THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 046/10

CEDRIC MAPANDE Appellant

and

THE STATE Respondent

Neutral citation: *Mapande v S* (046/10) [2010] ZASCA 119 (29 September 2010)

CORAM: Navsa, Heher and Bosielo JJA

HEARD: 10 September 2010

DELIVERED: 29 September 2010

SUMMARY: **Appeal against conviction on the basis that identification evidence insufficient and that evidence of co-accused ought not to have been accepted – held that evidence sufficient to found conviction. Appeal against sentence on the basis that insufficient consideration given to personal circumstances and that the court had erred in not concluding that there were substantial and compelling circumstances – held that conclusion on imposition of minimum sentence correct.**

ORDER

On appeal from: Limpopo High Court (Thohoyandou) (Hetisani J sitting as court of first instance).

The appeal against both conviction and sentence is dismissed.

JUDGMENT

NAVSA JA (Heher and Bosielo JJA concurring)

[1] This appeal, with the leave of this court, against conviction and sentence is without any merit. The appellant, Mr Cedric Mapande, was convicted with three other accused in the Thohoyandou High Court on one count of robbery with aggravating circumstances and was sentenced to 15 years' imprisonment.

[2] It was the State's case that on 27 June 2000 the appellant, together with three others, had gone to the house of Mrs Elelwani Friedah Chabalala at River Plaas and had forced her at gunpoint to part with approximately R20 000 in cash, clothing, a blanket, a camera, a cell phone and shoes. According to the State, the appellant was not one of the two robbers who had entered the home ─ he waited in the vehicle parked outside.

[3] A co-accused, Mr Balaganani Thomas Nematswerani, testified in support of the State's case, implicating the appellant. According to Mr Nematshwerani, the appellant was fully involved in the planning and execution of the robbery. The appellant's role at the scene was to ensure that the getaway vehicle was protected during the robbery. His evidence was corroborated in material respects by Mrs Chabalala and another witness in support of the State's case, namely, Mr Charles Chabalala. The latter testified that the appellant and another person had made enquiries earlier on the day of the robbery about the house at which the robbery was committed. According to Mr Chabalala, the appellant and his companion were travelling in

a motor vehicle, the registration of which he had noted and which ultimately was supplied to the police. It is common cause that that vehicle was used in the commission of the robbery. Mrs Chabalala's evidence coincided with Mr Nematswerani's testimony of the manner in which the robbery was committed. Mr Chabalala had also identified the appellant at an identification parade.

[4] The appellant chose not to testify. His appeal was based on two grounds. First, that the identification evidence was insufficient to found a conviction. It was submitted on his behalf that Mr Chabalala had testified that the enquiries referred to above were made at a place called Tshabani, located approximately 11 kilometres away from the scene of the robbery. Second, that the court below had erred in uncritically accepting the evidence of the appellant's co-accused.

[5] The submissions referred to in the preceding paragraph are fallacious. In the scheme of things the geographical distance between the place where the enquiries were made and the location where the robbery took place is minimal and can easily be traversed by a motor vehicle in a short space of time. The evidence of Mr Chabalala is but one part of the totality of the evidence on which the conviction was based. It fits in neatly with the testimony of Mrs Chabalala and that of the appellant's co-accused, Mr Nematswerani.

[6] The inconsistencies between a written statement made by the co-accused and his evidence in court do not militate against the acceptability of his testimony in relation to the count of robbery presently under consideration. It is true that Mr Nematswerani was untruthful when he testified that he only participated in the robbery presently under consideration and in other robberies because he was an informer for the South African Police Services. He was rightly disbelieved on that aspect of his evidence. It was a desperate attempt by him to avoid the consequences of his unlawful activities. It does not follow that because he gave false evidence in this regard that the remainder of his relevant testimony is also untrue. One must guard against

the natural impulse to use that lie to reject otherwise plausible and corroborated testimony.

[7] In Schmidt Rademeyer *Schmidt Bewysreg* 4 ed (2000) p 106 the following appears:

'Hoewel die hof uit 'n leuen *kan* aflei dat 'n getuie ook elders valse getuienis gelewer het, is die normale gevolg dat slegs die bewese onware getuienis uitgewis word. Die leuen verswak dus normaalweg nie die ander getuienis nie.'

See also *S v Oosthuizen* 1982 (3) SA 571 (T) and the other authorities referred to by the learned authors.

[8] Of course, a court must be cautious in approaching the evidence of an accomplice and must in determining the guilt of an accused have regard to the totality of evidence and be conscious of the burden of proof that rests on the State.

[9] It was submitted on behalf of the appellant that Mr Charles Chabalala did not identify the appellant as a robber but only testified that he was one of a party of two who, earlier on the day of the robbery, had made enquiries concerning the house at which the robbery was later committed. That is true. However, the following has to be pieced together. First, there is the evidence of Mr Nematswerani implicating the appellant. Before us, no reason was suggested for Mr Nematswerani's random selection of the appellant as a co-perpetrator. Second, Mrs Chabalala's account of the robbery was consonant with Mr Nematswerani's testimony about how it occurred. Third, there is the evidence of Mr Chabalala, that the appellant had been in the car used in the robbery, making enquiries earlier that day about the house at which it was perpetrated ─ Mr Chabalala was immediately suspicious to the extent that he recorded the registration number which was ultimately supplied to the police and which was traced back to the robbery. Importantly, the appellant failed to testify and challenge any of the evidence set out above, implicating him.

[10] If a witness has given evidence directly implicating an accused the latter can seldom afford to leave such testimony unanswered. Although

evidence does not have to be accepted merely because it is uncontradicted, the court is unlikely to reject credible evidence which the accused him or herself has chosen not to deny. In such instances the accused's failure to testify is almost bound to strengthen the case of prosecution.[1] In *S v Chabalala* 2003 (1) SACR 134 (SCA) para 21 the following was stated:

'The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. If he was innocent appellant must have ascertained his own whereabouts and activities on 29 May and be able to vouch for his non-participation. . . . To have remained silent in the face of the evidence was damning. He thereby left the *prima facie* case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt.'

See also *S v Boesak* 2001 (1) SACR 1 (CC) para 24.

[11] In the present case Mr Chabalala's evidence about the enquiries made by the appellant and his testimony linking the appellant to the vehicle used in the robbery called for an answer as did the testimony of Mr Nematswerani implicating him. At his peril, the appellant chose not to testify. In these circumstances the court below was correct in convicting him.

[12] In respect of sentence it was contended on behalf of the appellant that the court had not taken his personal circumstances into account and had erred in concluding that there were no substantial and compelling circumstances justifying a deviation from the prescribed 15 year-term of imprisonment.

[13] The submissions in the preceding paragraph are baseless. Whilst it is true that the court below (Hetisani J), could have been more expansive in describing the respective robbers' personal circumstances, it is clear that it took into account the appellant's degree of participation in the robbery, namely, that he waited outside whilst the robbery was being perpetrated. The court below took into account that the appellant had received his share of the

1 D T Zeffert, A P Paizes, A St Q Skeen *The South African Law of Evidence (*2003) p 127.

cash proceeds of the robbery and that he had identified completely with the planning and execution of the robbery. There is nothing to indicate that there is anything in the appellant's personal circumstances that was not noted that would have had a bearing on the sentence. The court below spoke in general terms about the motivation for the minimum sentencing regime and the frequency of crimes of violence. The court below clearly took the view that there were no substantial and compelling circumstances justifying a departure from the prescribed minimum sentence, a conclusion with which I can find no fault.

[14] For all the reasons set out above the following order is made:
The appeal against both conviction and sentence is dismissed.

M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	M E Mokgotho
	Instructed by Justice Centre, Polokwane Justice Centre, Bloemfontein
For Respondent:	R J Makhera
	Instructed by Director of Public Prosecutions, Polokwane Director of Public Prosecutions, Bloemfontein