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

CASE NUMBER: A173/2012

DATE: 25 MAY 2012

In the matter between:

MFUNISELE MKHEHLE Appellant

and

THE STATE Respondent

J U D G M E N T

BINNS-WARD, J:

The appellant was arraigned in the Regional Court at Cape Town on various charges of robbery and theft and of contravening the Firearms Control Act, 60 of 2000. He was tried together with two co-accused. He was convicted in respect of only three of the eight charges that were put to him.

These concerned firstly the robbery at gunpoint of Monwabise Ndingi - erroneously referred in the transcript as Monwabise Sandigo - of a Toyota Cressida motor vehicle at or near the LA Squatter Camp at Driftsands on 1 December 2006;

secondly, the unlawful possession of a 9 mm pistol in contravention of the Firearms Control Act and, thirdly, the unlawful possession of 15 X 9mm rounds of ammunition, also in contravention of the Firearms Control Act.

He was sentenced to 15 years' imprisonment in respect of the robbery, which was the prescribed minimum sentence applicable in terms of Section 51(2) of the Criminal Law Amendment Act, 105 of 1997, and two years' imprisonment – one of which was conditionally suspended – in respect of the counts contravening the Firearms Control Act, those two counts having been taken together as one for the purpose of sentence.

The appeal lies against the aforementioned convictions and sentences. It is brought, with leave granted in terms of a petition to the Judge President in terms of Section 309C of the Criminal Procedure Act, 51 of 1977.

At the trial the appellant pleaded not guilty to the three counts that are of relevance. He exercised his right to silence and did not offer a plea explanation. The main issue on appeal is whether the State succeeded in establishing the appellant's guilt beyond reasonable doubt. In respect of the robbery the issues are the dependability of the complainant's identification

of the appellant as one of the robbers and whether it should have been found by the trial court, with reference to the totality of the evidence that the appellant's exculpatory evidence could have been reasonably possibly true.

In respect of the firearms offences the question is whether the convictions can be sustained on the applicable inferential reasoning test in criminal cases laid down in S v Blom 1939 AD 188 at 202-203.

On the matter of sentence it is the appellant's contention that the trial court should have found the presence of substantial and compelling circumstances, justifying a departure from the prescribed minimum sentence.

The relevant evidence adduced against the appellant at the trial was that of the complainant and the police details that arrested him some three hours or so after the robbery at a time when he was a passenger on the rear seat of the stolen vehicle and at a place far removed from the commission of the offence. There was also evidence concerning the holding of an identification parade at which the appellant was identified by the complainant. After a trial-within-a-trial had been held, an extra-curial statement made by the appellant was admitted.

The complainant testified that he was a taxi driver by occupation. On the day in question, at about eleven o'clock in the morning, two men had approached him at the Lesoko Taxi Rank in Philippi East. They had asked him to convey them to Driftsands because they wished to fetch some property from there. After he had driven some distance one of these men, both of whom appeared to have been accommodated on the back seat of the car at the time, pointed a firearm at him and ordered him to get out of the vehicle. The complainant identified this person from the witness box as having been the appellant. He observed, however, that while the accused was sporting dreadlocks at the time of the trial, he had been wearing his hair short at the time of the robbery. The complainant also remembered that the appellant had been wearing a leather jacket and that his accomplice had been wearing blue overalls and a black hat. He had in addition noticed that the appellant was noticeably taller than his companion.

While on the aspect of the observations made by the complainant at the time, it is perhaps convenient to mention at this stage that in a statement made to the police on 6 December, just over a week after the incident, the complainant described one of his assailants as having been light in complexion, tall and of slender build, and the other as being

dark of complexion with no 'side teeth'. The appellant matched the characteristics of the first person so described. These are all pointers to the fact that the complainant had sufficient opportunity to take in and form a complex impression of the appearance of the two men he conveyed in his taxi.

I think it may also be taken into account that it appears from the content of a witness statement made by the complainant on the afternoon of the day of the incident, and put in as EXHIBIT A at the trial at the instance of the appellant's legal representative, that Driftsands is in the Mfuleni area. As it happens, according to accused 1, the appellant was resident in Mfuleni at the time. According to the appellant, on the other hand, it was his wife or girlfriend who lived in Mfuleni while he lived in Philippi.

Considering that accused 1 and the appellant were well-known, having been friends for many years; the contradiction is curious. The only significance of the issue is that it was just one more coincidence - if one is to believe that the appellant might have been mistakenly pointed out by the complainant - that he came from the very area in which the robbery occurred. The Court can use its local knowledge to take judicial notice that Philippi East and Mfuleni are in close proximity to one another along the N2 freeway and that a car journey between

the two places would probably take in the order of about five minutes.

In both of his witness statements made to the police within a week of the commission of the robbery the complainant stated that he would be able to recognise his assailants if he saw them again. The offence was committed in broad daylight and, in the circumstances I have just outlined, it is clear that the complainant would have had ample opportunity to have a good look at his assailants before and during the commission of the offence.

The complainant continued his description of the robbery, describing how the gun-wielding assailant then moved to the front of the car and again ordered him to vacate the vehicle, saying "you'd better get out because we don't want to kill you, we only want the car". The complainant did as he was told. The vehicle's engine must have been turned off because the complainant described that the robbers had difficulty in getting the vehicle to start and called him back to help them. He did not comply and instead ran away from the scene.

He testified that he had been invited to an identification parade held at the Athlone police station in May 2006, about six months later. It was not in issue at the trial that the

identification parade was conducted with due propriety. The complainant was invited to identify his assailants, if he could, from a line-up of 14 men. He picked out the appellant. He testified that when he picked out the appellant, he had stated to the policeman that he was not 100% sure of his identification, but thought that the appellant looked like his assailant. In translation, through the interpreter, his evidence was:

> "I pointed him because of I saw now this man is the man who pointed me with a firearm although I was not 100% sure."

The complainant's evidence reads on the record as if candidly given. It was not upset in cross-examination. Consistently, with the impression created by a reading of his evidence in the written record, the trial Magistrate found him to be a completely honest and straightforward witness and Mr Klopper, who appeared today for the appellant, fairly conceded that this was a fair assessment.

In my view the magistrate's rejection of the criticism of his evidence cannot be faulted. There is nothing on record to suggest that the appellant's physical features did not coincide with those described by the complainant in an extra-curial

statement given many months before the identification parade, and the likelihood of the pointing out of the appellant, whom it is common cause was found in the stolen vehicle very shortly after the robbery, as his assailant in a properly conducted parade involving a line-up of 14 men having been mistaken, or an unreliable one, or just a matter of unfortunate coincidence for the appellant, stretches credulity beyond reasonable limit.

Constable Ntotshwa of the SAPS, who is attached to the Organised Crime Unit at Bellville South, testified that at about 12:30 p.m. on 1 December 2006 he received information concerning the likely commission of a robbery somewhere along the N1 freeway. It was apparent from his evidence that the report contained information enabling the police to be on the lookout for identifiable vehicles. It is evident that the vehicle, which had earlier been stolen from the complainant, was one of the vehicles so identified.

Ntotshwa and his colleagues took up station at an Engen Garage along the N1 to look out for the reported vehicles. Ntotshwa spotted the white Toyota Cressida which was occupied at the time by two Black males. He and his colleagues followed the vehicle. It left the N1 at the Klipheuwel off-ramp and then proceeded in the direction of Malmesbury. Shortly, after the vehicle left the N1, it stopped

and a white Isuzu KB vehicle drew up behind it. Two Black males in the Isuzu went up to the stationary Cressida vehicle. A white Opel Monza vehicle – initially mistakenly referred to by the witness as a Honda Ballade – also stopped in the line-up of stationary vehicles. The two men who had been in the Isuzu vehicle then returned to that vehicle, while one person emerged from the Monza vehicle and climbed into the Cressida. It would seem, from the evidence Ntotshwa gave under cross-examination by the legal representatives for one of the appellant's co-accused, that the person who transferred from the Monza to the Cressida was probably the appellant. The Monza and the Isuzu then proceeded towards Malmesbury while the Cressida turned onto a gravel road which, judging from the manner in which the witness described it, may have been a farm road.

Ntotshwa and some of his colleagues, including a Capt Naudé, followed the Cressida vehicle while the rest of his colleagues followed after the other two vehicles. As he drove behind the Cressida Ntotshwa observed a black bag being thrown from the back window of the Cressida on its left-hand side. It was eventually common cause, *ex facie* his own evidence, that the appellant was the only person sitting in the back of the Cressida at the time. The item appears to have been thrown from the window at a stage when the police were indicating to

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the occupants of the Cressida that the vehicle should stop. I should perhaps mention that Ntotshwa was travelling in an unmarked vehicle equipped with blue lights for use when the police wished to declare themselves.

The three occupants of the vehicle were searched and a licensed 9 mm Norinco firearm was found on the driver, who was accused 3 at the trial. The occupants of the car were unable to give any explanation about the item that Ntotshwa had seen thrown out of the car. Ntotshwa then called in the dog unit to search for the item which he had been unable to locate himself. The search by the dog unit turned up a bag containing a firearm with its serial number erased and 15 rounds of ammunition. Ntotshwa was responsible for labelling and taking the weapon to the Forensic Laboratory, which he did on Monday, the 4th of December.

Under questioning by the police at the time, accused 1 stated that the Cressida was his vehicle. Telephonic enquiries had established that it was the vehicle that had been stolen earlier in the day from the complainant.

The appellant's legal representative in the court *a quo* did not challenge the evidence of Sgt Opperman of the SAPS who was called to the scene where the Cressida vehicle was recovered

with the search dog. Opperman's evidence was simply to the effect that the dog located a weapon stored inside a black bag in some bushes about a meter off the road on which the Cressida had been stopped. He testified that the weapon had been found on the left-hand side of the road relative to the position of the Cressida and about 12 meters distant from the stationary position of the vehicle on the road.

Capt Roger Naudé of the SAPS also testified. He was one of the police details who followed, albeit in a separate vehicle, behind Constable Ntotshwa after the Cressida, when it was being driven on the gravel road. He described how the police followed the Cressida vehicle for some 500 meters along the gravel road before they succeeded in stopping it. He corroborated the salient aspects of Ntotshwa's description of events. Naudé appeared confused and uncertain about the seating arrangements of the three accused in the Cressida, but that is not material in the context of the appellant's legal representative's decision not to cross-examine Ntotshwa and the appellant's own evidence which confirmed that of Ntotshwa in this respect.

Naudé was able to identify the licensed firearm found on the driver of the Cressida as a Norinco 9 mm pistol. He was also able to describe the weapon recovered by the dog unit as a

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firearm with no serial number and 14 rounds of ammunition. I go into some detail in this regard because it would seem from the content of a ballistic report that there must have been some mis-labelling of the exhibits, because the ballistic report as I read it, ascribes seven rounds of the 22 rounds of ammunition recovered to the CZ75 rather than to the Norinco. Mr Klopper, correctly in my view, conceded that the direct evidence of Ntotshwa and Naudé should prevail in the circumstances.

The appellant gave evidence in his own defence. He testified that he requested accused 3 to assist accused 1 with transport on the day in question. According to his evidence the appellant seemed to believe that accused 1 needed transport for something to do with his fruit and vegetable stall. He approached accused 3 for assistance. According to the appellant accused 3 had arrived in the Toyota Cressida. He said that he and accused 1 had had no reason to believe that it had been stolen. He appeared from his evidence to have learnt only when the three of them were underway in the vehicle, that accused 1 was looking for a vehicle. He said only accused 1 knew to which destination they were headed.

He made no reference in his evidence in chief to someone called Phindile, or to any apprehension by him that the

intended destination on the journey on which he and the other two had embarked, was Stellenbosch.

The appellant's evidence contradicted the contents of his extra-curial statement, which was to the effect that he had arranged the previous day with his brother-in-law, one Phindile Madubela, who lived in Stellenbosch, for accused 1 to come to Madubela to view a motorcar. When the contradiction was put to him, the appellant sought to suggest that he had telephoned Phindile only when he and his co-accused had become lost on the journey on the 1st of December of 2006. The appellant's evidence in this respect was risible.

In my view, the magistrate cannot be faulted for finding that the appellant was an unreliable witness. The record shows he was often evasive. An example is that when asked as to when he had telephoned accused 3 on the day, he gave a series of alternatives, eventually ending up with "not at six o'clock in the morning, but neither between three and five in the afternoon." The record shows that some of his answers were so convoluted that the interpreter had no idea what he was trying to say.

The magistrate correctly had regard to the totality of the evidence. In the result, taking account of the appellant's

dismal performance on the witness stand, there was nothing of substance to contradict the cogent evidence of the complainant and the police witnesses. In my judgment the evidence of the identification of the appellant by the complainant was an honest and reliable one. The honest qualification given by the complainant at the time that he was not 100% sure, does not occasion reasonable doubt when assessed in the context of all the other factors in the evidence linking the appellant to the commission of the robbery. I can find no merit in the appeal against conviction on the count of robbery.

Likewise, in the context of the acceptance of the police evidence concerning the throwing of an object from the back of the Cressida and the complainant's evidence that he had seen the appellant in possession of a handgun only a few hours earlier, taken together with the position of the appellant at the vehicle at the time, I am left in no reasonable doubt that the appellant was the person who threw the handgun and ammunition out of the car's window and that his possession of those items was thus established.

In the absence of a credible explanation to the contrary from any of the accused – compare S v Boesak 2001(1) SA 912 (CC) at 28 – that in my view is the only reasonable inference to be drawn from the proven facts. The evidence of the

appellant, who, as I have said, was seated at the back seat of the Cressida at the time, that he was unaware of anything having been thrown from the back window, is quite patently false. It is undisputed that the dog unit was summoned to the scene. It is inconceivable that this would have happened had Const Ntotshwa not seen what he testified to having seen.

I am thus of the view that the appeal against the convictions on the two counts of contravening the Firearms Control Act should also fail.

On the issue of sentence I see no reason to interfere. Sentence is pre-eminently a matter within the discretion of the trial Court, and in the absence of a material misdirection by the trial court, a court of appeal should not intervene. The magistrate took into account all of the relevant factors, including the fact that the appellant had been in custody for over three years since his arrest and during the course of a very extended trial.

In the context of the seriousness of the offences the appellant's personal circumstances obviously weighed less in the balance against the interests of society in the severe punishment of such offenders. Indeed, apart from the seriousness of the offences there were a number of

aggravating factors, including an impressive criminal record stretching back 20 years, including offences involving violence, theft and housebreaking and also the complete absence of any indication of remorse on the part of the appellant. Had it not been for the period that the appellant had already spent in custody, the trial Court would have been justified in the circumstances in imposing a sentence longer than the prescribed minimum. The sentences in respect of the statutory offences, if they were at all errant, erred on the side of leniency in my view.

Having arrived at the conclusions just stated, I feel it necessary to comment on an aspect of the prosecution of the appellant. It is apparent from the ballistic evidence adduced by the State at the trial, the weapon in issue in this appeal was a semi-automatic pistol. In terms of Section 51(2)(a)(i) of the Criminal Law Amendment Act, 105 of 1997, the unlawful possession of a semi-automatic firearm is subject to a prescribed minimum sentence of 15 years in the case of a first offender. The charge sheet was not appropriately formulated to include a reference to the sentencing provisions and accordingly, because of this ineptitude on the part of the prosecution, the appellant was not prosecuted in a manner that rendered him susceptible on this account to the minimum sentence regime. See S v Legoa 2003 (1) SACR 13 (SCA); S v

Ndlovu 2003 (1) SACR 331 (SCA), S v Makatu 2006 (2) SACR 582 (SCA), paras 4–7 and S v Mabuza 2009 (2) SACR 435 (SCA) at para 10. This type of inexcusable ineptitude is unfortunately not infrequently encountered and is to be deplored. It brings the criminal justice system into disrepute, undermines the legislative scheme and it results in an arbitrary and constitutionally incompatible unequal treatment of accused persons and offenders.

Counsel appearing for the State today, Ms Ardim, acknowledged the unsatisfactory state of affairs in this respect and undertook to draw the remarks I have made to the attention of the Director of Public Prosecutions in the hope that remedial measures will be implemented within the system.

I WOULD THEREFORE DISMISS THE APPEAL AND CONFIRM THE CONVICTIONS AND SENTENCES

BINNS-WARD, J

I agree and I order in these terms.

BLIGNAULT J

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