

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)**

**CASE NO: CA&R85/2013
DATE HEARD: 04/09/2013
DATE DELIVERED:**

In the matter between:

SIPHUMLE GADE

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

ROBERSON J: -

[1] The appellant was convicted in the Regional Court, Port Elizabeth of three counts: unlawful possession of a firearm, unlawful possession of ammunition, and attempted robbery with aggravating circumstances. On the first two counts, which were taken as one for the purpose of sentence, he was sentenced to 5 years' imprisonment and on the third count he was sentenced to 8 years' imprisonment. 3 years of the 5 year sentence was to run concurrently with the 8 year sentence.

[2] This appeal is against the convictions. Leave was granted on petition to the Judge President of this Court.

[3] The evidence led on behalf of the State consisted of viva voce and hearsay evidence, the latter having been admitted in terms of s 3 (1) (c) of the Law of Evidence Amendment Act 45 of 1988.

[4] The offences were alleged to have been committed on 25 November 2005 at or near the Shell garage in Commercial Road, Sidwell. The trial commenced on 9 March 2011.

[5] Mr. Philile Mjongile testified that on 25 November 2005 he was standing outside his car about ten metres from the Springbok Butchery (Springbok) in Commercial Road. He was not sure of the time but it appeared not to be in dispute that it was about midday. At the point where he was standing, Commercial Road has three traffic lanes in each direction, with an island in the middle where taxis stand. He was waiting for his wife who had gone into Springbok to make purchases. His children were in the car. He heard shots and looked in the direction from where they had come. He saw a person, who he identified in court as the appellant, running from the direction of the Shell garage, which is opposite Springbok. Mjongile did not take cover because the shots came from the garage which was far from him.

[6] After the shots went off some people ran away, some went into Springbok, and others sought shelter. The appellant crossed the road and ran to the left, but then turned around and ran towards Springbok. At this time other persons were standing still and no-one other than the appellant was moving. The appellant passed Mjongile, about three metres away from him. He was wearing a blue jacket and blue jeans and Mjongile saw his face. He was holding a half metre long firearm in front of

him with both hands. Mjongile assumed he was a policeman. When the appellant was not far from Mjongile, near the post office, he threw down the firearm and then ran into Springbok. A man came out of a cellphone repair shop and picked up the firearm.

[7] A police van arrived and the police came directly to Mjongile and asked him if had seen the person, and he told them that the person had entered Springbok and gave them a description of his clothing. He also told the police that the firearm was with the shopowner who had picked it up. The police did not go into Springbok but drove around to the back and Mjongile assumed that they found the appellant there. Some time later, he could not say how long, the police came to him with the appellant in the van and asked him if this was the person. He confirmed that it was. The appellant was no longer wearing a jacket. He knew it was the same person who had run past him because he saw his face. When asked in cross-examination if he noticed any distinguishing features about the appellant, he said one cannot notice everything about a person when the person is running. He was also asked in cross-examination if he had seen anything else besides the clothing of the person who was running, and he said it was his clothes and the firearm and that the incident happened quickly.

[8] Constable Lonwabo Vayi testified that on Friday 25 November 2005 he attended a complaint of attempted robbery at the Shell garage in Commercial Road. He and a colleague secured the scene. Inspector Mkupha was chasing a suspect in Commercial Road but Vayi and his colleague did not follow because they were attending to the scene. While Vayi was trying to find eye witnesses, Mkupha arrived

and told him he had caught the suspect and that he had information that there was a firearm in Davis Street, which is behind Springbok. Mkupha asked Vayi to go to the scene where the firearm was. Vayi did so and in an alley between two buildings, at the front of which was a locked gate, saw a black 9mm pistol, next to which was a cap and a blue overall. The alley was about thirty metres from the rear entrance of Springbok. Vayi remained there for a while and then returned to the scene of the attempted robbery. Photographs of the alley were included in an album which was admitted by agreement, and showed the pistol and a black cap on top of a blue piece of clothing. Vayi only saw the suspect at a later stage when he was brought by Mkupha to the scene of the attempted robbery.

[9] Captain Bonisile Mkupha (formerly Inspector) testified that at the time of the incident he was a detective attached to the violent crime unit in Port Elizabeth. On that day he was driving an unmarked police vehicle in Commercial Road. As he approached the Shell garage an elderly white man who was standing in the road stopped him and shouted that there had been a robbery. People were running in all directions. The man pointed to someone running in the direction of Sutton Street, which is on the other side of Springbok. (According to a sketch which he drew and which was an exhibit, Sutton Street is parallel to Commercial Road.) Mkupha suspected that a robbery had taken place. He alighted from his vehicle and the white man and persons at the garage told him that the garage had been robbed.

[10] Mkupha ran in the direction which the white man had pointed out to him. He ran past a black man, who later introduced himself as Mjongile, who told him that the man who was running had thrown down a big firearm in front of the shop where

cellphones were sold. Mjongile told him that the man had on a white skipper and blue trousers and had run in the direction of the hawkers and a shop in Sutton Street which sold groceries. Mkupha said that Mjongile was mistaken if he said that the man had entered Springbok. Mkupha told Mjongile to keep a watch on the firearm.

[11] Mkupha saw the man wearing a white skipper and blue trousers running away but he turned the corner. At that time security officers from a security firm were also chasing the man. They ran around the corner into the street behind Springbok but could not see the man. Other persons who had also given chase pointed out to Mkupha that the man had run into a hardware shop. Mkupha found the man in an aisle in the shop, with his hands in the air. He was not hiding away. He fitted the description which had been given to him, both with regard to clothing and height. It was the appellant. He told the appellant he was under arrest and he was handcuffed by one of the security officers. Mkupha told the appellant he was under arrest for attempted robbery at the Shell garage and for the firearm which he had thrown down in front of the shop. He explained the appellant's rights to him and put him in the police van. He instructed that the appellant should immediately be taken to the police station because the crowd was angry and might have assaulted him. He did not take the appellant back to Mjongile or the white man to confirm that he was the person they had pointed out. He would not have done such a thing because an identity parade could still be held. The canvas on the side of the van had not been pulled down and Mjongile said to Mkupha that it was the man and that he could point him out. He thought that Mjongile saw the appellant as the van drove past Springbok.

[12] Mkupha was told by persons on the scene that the firearm had been taken by the owner of the shop. He retrieved the firearm from the owner, Mr. Leon Hills, who had it under the shop counter. Mkupha recognised it as a 9mm BXP, which when used has to be held with both hands, like a sub-machine gun. It contained ammunition.

[13] Mkupha was referred to the photographs of the items which were found in the alley, about which Vayi had testified. Mkupha said he was told that the overall had been thrown away by other robbers who had run in that direction, which was not the direction in which the appellant had run. Mkupha suspected that these were the persons who had entered Springbok. He said that the appellant was never in Springbok.

[14] Three statements were admitted in terms of s 3 (1) (c) of Act 45 of 1988. The first was by Mr. Simon Nazo who stated that he was employed by Trans Cash Company. On 25 November 2005 he and one Landman were on duty collecting money and arrived at the Shell garage. He collected a trunk from the office and on his way to the drop safe noticed a white Jetta with three occupants, one of whom put on a balaclava. He alerted Landman, at which stage the person with the balaclava got out of the Jetta carrying a big rifle. He was wearing a white balaclava, blue trousers and a blue overall-like top. Nazo started shooting at this person and the driver of the Jetta reversed and collided with the pavement. The occupants of the Jetta alighted and ran away.

[15] The second statement was that of Nazo's colleague, Mr. Jacques Landman. He observed the Jetta with three black male occupants at the Shell garage. The two passengers pulled balaclavas over their faces. Landman warned Nazo that there was trouble and took the trunk from Nazo and tossed it into the drop safe. The Jetta reversed into a wall, and the three occupants alighted. The front passenger was carrying a black machine gun. He was wearing a blue top under which was a white T-shirt. Landman thought he was wearing blue trousers and blue takkies. He was fairly tall and of fairly large build. Landman heard shots fired, and he and Nazo drove away from the scene.

[16] The third statement was by Leon Hills, the owner of a shop called Cellular Fever in Commercial Road. He stated that on 25 November 2005 he was in his shop and heard shots fired. He went to see what was going on and when he was in front of his shop he saw a black man running from the direction of the Shell garage and crossing Commercial Road. This man was carrying a large firearm, like a rifle, and was wearing a navy blue jacket. On seeing the man running towards his shop, Hills closed the door and looked through the glass. The man ran past the shop towards the intersection with the robots and Hills noticed a police vehicle approaching from the direction in which the man was running. The man turned and ran back towards the shop. When he was in front of the door of the shop, he dropped the firearm and ran in the direction of Springbok. Hills went out and picked up the firearm and took it into his shop. It was later collected by a plain clothes police officer.

[17] Ballistic reports in respect of the firearms retrieved at the scene and ammunition found at the scene were shots were fired were handed in by agreement. The firearm allegedly in the possession of the appellant was identified as a 9mm Parabellum calibre Phoenix model BXP semi-automatic hand carbine with the number erased.

[18] The appellant testified that on 25 November 2005 he left his home to go to King Cars in order to look for a car to buy. He could not dispute that King Cars is about 500 metres from the Shell garage. He was wearing a navy track suit top with white lettering on the front and, if he remembered correctly, jeans. From King Cars he went to telephone his wife from a public telephone near the garage. He chose this telephone because it was opposite the taxi rank. As he was walking on the pavement, with the garage on his left, he heard shots and people in the garage premises ran. Others with firearms crossed the road towards Springbok.

[19] Fearing for his life, the appellant ran across the road and into Springbok, as did many other people. He was carrying nothing in his hands. He felt hot and because he suffers from asthma and sinus took off his top and held it in his hand. He was wearing a white T-shirt. While running through Springbok the top fell, but he only noticed later that he did not have it. He went out of Springbok at the back where it was quieter, but there were other people in the vicinity. Because he was in shock, he decided to walk to his home, which was not far from Sidwell.

[20] While he was walking on the pavement opposite a block of flats, a car stopped alongside him and two Xhosa Chubb Security officers alighted and told him

to sit and not to move and that he was under arrest. He denied that he was arrested in a hardware shop. Uniform police arrived about half an hour later and he was taken in the van back to Springbok. He agreed with Mjongile's evidence that the police had returned with a person in the back of the van whom they had arrested, and that Mjongile identified him as the person who had run past him. The canvas on the sides of the van was closed and the police opened it in order for Mjongile to look. He did not know if anyone else was arrested but there was no-one else with him in the van. He did not deny that Mkupha was on the scene and said that perhaps he had arrived after the other police. He first saw Mkupha at the police station.

[21] After the appellant was released on bail, an investigating officer came to his house and asked him to accompany him to Dora Nginza hospital for DNA tests. The appellant was willing to do so but first wanted to consult with his attorney, who agreed to the tests.

[22] The magistrate accepted Mjongile's evidence. He found that he was a credible witness and that his evidence was corroborated by the probabilities and the circumstantial evidence. He referred to the evidence of Nazo, Landman and the accused, which corroborated Mjongile's description of the clothing of the person he saw with the firearm. The magistrate acknowledged that there were discrepancies between the evidence of Mjongile and Mkupha, and said that there was a big question mark over Mkupha's observations of who it was he chased and eventually arrested. He accepted Mjongile's evidence over that of Mkupha, where their evidence differed. He said that the effect of Mkupha's evidence that he was told that it was not the appellant who had placed the pistol and the blue jacket in the alley,

was that there were two persons with blue jackets, who had run away, yet the witnesses had only mentioned one such person.

[23] The magistrate referred to the difference between the evidence of Mkupha and the appellant concerning where the appellant was arrested, and, because Mkupha had made so many mistakes, was inclined to accept the appellant's evidence on this aspect. He was however of the view that it did not matter where the appellant was arrested. He asked rhetorically why the appellant would cause the Chubb security officers to be suspicious of him and why they would pick out the appellant when there were other persons running away. He went on to say that the question remained that perhaps the appellant was arrested in the shop but he was unable to make a finding on this aspect.

[24] The magistrate was of the view that it could not have been mere coincidence that the appellant was dressed as described, that his jacket fell in Springbok, that he emerged from Springbok without a jacket, and that a blue jacket was discovered in the alley near Springbok. He said that the only blue jacket on the scene was the one found with the pistol. He said that it was probable that a robber running away would take off the jacket and throw it away so that he would appear to be a person other than the one who was being chased.

[25] In my view, simply to accept the evidence of Mjongile in preference to that of Mkupha where they differed, was to pay insufficient regard to the material discrepancies in their evidence. Mkupha's evidence could not simply be disregarded as mistaken. It was part of the State's case that Mkupha chased and eventually

arrested a person pointed out by Mjongile. The prosecutor specifically put to the appellant that Mkupha was behind him and that Mkupha and security officers and members of the public had chased him. It was further put that Mkupha would not have chased him if he had not been pointed out by the white man. It was also part of the State's case that Mjongile had given a description to the police of the man he saw running and told them where he had run to. However if one compares the evidence of Mjongile and Mkupha, they were talking about two different people. One was wearing a blue jacket and jeans and ran into Springbok and the other was wearing a white T-shirt and blue trousers and ran around the corner to Sutton Street. According to Mkupha, besides himself, there were security officers chasing the person. This evidence accords with the appellant's evidence that he was arrested by Chubb security officials. Mjongile did not see the appellant being arrested so these discrepancies were never reconciled.

[26] In my view, the result of these material discrepancies between Mjongile's and Mkupha's evidence is that there is doubt that the person pointed out to Mkupha by Mjongile was the person he said he saw entering Springbok, and consequently doubt that the person he saw running with a firearm was the appellant. I do not think that the fact that the evidence of Mjongile and the appellant coincided in some respects, cured these material discrepancies and the adverse effect they had on the State case.

[27] With regard to the identification of the appellant by Mjongile the magistrate was alive to the need for caution particularly if the witness has not seen the person before. In accepting Mjongile's identification of the appellant, he mentioned that it

was daylight, that Mjongile had watched the person the whole time and had looked at his face and seen how he was dressed, and that he had not felt that he was in danger because he initially thought the person with the firearm was a police officer. However, I am of the view that there were factors militating against a reliable identification. Although Mjongile said that everyone else had come to a standstill, this was unlikely. It is more probable that, as Mkupha said, people were running in all directions. The person ran past Mjongile which would shorten the time for a close observation, and Mjongile himself was unable to refer to any distinguishing features of the person. He also said that it was the clothing and the firearm that he had seen, and that the incident happened quickly. There was therefore room for mistake.

[28] The magistrate concluded that the appellant threw away the jacket found in the alley. I am of the view that there was a degree of speculation in such a conclusion. The photographs show a jacket with a cap and a pistol on top of it. It is probable that whoever discarded the jacket also discarded the pistol and cap. Mjongile did not mention that the person he saw running was wearing or holding a cap. Moreover, if the appellant was running holding a firearm in front of him with both hands, one wonders where he kept the pistol, especially if he took his jacket off in Springbok.

[29] For all the above reasons, I am of the view that despite grounds for suspicion, there was reasonable doubt about the guilt of the appellant.

[30] The appeal is allowed and the convictions and sentences on counts 1, 2 and 3 are set aside.

**J M ROBERSON
JUDGE OF THE HIGH COURT**

MAKAULA J:-

I agree

**M MAKAULA
JUDGE OF THE HIGH COURT**

Appearances:

For the Appellant: Mr R P O'Brien, O'Brien Incorporated, Port Elizabeth

**For the Respondent: Adv H Obermeyer, Director of Public Prosecutions,
Grahamstown**

