NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR646/14

In the matter between:

SIDINGO SIFUNDO NDWANDWE	**FIRST APPELLANT**
SIBONGISENI DUMA	**SECOND APPELLANT**

And

THE STATE	**RESPONDENT**

JUDGMENT

Delivered on: Thursday, 20 August 2015

OLSEN J (V NAIDOO AJ concurring)

[1] The two appellants in this matter were each convicted in the Regional Court at Durban of robbery with aggravating circumstances, kidnapping, possession of firearms, possession of ammunition and 5 counts of attempted murder. The cumulative effect of the sentences imposed in respect of these convictions was 20 years imprisonment and a non-parole period of 12 years was stipulated by the learned magistrate. The appellants appeal against their convictions and sentences with the leave of the court *a quo*.

[2] When the application for leave to appeal was argued before the magistrate counsel for the State (who did not appear for the State during the

trial) argued that there were problems with some of the convictions in this matter on the State's own version, and that leave to appeal ought accordingly to be granted (as it was). Counsel who appeared for the State before us similarly conceded that there were difficulties on the State's own case with all of the convictions save for the conviction on the charge of kidnapping.

[3] Both of the appellants gave evidence at the trial. They denied being party to any criminal activities and asserted that they were innocent travellers caught up in the events which gave rise to their trial. Nothing they said contributed to the quality of the State's case. I accordingly propose to commence by dealing with the convictions of robbery, possession of firearms and ammunition and attempted murder against the background of the facts revealed by the State witnesses, without raising any question as to the reliability of the State witnesses and as to whether those facts were proved beyond reasonable doubt.

[4] The State called six witnesses. The first of them was a Mr Ngcobo, a taxi driver. The other five were policemen, two of them being members of the Metro Police in Durban, and the other three members of the South African Police Services. The evidence of these witnesses described the following events.

[5] On the evening of 14 July 2011 Mr Ngcobo was driving a taxi affiliated to the Inanda Taxi Association. He was employed as its driver. He was in Durban. He found himself in his taxi with some men (later established to be 5 in number) who he could not identify. One of them placed an object (which Mr Ngcobo never saw) against the back of his neck and told him to move off, whereafter he was required to drive as instructed by another one of the passengers who was sitting in the front passenger seat of the taxi. (This event gives rise to the kidnapping charge which I shall deal with later.)

[6] Eventually the taxi came to a place in Clairwood where Mr Ngcobo was told to stop the taxi. Three of the occupants disembarked from the rear of the taxi and crossed the road. The occupant of the front passenger seat walked

off in another direction, and one of the passengers who had been sitting behind remained, apparently to ensure that Mr Ngcobo was kept as a hostage. The keys to the taxi were removed by the front seat passenger. The passenger who remained behind received a cell phone call and decided to conduct his conversation outside the taxi, leaving Mr Ngcobo in it. Mr Ngcobo took the opportunity to dial the emergency number 10111 on his cell phone. According to Mr Ngcobo he managed to report that he was driving a white taxi, that he had been hijacked and that he was in Clairwood, before he had to terminate the call as his "guard" returned to the taxi. Thereafter the others who had walked off returned, gave Mr Ngcobo the keys and told him to drive off.

[7] It is the State's case that the message to the emergency call centre generated the delivery of messages to three police cars occupied variously by the five policemen who gave evidence. They were busy with other duties at the time. They eventually came upon the taxi being driven by Mr Ngcobo. After the presence of the police cars was signified, shots rang out from the taxi and the police returned fire. At the end of the fire fight the taxi driver emerged unharmed. Two of the five alleged kidnappers were found to have been killed in the fire fight. Three were wounded. One of them died later in hospital from his wounds. The remaining two are the appellants. The wounded were taken by ambulance to a hospital.

[8] The policemen involved in the fire fight noticed that there were three hand guns lying on the floor of the taxi once they had extracted the dead and wounded. These were not touched or interfered with in any way. According to them they simply secured the scene (which was on an access ramp to the N2, at the intersection of two major roads south of Durban), and awaited the arrival of the police who would investigate the incident. These police who investigated the incident (I will call them the "investigators") did not give evidence. Instead affidavits were handed in without objection from the appellants which provided the court with photographs taken of the taxi and the area around it (including spent cartridges), a list of the articles collected on the scene and a report on a forensic examination of the spent cartridges and the

hand guns found in the taxi. These affidavits revealed that only two of the hand guns found in the taxi were capable of being fired. Only three spent cartridges were found in the taxi. A forensic examination revealed that one cartridge came from one of the hand guns found in the taxi and the other two from the other hand gun which was capable of being operated. From the evidence placed before the court only two cartridges were found outside the taxi and the forensic report confirmed that they had not been fired by any of the guns found inside the taxi.

[9] Although Mr Ngcobo gave evidence to the effect that there had been shooting from his taxi, he was unable to say anything at all about who amongst the passengers was shooting. He gave no evidence as to any discussion at all amongst the five men in the taxi as to whether the shooting should take place. According to him he simply heard his windows being opened and shots ringing out from the inside of the taxi. He gave no evidence to the effect that he had realised in advance of the clash with the police that any of his passengers were armed with a firearm (although he presumably suspected that the hard object which had been placed behind his neck when the alleged kidnappers first took control of his taxi was a gun; but he did not know that).

[10] Two of the police witnesses who described the message they had received, and which put them on the trail of the taxi, gave an account of the message which coincides more or less with what Mr Ngcobo says he was able to convey to the operator at the emergency number. The other three said that the message conveyed to them was that the taxi was to be used or had been used in a robbery at a tavern in South Coast Road known as the Manyaweni Tavern. No evidence at all was led in support of the proposition that there had been such a robbery or that one was planned. Mr Ngcobo gave no evidence that he overheard conversations whilst he was driving the taxi, which gave any clue as to why he had been kidnapped and his taxi commandeered in the process.

[11] The State led no evidence of an examination of the firearms found in the taxi for fingerprints, or of the conduct of any primary residue tests, in order to establish who amongst the five alleged kidnappers had fired at the police. Neither was any explanation tendered for the absence of such evidence.

[12] It is against that background that the State sought convictions on the charges that the appellants were guilty of

(a) robbing Mr Ngcobo of the taxi in aggravating circumstances;
(b) unlawful possession of the firearms (and ammunition still in the magazines thereof) which were found in the taxi; and
(c) the attempted murder of each of the five policemen (none of whom were injured and none of whose cars were in any way damaged) through the firing of guns from the taxi at the police officers concerned.

[13] Dealing first with the conviction of robbery, it is a requirement that the theft of the taxi be proved. Counsel for the State argued during the course of the application for leave to appeal there was no evidence to support the proposition that the five alleged kidnappers intended to steal Mr Ngcobo's taxi. He was left in the driver's seat at all times, and it is clear that he was deprived of the keys for only a short while, and simply to ensure (on the State's version) that his status as hostage was maintained. Whatever may be said, one way or the other, on the question as to whether the alleged kidnappers had assumed control of the taxi to the exclusion of Mr Ngcobo (the latter being the lawful possessor), it is a requirement for a conviction on the crime of theft (and therefore robbery) that there should be an intention "to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership." (*R v Sibiya* 1955 (4) SA 247 (A) at 257.) Here there is no evidence at all to support any conclusion as to why Ngcobo was kidnapped (one might say, with his taxi). No evidence of any robbery or planned robbery was led. No final destination was reached. Ngcobo could say nothing about what the five men in his taxi might have intended to do at the end of or during the course of the journey, whether with regard to the taxi or otherwise. It seems, therefore, that the conviction for robbery cannot be sustained on the

State's case. There is no evidence of an intention permanently to appropriate the taxi.

[14] The difficulties which afflict the convictions of possession of the firearms and of attempted murder overlap to some extent. It will be recalled that there were only three spent cartridges found at the scene, which had been fired from the two firearms found in the taxi. It is overwhelmingly probable that only two out of the five men fired. There is no evidence to support the proposition that the three who did not shoot knew that those who did were armed with those two firearms. Whatever the purpose of the kidnapping and directions given to Mr Ngcobo as to where the taxi should drive, it was not to use those firearms to shoot at the police. As far as can be judged from the evidence, the decision of the two to shoot at the police must have been made on the spur of the moment when it was realised that the police were attempting to or had stopped the taxi. As already mentioned Mr Ngcobo gave no evidence of any conversation generating a joint decision to start shooting at the police. In the absence of that it is difficult to see how the conduct of those who did shoot can be imputed to those who did not, without it being established first, beyond a reasonable doubt, that those who were not armed knew that the others were.

[15] It will be apparent that these difficulties afflict also the proposition that there was joint possession of the firearms alleged to have been found in the taxi after the event. The magistrate found that joint possession had not been established. He convicted the appellants of possession of the firearms and ammunition upon the basis that they were over 16 years of age and present in the vehicle at the time when the firearms and ammunition were found. In this regard he relied upon the presumption set out in s117 (2) (d) (vii) of the Firearms Control Act, 60 of 2000. Putting aside the concern raised by counsel who appeared for the State in the application for leave to appeal, as to the constitutionality of s117 of the Firearms Control Act (or certainly parts of it), it seems to me that the learned magistrate misdirected himself in overlooking the requirements set out in the introduction to sub-section 117 (2) for the application of the presumption in the various circumstances listed in sub-

sections 117 (2) (a) to (i). The presumptions cannot apply unless "the State can show that despite the taking of reasonable steps it was not able with reasonable certainty to link the possession of the firearm or ammunition to any other person". In the absence of evidence of an attempt to establish who had possessed the firearms through an examination for fingerprints, and primary residue tests, the conclusion must be that the State had not taken reasonable steps available to it. The magistrate's reliance on s117 (2) was accordingly misplaced.

[16] For the reasons stated above it was accepted by the State in argument that on its own case it had difficulties supporting the convictions it had secured for robbery, possession of firearms and ammunition and attempted murder. There is a strong suspicion that the appellants were fully involved, but not proof beyond a reasonable doubt. Insofar as the conviction for kidnapping is concerned the position on the State's case is different. According to the evidence of Mr Ngcobo, after something had been pressed against the back of his neck to commence the kidnapping, all of the five men concerned left the taxi and would have had an opportunity to flee the scene if they were not associated with the kidnapping. They all returned voluntarily. On the State's case, therefore, the two appellants participated in the kidnapping. Their return associated them with it. The question then is whether the State discharged the onus of proving its version beyond a reasonable doubt. Counsel for the appellants offered no argument against the proposition that the State had proved its case. But the appeal against the convictions on the charge of kidnapping still stands and must be dealt with.

[17] According to both appellants they were innocent travellers in a taxi in which no act of kidnapping took place. In the course of the journey in the area to the south of Durban the taxi dropped its five occupants off at the Manyaweni Tavern and the driver left them there promising to return to pick them up. Some or all of the five took some refreshment and the taxi eventually returned, whereupon they boarded, intending to be taken back to Durban. According to the first appellant at a certain stage near a robot intersection he heard the sound of a siren outside and, after crossing the

intersection, the taxi pulled over on the roadside. Then he heard gunshots – the police were shooting at the taxi. The taxi was stationary. When the shooting had apparently died down the doors were opened and a police dog dragged the first appellant out of the taxi. At that stage, he says, he had not been shot. He was dragged towards where the police cars were parked. He asked why the taxi had been shot at but there was no answer. He was then shot in his left buttock and the bullet travelled through to lodge itself near his left groin. He asked why they were shooting him and lifted up his hands. He got no answer and the next thing he was shot in his left hand. He was then seated on the ground supporting his body with one hand when he overheard one policeman say to another "you can shoot the head". He was shot in the head. It appears that the shot penetrated below his right cheek and exited between his eyebrows, in the process destroying his right eye. All of this was done to him outside the vehicle. He, like the second appellant, contended that there had been no shooting at all from inside the taxi. He did not know the other occupants of the taxi save for one, and he did not know the second appellant. The only person he had spoken to during the course of the journey was his friend, one Vuzi, who appears to have been the front seat passenger, and who was killed on the scene.

[18] The second appellant's account of how the shooting started is very similar to that of the first appellant. He remembers the sound of the siren and he saw the lights of the police car but he cannot remember what happened after that. He only heard the sound of gunshots. It was the police shooting at and into the taxi. When the shooting had apparently died down he heard a voice saying that those in the taxi should put their hands in the air and open the door. He followed the instruction. As he was in the process of exiting he was shot in his upper right arm. When he turned facing the police another bullet entered the left side of his chest. At the same time a dog was biting him on his right thigh. He was told to lie on the ground. Although his evidence is not clear on this point it appears that he may have been shot again at this stage with a rifle. He lost consciousness and was hospitalised for three months to recover from his wounds.

[19] On the version of the two appellants not only was there no kidnapping; there was also no shooting from the taxi; which must mean that the attack by the police on the taxi, and those in it, was some sort of dreadful mistake. On the appellants' version the three firearms found in the taxi must have been planted there by the police. If that happened it would presumably have been to facilitate a cover-up. On this question the magistrate misdirected himself by finding that it was "inconceivable" that the police officers would have had such firearms and exhibits (presumably he meant spent cartridges) available to be used in circumstances like this. It would be legitimate to say that on all the evidence it was improbable; but illegitimate to close one's mind to an assessment of all the evidence upon the basis that it is "inconceivable" that the events could have occurred as the appellants said they did.

[20] The intersection through which the taxi passed just before it stopped led the taxi onto a ramp giving access to the N2 highway. Even at 10 o'clock at night (when the shooting occurred) this would be a very public place. According to the police evidence all those shot (as the appellants were) were shot in the taxi. The three who did not die immediately were extracted or emerged wounded already. It seems to me to be grossly improbable that, for no reason at all, the police would have shot the two appellants after they had emerged unscathed from the taxi into the open where there was presumably a risk that a member or members of the public may see what was going on. If, as seems to be implied by the version given by the appellants, the intention was to shoot the appellants to cover up what the police had done, then a bad job was made of it by the police, and one wonders why an ambulance was called to assist the appellants to recover and live to tell their tale.

[21] However it is not for an accused person to establish his or her innocence. It is not a necessary condition for a finding that the State failed to prove its case beyond a reasonable doubt that the version of events furnished by the appellants should be accepted. It is not impossible that the appellants inadvisably decided to embellish their version as to how they were shot, with a view to gain some advantage beyond the criminal trial, when in fact the rest of

their version of events is substantially true, save that they were in fact shot whilst in the taxi.

[22] The allegation that the taxi driver was kidnapped rests primarily on the evidence of Mr Ngcobo.

[23] The learned magistrate accepted the evidence of Mr Ngcobo and his view may be summarised from this statement in the judgment.

> "He explained all of the evidence sequentially and the court felt that he was, although it was a harrowing experience, he did explain it in such a way that all of the pieces fitted together."

Insofar as the police evidence was concerned the magistrate concluded that there were no discrepancies and he described the police as good and honest witnesses. Their version of events was accepted. A difficulty with which we are confronted as an appeal court is that as a matter of fact there were discrepancies between the evidence of Mr Ngcobo and the police witnesses, and in some respects between the police witnesses themselves, which were not cleared up in evidence and which were overlooked by the magistrate.

[24] I have already mentioned that three of the police witnesses claimed to have received a message that the white taxi they were to look out for had been involved or might be involved in a robbery at the Manyaweni Tavern, information which would not have emanated from Mr Ngcobo according to his evidence. However it is possible that the three police witnesses became confused about the connection between the events that night and the Manyaweni Tavern, given that the appellants' claim that the taxi dropped them off there.

[25] According to Mr Ngcobo, as he approached the scene where he eventually stopped his taxi he became aware of the fact that there were police behind him, and perhaps alongside him (his evidence is not perfectly clear on that point). He said that he was instructed through a loud speaker to stop the

taxi. No such evidence was given by the police witnesses. They said they had employed blue lights and sirens.

[26] Mr Ngcobo said he was instructed by a person sitting behind him not to stop and to carry on, which is what he did. He realised that the occupants of the taxi had opened the windows and they then started shooting at the police behind. He carried on driving. Next the police returned fire, and when that happened Mr Ngcobo brought the taxi to a stand-still. That account of how the shooting started does not accord with the evidence of the five police witnesses. According to them Mr Ngcobo did not bring his taxi to a stand-still as soon as their blue lights and sirens were turned on, but proceeded through the robot intersection onto the ramp leading to the N2, and then brought his taxi to a halt. At that stage the policemen got out of their cars and started to approach the taxi. It was only then that they were shot at from the taxi, as a result of which three of them returned fire. Two did so with handguns and a third with a R1 rifle. This discrepancy was not noticed by the magistrate and neither was it dealt with in the course of the evidence.

[27] The State case was characterised by shoddy investigation. It may well be that the prosecution was not conducted properly either. One does not even know the names of the three people who died. No medical reports (post mortem or otherwise) were handed in to clarify what happened. Only two spent cartridges emanating from police weapons were recovered on the scene despite the fact that 5 or 6 shots struck the appellants themselves. One does not know how many bullets struck those who died. No R1 cartridges were recovered by the investigators, despite the fact that the five police witnesses claimed that as soon as the dead and wounded had been extracted from the taxi the scene was cordoned off and protected from interference pending the arrival of the investigators. As mentioned already, the investigators were not called to explain what they did; and in particular to explain what they did not do in the discharge of their duty to ascertain what had happened on the scene of these events.

[28] Having said all these things it must be observed that Mr Ngcobo and the police witnesses were not in any way disturbed by cross-examination on their account of events. No other explanation for the pursuit by the police of the taxi emerged save for Mr Ngcobo's message to the emergency number. Whilst the different accounts of how the shooting started (i.e. whether the taxi had come to a stand-still before or after the shooting started) should have been explored in evidence, one must observe that given the nature of these events there is no reason to be surprised at any confusion arising in Mr Ngcobo's mind as to whether he had stopped the taxi before or after the shooting started. It was open to the magistrate to accept, notwithstanding the contradictions and shortcomings I have referred to, that Mr Ngcobo's evidence was acceptable, and in particular his evidence that he was kidnapped. The magistrate was highly critical of the evidence of the appellants and their performance as witnesses and, judging from the record, I can see no reason for an appeal court to conclude that the credibility findings he made against the appellants were wrong. Indeed, as observed earlier, no argument was advanced by counsel for the appellants to the effect that the convictions of kidnapping should be set aside. In my view they should be affirmed.

In the circumstances the following order is made.

1. **The appeals are upheld in part.**

2. **The convictions of the appellants on Counts 1 (robbery with aggravating circumstances), 3 and 4 (possession of firearms and ammunition) and 5 to 9 (attempted murder), and the sentences imposed in respect of those convictions, are set aside.**

3. **The appeals of the appellants against the convictions on Count 2 (kidnapping) and the sentences imposed in respect of that count (2 years imprisonment), are dismissed, and the convictions and sentences are confirmed.**

4. To the extent that it is necessary to do so, given the outcome of the appeals, it is recorded that the appeals against the imposition of non-parole periods of imprisonment are upheld and the relevant orders are set aside.

OLSEN J

V NAIDOO AJ

Date of Hearing:	TUESDAY, 11 AUGUST 2015
Date of Judgment: :	THURSDAY, 20 AUGUST 2015
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