 09h30, when a bank robbery took place at the NBS Building Society (the bank), situated at the Pick n Pay centre, in Dundee, KwaZulu-Natal, as set out in the charge sheet.

[3] The appellant pleaded not guilty to the charges and advanced an alibi defence. Through his counsel he denied that he was the person depicted in the photograph taken by a police witness Inspector Khoza and in the video footage of the robbery, both of which formed part of the evidence produced in court. The appellant did not testify in his defence at the trial.

[4] The State relied on the dock identification of the robbers by Mr Sikhumbuzo Mbatha, a security officer employed by Roman Protection Solutions, stationed at the bank that morning, video footage of the bank robbery taken by digital close circuit television (CCTV) cameras which were in place at the bank at the time of the robbery (where both accused five and the appellant are seen participating in a bank robbery, and where the latter is seen wearing a blue t-shirt) and the evidence of Inspector Naude, a member of long standing with the South African Police Services, who was attached to the Facial Identification Unit for 18 years, and who made a facial comparison of the appellant and accused five, from photographs taken of them (exhibit K and exhibit L), by Inspector Khoza two weeks after the robbery and video stills (exhibit F29 and F30) taken from the video footage. It therefore followed that in order to secure a conviction the state had to lead a chain of evidence to link the appellant to the robbery.

[5] The sole issue for determination on appeal is whether the appellant was properly identified as one of the robbers. The appellant challenged the State's case on three legs. Firstly, it was submitted that Mbatha's testimony was unsatisfactory and contradictory, that no reliance could be placed on his dock identification, more especially since no identification parade was held. Secondly, that the expert, Inspector Naude, called by the State as a facial comparison expert was no 'expert', as she lacked academic qualifications and that her findings were thus unacceptable because it was not of a generally accepted standard. Thirdly, that the video footage of the robbery was not the original and should not have been admitted in evidence. I turn to consider these challenges in the factual matrix.

[6] I deal first with the evidence of Mbatha. He testified that he was on duty at the bank on the day in question. He stood at the entrance where he searched every person that entered the bank, using a metal detector. As he stood there, three persons appeared. He testified that he could only identify the two that approached and spoke to him. He described one as having a short hair cut and the other as wearing a blue Adidas skipper and an Adidas pants. The third person stood at a lotto machine which was situated at a restaurant opposite the bank. One of the two that approached him, asked 'whether he had seen people robbing a bank', to which

he did not respond. He identified this person as the appellant, who was accused four at the trial.

[7] This person, whom he identified as the appellant, then drew a firearm and pointed it to the ground and ordered him to allow the other two into the bank. At this stage, three robbers and Mbatha then entered the bank, passed two doors within a cubicle and walked into the banking hall. As they did so, two other robbers, followed, now numbering five. The first person to enter the bank pointed a firearm at Mr Mabaso who worked at the enquiries counter. The latter was then assaulted with a crowbar and ordered to open the door of the tellers' section, which was opened by Ms Ayesha Ismail, one of the tellers.

[8] The robbers then proceeded to take the money and grabbed Ismail as a hostage but then left her in the cubicle. Thereafter the robbers left the bank. Mbatha testified that the robber who assaulted Mabaso wore short pants and a blue t-shirt and in court identified him as accused five.

[9] Mbatha's evidence was criticised by counsel for the appellant especially with regard to the description of the clothing allegedly worn by the appellant. According to Mbatha's testimony, accused five wore a blue t-shirt, and that the appellant stood next to him carrying a firearm. This was in stark contrast to what the appellant and accused five are seen wearing in the video stills. It is the appellant who is seen wearing a blue t-shirt. In my view Mbatha's contradictory evidence in respect of the clothing worn by the appellant and accused five cannot be seen in isolation. If one examines Mbatha's evidence, except for the description of the clothing worn by two of the robbers, whom he identified as the appellant and accused five, his testimony is completely in line with what is portrayed on the video footage and the stills as having taken place during the robbery. Mbatha's evidence that one of the robbers wore a blue Adidas t-shirt was corroborated by Ms Botes, a branch manager at the NBS bank. She testified that she was seated in her office, when she was confronted by one of the robbers wearing a blue t-shirt with an inscription in white with a capital letter 'A', and who ordered her to open the safe.

[10] Additionally, merely because Mbatha made a dock identification of the appellant and accused five, does not make his evidence less credible. Generally, a dock identification carries little weight, unless it is shown to be sourced in an independent preceding identification.[1] But there is no rule of law that a dock identification must be discounted altogether, especially where it does not stand alone. Mbatha had ample opportunity at least to observe two of the robbers who participated in the robbery as is visible from the video footage and who were later identified as the appellant and accused five in the facial comparison made by inspector Naude, an aspect to which I shall return to later, thus supporting his dock identification of them.

[11] As is apparent from the aforegoing, Mbatha's testimony is not the sole testimony relied upon by the State. As already indicated, his description of how the robbery unfolded is corroborated by the video footage. Although there were contradictions in his testimony as to the clothing worn by the appellant and accused five and his statement to the police, when his evidence is assessed as a whole these contradictions are not material and pale into insignificance. He may have been innocently mistaken about the apparel of the robbers, which is understandable in the circumstances, given that a gun was pointed at him. As was stated by Nugent J in *S v Van der Meyden,*[2]

'A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.'[3]

'A court does not base its conclusions, whether it be to convict or to acquit, on only part of the evidence:'[4]

'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is

[1] *S v Tandwa* 2008 (1) SACR 613 (SCA) at 617b-d.
[2] 1999 (2) SA 79 (W).
[3] *Van der Meyden* at 81A-B.
[4] At 82A.

appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'[5]

[12] Mbatha had no reason to falsely implicate the appellant and accused five in the robbery. I am satisfied that Mbatha's identification of the appellant as being involved in the NBS robbery taken together with the other evidence in this case, establishes the appellant's participation in the robbery.

[13] I turn to the evidence of Inspector Naude. But before doing so, it is necessary to refer briefly to the challenge levelled against the evidentiary material that she relied on in reaching her conclusion that the appellant was one of the robbers.

VIDEO FOOTAGE

[14] Inspector Naude analysed the still photographs of the video footage recorded at the bank during the robbery. Ms Botes testified that there were nine surveillance cameras strategically installed inside the bank, at the door and at the ATM machine. All nine cameras were connected to a video machine. On the morning of the robbery, the video footage and the video cassette remained under lock and key until it was handed over to Mr Henk Viljoen, the regional security manager for the Nedcor Group.

[15] Viljoen confirmed that the digital CCTV recorders were installed at the NBS bank which recorded all footage on a hard drive and transmitted those onto a computer. This was stored in the treasury area of the bank. Each of the video cameras were hooked up to one system which recorded onto three separate hard drives. The hard drives were serviced and tested on a weekly basis to ensure that the cameras were recording and functioning properly. No member of staff had access to download any information or to tamper with information that was stored on the hard drive.

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[5] At 82C-D.

[16] When Viljoen viewed the video footage, he downloaded the information, (which he was solely authorised to do) for the police to print video stills of what occurred in the bank robbery, and handed the footage over to Inspector Ahmed. He stated that although he did not have any computer qualification, the technicians and the manufacturers of the digital video recorder system had shown him how to operate it.

PHOTOGRAPHS

[17] I turn to the photographs. Photographs were taken by Inspector Khoza of the appellant and accused five, ex post facto, two weeks after the incident and handed over to Inspector Ahmed. The latter handed over the two photographs and the video footage to Inspector Naude to do a facial comparison. Inspector Naude found in her facial comparison analysis of both the appellant and accused five, that there were points of similarities, between the photograph of the appellant (exhibit K) and the person appearing in the video footage (exhibit F29) and the photograph of accused five (exhibit L) and the video footage (exhibit F30). Based on her findings of points of similarities, she concluded that the persons appearing in the video footage were the appellant and accused five. For the purposes of this judgement it is not necessary to refer to the details in regard to the facial comparison of accused 5, except to point out that the court below appears to have inadvertently confused exhibits L and F30 as being that of the appellant. The evidence of Inspector Khoza, that he took the photograph of the appellant was not seriously disputed. All that the appellant said was to deny through his legal representative that he was the person depicted in the photograph taken by Inspector Khoza. That denial however, took the matter nowhere because the appellant did not testify in his defence. In this regard Inspector Khoza's evidence stood alone.

[18] In this case there appears to be every reason to accept Inspector Naude as an expert. The merits of her findings were not seriously impugned. All that was argued was that she lacked academic qualifications. A lack of academic qualification may sometimes be regarded as indicative of a lack of sufficient training, but this is not the case here, if one has regard to the vast experience that Inspector Naude

accumulated over a number of years. Inspector Naude testified that she was a police officer for 30 years. She has been stationed at the Pretoria Criminal Record Centre, in the Facial Identification Unit for 18 years. The work at the unit involved developing facial reconstruction from skulls, facial comparisons and facial compilations. Nationally she was involved in the training of all facial identification units. Although she did not have any academic qualifications, she had run three workshops at the University of Pretoria and was studying osteology at the University of Pretoria. She had done over five hundred facial comparisons and thousands of facial compilations. She had testified in court on a number of occasions and this was her twentieth case. In this regard the judgment of this court in *S v Mlimo*[6] is in point. In that case Mthiyane JA said:

'In my view a qualification is not a *sine qua non* for the evidence of a witness to qualify as an expert. All will depend on the facts of the particular case. The court may be satisfied that despite the lack of such a qualification the witness has sufficient qualification to express an expert opinion on the point in issue. It has been said:

It is the function of the judge [including a magistrate] to decide whether the witness has sufficient qualifications to be able to give assistance. The court must be satisfied that the witness possesses sufficient skill, training or experience to assist it. His or her qualifications have to be measured against the evidence he or she has to give in order to determine whether they are sufficient to enable him or her to give relevant evidence. It is not always necessary that the witnesses' skill or knowledge be acquired in the course of his or her profession it depends on the topic. Thus, in *R v Silverlock* it was said that a solicitor who had made a study of handwriting could give expert evidence on the subject even if he had not made any professional use of his accomplishments. (See DT Zeffert, AP Paizes & A St Q Skeen *The South African Law of Evidence* (2003) at 302; see also Lirieka Meintjies-Van der Walt, 'Science fiction: The nature of expert evidence in general and scientific evidence in particular' (2000) 117 SALJ 771 at 773-4.)'

[19] In this matter, inspector Naude had received two photographs, the photograph of the appellant (exhibit K) and the photograph of accused five (exhibit L) from Inspector Ahmed, as well as a copy of the video footage of the bank

[6] 2008 (2) SACR 48 (SCA) para 13.

robbery. She was instructed to do a facial comparison of the individuals appearing in the photographs and the video footage.

[20] The methods that she employed were in terms of the standards generally accepted in her department, and were based on her vast experience. She found 13 points of similarities between the facial features of the person in the video footage, (exhibit F29) and the photograph of the appellant (exhibit K). Thus she was able to establish the link that the person appearing in the video footage of the robbery was the appellant. The courts below were justified in accepting her conclusions in that regard.

[21] Although Inspector Naude chose to do the facial comparison from only two photographs, this does not detract from the conclusions that she arrived at. There were other individuals appearing in the video footage. Her evidence was sufficient to establish a link that one of the individuals captured on the video footage during the robbery was the appellant. There is no reason to doubt the accuracy of her findings. The fact that she was unable to identify the appellant in court as the person appearing in the footage was irrelevant, and was not the purpose of her testimony. The results of her findings as reflected in the points of similarities established between the photograph taken by Inspector Khoza and the still photographs downloaded from the video footage, are sufficient to link the appellant to the robbery.

[22] I turn to the third and final challenge, namely that the video footage was not the original. Viljoen testified that each branch had its own hard drive from which the video footage images in which the appellant and his co-accused were captured, were downloaded. There can therefore be no question that the video footage was original and therefore constituted real evidence. The submission by the appellant's counsel to the contrary is therefore without substance. In *S v Mpumlo & others*[7] it was stated that a video film, like a tape recording, 'is real evidence, as distinct from documentary evidence, and, provided it is relevant, it may be produced as admissible evidence, subject of course to any dispute that may arise either as to its authenticity or the interpretation thereof'.

[7] 1986 (3) SA 485 (E) at 490H-I; *Motata v Nair NO* 2009 (2) SA 575 (T) para 21.

[23] In *S v Ramgobin & others*[8] it was held that for video tape recordings to be admissible in evidence it must be proved that the exhibits are original recordings and that there exists no reasonable possibility of 'some interference' with the recordings. In this case there can be no question that the aforesaid video evidence was admissible. Viljoen testified that he was solely authorised to download the video footage of the robbery from the bank's digital CCTV cameras which were installed at the NBS bank. He handed these to Inspector Ahmed. Botes confirmed that they were instructed not to touch the video footage which remained under lock and key until it was retrieved by Viljoen. In my view no tampering took place with the video footage. Consequently, there appears to be no reason to reject the authenticity and the originality of the video footage downloaded by Viljoen from the surveillance cameras installed at the bank.

[24] In any event, it need not be established that the original footage was used because the purpose of introducing the video footage into evidence was to identify the scene where the robbery took place, to enable the witness to identify the robbers and for Inspector Naude to make the facial comparisons. (See *S v Ramgobin and others* at 125E-H.) As I have already indicated the video footage of the robbery constitutes real evidence as it was taken from the surveillance cameras installed at the bank. The video footage provides corroboration for Mbatha's testimony as to what occurred during the robbery. What emerged from the video stills is unmistakably the identification of the appellant and accused five being present at the NBS bank and participating in a bank robbery.

[25] Having regard to the totality of the evidence, the appellant was properly identified as one of the robbers of the NBS bank. In the face of incriminating evidence that the appellant was involved in the bank robbery, he adduced no counterveilling evidence in his defence. Despite video footage recording his presence at the bank, the appellant chose not to testify. Where there is direct evidence implicating an accused in the commission of an offence, the prosecution case is *ipso facto* strengthened where such evidence is uncontroverted due to the failure of the accused to testify.[9] Furthermore the appellant's bald denial that he was

[8] 1986 (4) SA 117 (N).
[9] *Magmoed v Janse van Rengsburg and others* 1993 (1) SACR 67 (A).

not the person depicted in the photograph taken by Inspector Khoza nor the one appearing in the video footage must be rejected as false.

[26] An accused has the constitutional right to remain silent but this choice must be exercised decisively as 'the choice to remain silent in the face of evidence suggestive of complicity must, in an appropriate case, lead to an inference of guilt'.[10]

[27] In my view all of the State's evidence, cumulatively, established the identification of the appellant as one of the robbers in the NBS bank beyond a reasonable doubt. The appellant was correctly convicted. Accordingly, the appeal against the conviction must fail.

[28] I turn to consider the appeal against the sentence. Counsel for the appellant contended that the court below did not properly exercise its discretion in sentencing the appellant to twenty years' imprisonment, five more years than the minimum prescribed. In advancing these submissions, he stated that the appellant was a first offender, that he had been incarcerated for more than a year and that no one had been injured during the robbery.

[29] It is trite that this court may only interfere if a misdirection has been committed by the sentencing court. In my view no such occurred. The aggravating features of this robbery far outweigh the mitigating. In my view the brazen conduct of the appellant and his co-accused in entering a bank, and robbing it with impunity in the presence of innocent members of the public and assaulting a staff member, is deserving of the sentence imposed. It is not a shocking sentence but a salutary one. In my view, their brazen conduct is deserving of the sentence imposed. It is neither excessively severe nor harsh that it must be interfered with. It follows therefore that the appeal against sentence also fails.

[30] Accordingly the following order is made:

The appeal against the conviction and sentence is dismissed.

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[10] *Tandwa* at 615I-j; see footnote (1) above.

H K Saldulker

Acting Judge of Appeal

APPEARANCES:

APPELLANT/S:	S B Mngadi Mlungisi Mdlongwa (In person)
RESPONDENT/S:	A A Watt Instructed by The director of Public Prosecutions, Pietermaritzburg The Director of Public Prosecutions, Bloemfontein