

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: A364/2006

In the matter between:

MZUKISI NGUDLE

Appellant

Versus

THE STATE

Respondent

JUDGMENT DELIVERED 30 APRIL 2010

Allie, J

[1] The appellant was convicted on one count of robbery with aggravating circumstances and sentenced to 15 years imprisonment.

[2] The state alleged that the appellant forcibly took a 9mm pistol from the complainant, Mr M Racula in Nyanga during November 2001 while the complainant was walking in the street. The complainant said that the appellant drove a Mazda motor vehicle which stopped alongside him. The appellant then rolled down the window of the driver's side of the car and called the complainant to come to him. When the complainant was near enough, the appellant pulled the pistol off from the body of the complainant where it was kept. Later that same day the pistol was found on accused at a service station in the city.

[3] The complainant described the appellant as bald and said that he wore a leather jacket. He said between the appellant and his co accused one was short and the other tall.

[3] The complainant described the appellant as bald and said that he wore a leather jacket. He said between the appellant and his co accused one was short and the other tall.

[4] While the complainant was talking to the police, some photos fell out of another file. The complainant then identified the appellant as the robber who took his firearm forcibly.

[5] Clearly the identification by means of the photographs was not intended to be a formal photo identification.

[6] Regrettably the complainant's powers of observation were not tested. His ability to properly see the appellant at the time of the robbery was not mentioned. His description of the appellant does not raise clearly identifiable features. There are accordingly no extraneous factors outside of the identification of the appellant by virtue of a photograph to serve as guarantees that the identification was indeed reliable. The court *a quo* placed little store on the inconclusive description given by the complainant about his assailants.

[7] The complainant said that he was scared to inform his father that the firearm was stolen from him as he was not supposed to be walking in the street with it. That fear cannot be ignored when considering whether the complainant made an honest mistake in identifying the appellant.

[8] I am not persuaded that the identification was reliable in the circumstances. [see: **S v Mthetwa 1972 (3) SA 766 (A) at 768 A-D; S v Zitha 1993 (1) SACR 718 (A).**]

[9] I am of the view that the state has not discharged the onus of proving that the appellant was correctly identified.

[10] In the circumstances the appeal succeeds and the conviction is set aside.



ALLIE, J

I agree



DC JOUBERT, AJ