



Republic of South Africa

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

**CASE No: A752/2010**

In the matter between:

**MOSES VUYANI MEMANI**

**Appellant**

And

**THE STATE**

**Respondent**

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**JUDGMENT : 13 MAY 2011**

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**MANTAME, AJ:**

[1] This is an appeal brought with the leave of the court *a quo* against conviction on the 03<sup>rd</sup> of February 2010 of attempted murder and theft and the effective sentence of 6 years imprisonment on the 17<sup>th</sup> May 2010 imposed on the Appellant by the Wynberg Regional Court. The Appellant was represented by Mr. Joseph Weeber, and the state was represented by Mr. M Sebelebele on appeal.

[2] The Appellant who was represented throughout by an attorney appeared in the Wynberg Regional Court on charges of attempted murder and robbery with aggravating circumstances. He pleaded not guilty to both charges.

[3] At trial, the state called four witnesses in proving its case and the Appellant called two witnesses in his defence.

[4] The common cause facts are that, on the 17 January 2004 at about 18:00, a mob of people gathered in front of the house of Mr Ben Mazibuko, the complainant in this matter, who carried on a shebeen business at his house in Malinga Street, Thambo Village. The mob was singing liberation songs and dancing.

[5] The complainant testified that he, his wife and niece were at his house. The niece was busy serving customers alcohol through a hole in the wall. Two men, the Appellant, known to him only as Rasta and one Fatty Boy came with the mob to his house. Fatty Boy told him to open the door and he complied. At that point, both men took out firearms. They then ordered him to go outside. In the process, they hit him with the firearm. Outside Rasta then shot him in the forehead. Thereafter he was powerless and fell on the ground where he was attacked by the mob. Complainant then sustained several further injuries as a result of this mob attack. He then became unconscious and he was later taken by the police to the hospital. Apart from the laceration to his head, he sustained a broken jaw and lost six upper teeth as a result of this incident. Complainant initially claimed to know the

Appellant for approximately seven to eight months prior to this incident. He did not even know his name, he called him Rasta because he had dreadlocks.

[6] During the course of the commotion at his house, some items went missing, i.e. a cash amount of approximately R3200.00, a TV, video machine, 3 x cell phones, a gold necklace chain. A fridge was broken into and some of the alcohol went missing.

[7] Appellant on the other hand testified that on the day in question, he went first to a memorial service for the late Qondile who had been murdered. Thereafter he went to NY 7 Sports Complex. He was in his vehicle with one Andile. He met the ANC motorcade of about  $\pm$  200 vehicles. This motorcade moved towards Thambo Village. On the way they heard some gunshots and decided to go towards that direction to investigate. On investigation, they were advised that the gunshots do not have anything to do with the motorcade, but rather they came from the "shebeen" house. The shebeen house belonged to the complainant. They then decided to go back. On their way back, they walked in parallel direction. Whilst Appellant was still walking, he was tripped from behind and fell down. When he was still trying to investigate the reason of his falling down, he was pointed with a firearm by the police. He was then arrested and taken to Manenberg Police Station. On inquiring about the reason for his arrest, he was advised that he was arrested for having fired shots in a municipal area.

[8] He further testified that he knew Ben Mazibuko, the complainant and his wife in the 90's already. But, on that particular day, he never saw them, he only



saw Ben's wife at the Manenberg charge office after he was arrested.

[9] The evidence of the complainant was not totally corroborated by that of his wife. It must be taken into account that throughout the trial, the Appellant maintained his innocence and was very sorry of what happened to the complainant, nevertheless, he was not responsible. He even proceeded to say he was at the "*wrong place at the wrong time*" hence he got arrested.

[10] Ms. Florence Norhunga, the wife of the complainant who testified for the State, saw the Appellant in the charge office at Manenberg Police Station. Only when the detective asked her whether she knew the Appellant, did she say that 'this is the person who pointed me with a firearm in my house.' It apparently never occurred to her that she must alert the policeman immediately after the incident, that the Appellant was the one who pointed them with a firearm and who attacked her husband.

[11] Apart from the evidence of the complainant and his wife, there is no clear nexus between the commission of an offence and the Appellant. Constable Adams, arrested the Appellant for a totally different reason, that is, for allegedly pointing a firearm at his colleague Constable Drummond and not the commission of a crime on the complainant and his property. Even though this is why he says he arrested the Appellant, he does not state it to be the reason for the arrest when he makes his statement soon after the arrest. The distance where the Appellant got arrested is some 200-300m away from the place of the incident.

[12] The complainant's evidence in chief that he knew the Appellant only by the name Rasta, which is what he called him because of his hairstyle, was clearly, on his own version, a lie. He stated in cross-examination that he knew the Appellant by his name Vuyani Memani. This is in line with the evidence of the Appellant and that of one of his witnesses, Mr. Ntamo who testified that the Appellant and the complainant knew one another very well from the days that they were members of the Cape Youth Congress.

[13] In addition, it became common cause during the complainant's evidence under cross-examination that the Appellant and the complainant had a heated disagreement only days before the incident at the complainant's house. The issue was that the complainant claimed to have had information about the persons who were responsible for the death of Qondile. He wanted to take it upon himself to confront these persons. At a meeting called by Ntamo, who is a councillor and apparently a person of some influence in the community, the complainant and the Appellant expressed opposing views. The Appellant contented that the complainant should not take the law in his own hands but should go to the police with his information. The complainant wanted to confront the alleged killers. The outcome of the meeting was that the complainant should go to the police. Both the Appellant and Ntamo stated that the discussion became quite heated and that the complainant was very upset and angry at the outcome of the meeting.

[14] The Appellant, when asked why the complainant would falsely accuse him, said that he thought that it might relate to the outcome of their earlier altercation.



[15] The fact that the complainant at first suggested that he did not know the Appellant very well even to the extent that he did not know his real name and failed initially to refer to their heated difference of opinion a few days before the incident, casts considerable doubt, in my view on the cogency of his implication of the Appellant as one of his attackers.

[16] The Appellant and his witnesses apparently made a good impression on the magistrate and a perusal of the evidence, in my view, confirms that they were good witnesses

[17] For the reasons mentioned above, I am not convinced that the factual basis supporting a conclusion that the Appellant is guilty has been sufficiently established.

[18] Ordinarily, a court of appeal will not interfere with a conviction based on the evaluation of the facts by the lower court unless there has been a material misdirection by the court *a quo* or the court of appeal is convinced that the conclusion is not correct.

[19] This court when exercising appellate jurisdiction, will not simply approach the question of conviction as if it were a trial court and make a substitution simply because it prefers another result. There should be valid reasons to do so, which in this case there are, in my view.

[20] Having regard to all the evidence, a reasonable doubt has been created on

whether the Appellant was at a scene where this incident took place, as all the evidence that was produced by the state does not establish beyond reasonable doubt that indeed the Appellant attempted to murder and then stole from the complainant.

[21] In the circumstances, the conviction of attempted murder and theft must be set aside.

[22] For the reason set out above, I propose following order:

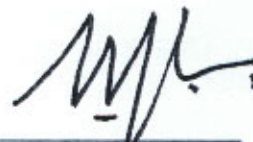
1. The appeal against the conviction and counts 1 and 2 is upheld;
2. The convictions and sentences on counts 1 and 2 are set aside.



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MANTAME, AJ

I agree, it is so ordered



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LOUW, J