

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

**CASE NO: A243/08**

**THABO NXAZONKE**

Appellant

v

**THE STATE**

Respondent

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**THIS JUDGMENT DELIVERED ON 12 FEBRUARY 2011**

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**FORTUIN, J:**

[1] The appellant, Mr Thabo Nxazonke, was charged with one count of robbery with aggravating circumstances, and one count of illegal possession of a firearm, a contravention of sec 3 of Act 60 of 2000. He pleaded not guilty to both charges.

[2] On 11 August 2008, the appellant was convicted of both charges in the Regional Court, Paarl, and on the same date he was sentenced to 12 (twelve) years of imprisonment, the counts having been taken together for the purposes of sentencing. He was also found to be unfit to possess a firearm.

[3] This appeal is against both conviction and sentence.

[4] The grounds of appeal with regard to conviction is that the court *a quo* erred in finding that the appellant was correctly identified by the complainant, who was a single witness.

[5] The relevant facts are, in short, the following:

- 5.1 At 6h45, on the morning of 21 August 2004, the complainant, Mr Theodore Jansen, was sitting in his vehicle waiting for his co-workers;
- 5.2 It was still dark and misty when a man, holding a firearm, opened the front passenger door and leaned into the car;
- 5.3 The man held the firearm to his head and demanded that he handed over his cash and valuables;
- 5.4 When Mr Jansen's cellphone message alarm sounded, the robber also grabbed his cellphone;
- 5.5 A second man approached the driver's door and forced Mr Jansen to open the door;
- 5.6 He held a knife to Mr Jansen's side and robbed him of the cash in his pockets;
- 5.7 Mr Jansen's co-workers arrived and the robbers fled;
- 5.8 The following day Mr Jansen was asked by the investigating officer, Insp. van Zyl, to page through two photo albums for the purpose of identifying the suspects;
- 5.9 Mr Jansen pointed out one photograph depicting the appellant as the person who pointed a firearm at him.

[6] Evidence of identification should always be approached with caution.

[7] The legal principle with regard to identification generally is trite:

*"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. 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 weighed one against the other, in the light of the totality of the evidence, and the probabilities;<sup>1</sup> ..."*

[8] The danger in photographic identification is that a witness may identify the person whose photograph he/she saw and not necessarily the **person who** committed the offence. The Supreme Court of Appeal in **S v Moti**<sup>2</sup> pointed out that identification based on photographic identification should be considered with caution.

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<sup>1</sup> **S v Mthetwa** 1972 (3) SA 766 (A) 768

<sup>2</sup> 1998 (2) SACR 245 (SCA)



[9] *In casu*, the court *a quo*, correctly, in my view, found that a conviction could only follow if the identification of the robber was reliable. The question that should be answered is, therefore, whether the finding of reliability by the court *a quo* was correct.

[10] If the facts of this matter are tested against the guidelines laid down in the **Mtethwa** matter, the following questions arise:

- 10.1 With regard to lighting - it was misty and dark and as a result thereof, could the complainant observe the robber sufficiently for him to make a reliable identification?
- 10.2 With regard to visibility inside the car – did the light that went on when the car door was opened provide sufficient visibility for a reliable identification?
- 10.3 With regard to the opportunity for observation – was the short period of time, even though not determined with clarity, sufficient to enable a reliable identification. During cross examination the complainant conceded that the incident occurred over a very short period of time;
- 10.4 With regard to the mobility of the scene - the complainant was traumatized and his attention was divided between the two robbers;
- 10.5 With regard to the accused's face, voice, build and dress - the complainant could not identify the clothes worn by the robber, nor was he able to identify the scar on the appellant's chin. The

complainant during cross examination testified that the robbers were wearing hats;

10.6 With regards to the extent of his prior knowledge of the accused - the complainant has not seen the accused before;

10.7 With regard to suggestibility - the complainant was shown two photo albums, i.e. 500 photographs;

10.8 With regard to an identity parade, it is undisputed that no follow-up identity parade was held and that the court *a quo* relied only on the photographic identity parade;

10.9 With regard to corroboration, the complainant was a single witness.

10.10 With regard to the proximity of the robber, the complainant testified that he would have been able to see a person at an arms length from him. During cross examination he conceded that he could not see the robber clearly.

[11] The appellant's version is that he was at home at the time of the incident. The appellant has no further obligation to prove his innocence. The onus is on the state to prove his guilt beyond reasonable doubt. In order to discharge this onus, the identification should be reliable.

[12] The court *a quo* made a finding about the honesty and sincerity of the complainant. However, as stated in the **Mthetwa** decision<sup>3</sup>, this is not the only requirement. I am in agreement with the court *a quo* that the complainant


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<sup>3</sup> *supra*

came across as an honest witness. However, when his evidence on the identification of the appellant is tested against the guidelines laid down above, I am not satisfied that the factors, considered not in isolation but cumulatively, amount to a reliable identification. As stated earlier, there is no corroboration for the complainant's version that the appellant was the robber. The only evidence that the court *a quo* had was the identification. I am not satisfied that the guilt of the accused was proved beyond reasonable doubt.

[13] In the circumstances, I would interfere and make the following order:

**The appeal is upheld. The conviction of robbery with aggravating circumstances and possession of a firearm is set aside.**



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**FORTUIN J**

I agree and it is so ordered



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**BOZALEK J**