

FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, MTHATHA JUDGMENT

PARTIES: **Chuma Ndibongo**

VS

The State

- Case No.: A130/07
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, MTHATHA**

DATE HEARD: 13th November 2009

DATE DELIVERED: 3rd December 2009

JUDGE(S): Miller J. Petse ADJP concurring
LEGAL REPRESENTATIVES –

Appearances:

- for the Appellant: Mr. Somacala
- for the Respondent: Mr. Lepheane

Instructing attorneys:

- Appellant: Linyana & Somacala Inc.
- Respondent: DPP

CASE INFORMATION -

- *Nature of proceedings* : Criminal- Appeal- Conviction- Robbery Aggravating Circumstances .

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH COURT : MTHATHA**

CASE NO. A130/07

In the matter between:

CHUMA NDIBONGO

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

MILLER, J.:

[1] The appellant, together with a co-accused, one Mhleli Ngwilikane (Ngwilikane), was charged in the Regional Court, Mthatha, with two counts of robbery with aggravating circumstances. He was found guilty on both counts as charged and was sentenced to an effective term of 20 years imprisonment.

[2] The appellant appeals against his convictions only. The appeal of Ngwilikane, who was convicted on one of the charges, is not before us.

[3] The facts relating to the first charge are briefly summarized as follows:-

On 27 January 2003 at approximately 07h45 Ms Sandra Van Meyer (Van Meyer) went in her motor vehicle, a Toyota Conquest, together with her mother to the Pick 'n Pay Supermarket in Mthatha. She parked her vehicle and two men approached her vehicle, one on her side and the other on her mother's side. The one on her side pointed a firearm at her and demanded the keys to the car. She handed over the keys to the man and got out of the car and screamed to her mother to get out. Another vehicle then stopped behind her vehicle and the man with the firearm pointed it at the driver of the other vehicle and ordered him to drive away, which he did.

Van Meyer then ran away and her mother was pulled by her hair out of the vehicle by the other man. Both men then got in the vehicle and drove away.

The incident was witnessed by Mr Winston Clarke (Clarke). He, upon seeing the vehicle driving away, got into his vehicle and gave chase. He lost sight of Van Meyer's vehicle for a short while, he estimates for about 20 to 30 seconds, but saw the vehicle again at the Ngangelizwe robots. Both men were still in the vehicle.

He thereafter followed the vehicle without losing sight of it. It turned left on a dirt road near the Technical College and drove to the main Mthatha – Port St Johns road, where it again turned left and drove very slowly towards the centre of Mthatha.

During the chase Clarke phoned one John Botha, a police reservist, and informed him of the events and called for his assistance. The vehicle turned into Sprigg Street where it met up with a golden coloured VW Golf motor vehicle driven by a lady. Both vehicles stopped and the drivers spoke to each other through their windows. Both vehicles then pulled over and the passenger in Van Meyer's vehicle alighted and went into the VW Golf. He was carrying something in his hand when he got into the other vehicle. Both vehicles then proceeded down Sprigg Street. There was a queue of vehicles waiting at the robot, but Van Meyer's vehicle, driving on the wrong side of the road, passed them and sped away. Clarke gave chase for a short while but the vehicle got away.

He then returned to the VW Golf, but when he got there only the lady driver was in it. He followed her, again phoning Mr Botha. He followed to a place in Ikwezi. The police arrived there and a car radio was found on the floor of the VW Golf on the front passenger side of the vehicle.

The lady driver was questioned in the presence of Clarke. She provided the police with the names of both the driver and the passenger who were in Van Meyer's vehicle. The car radio was then taken back to the Pick 'n Pay car park where it was shown to Van Meyer who identified it as being the radio which was in her vehicle. Ngwilikane was arrested a short while later as a result of information received from the driver of the VW Golf and Van Meyer's vehicle was recovered. The police, who were searching for the appellant, did not arrest him at that stage.

[4] The facts pertaining to the second charge are briefly set out as follows:

On 28 July 2003 at approximately 1h00 and at City Motors in Mthatha there were two petrol attendants, a cashier and a security guard on duty. The two cashiers, one of them being Bonginkosi Siguba (Siguba), were in the restroom and the cashier, who was Khaba Mkize (Mkize) and security guard were in the Quickshop.

A man entered the restroom and pointed a firearm at Siguba and asked him who else was on the premises. Siguba told him who was there and the man then took out a cell phone, described by Siguba as a Nokia 3310, and made a phone call. Siguba and the other petrol attendant were made to lie on the floor and then two

other men entered the room. Siguba was then made to lead the man with the firearm, who was now armed with a shotgun, to the Quickshop. They entered the Quickshop where the men robbed some money and Siguba and the cashier and security guard were made to lie on the floor and the armed men left the shop.

Immediately thereafter a shot was fired and shortly thereafter the police arrived together with the man who had pointed the firearm at him and who had the shotgun when in the shop.

[5] The critical issue in this matter is the identity of the man who pointed the firearm at Van Meyer and who drove her vehicle away (count 1) and of the man who entered the Quickshop and who was in possession of the shotgun. No identification parade was ever held.

[6] With regard to the first charge, the appellant, when he testified, stated that he cannot recall where he was on 27 January 2003. He says that he has only been to Pick 'n Pay about three times and he was not there when a robbery occurred. His evidence was not in line with what was put to State witnesses when they were being cross-examined by his legal representative, namely, that the appellant was at his home in Mqanduli for the whole day on 27 January 2003.

[7] Both Van Meyer and Clarke identified the appellant as being the man who pointed a firearm at Van Meyer and who drove her car away. Van Meyer said that when she saw the two men coming towards the car she did

not really pay any attention to them. When the firearm was pointed at her through the window of the vehicle she could also not identify who was holding it as she could not see his face. It was only when she got out of the vehicle and particularly when the man pointed a firearm at the vehicle which was blocking the way that she had a good opportunity to identify the appellant. Van Meyer did not identify Ngwilikane.

[8] Clarke stated that the incident took place a short distance from him. He said that he had ample time to observe what was taking place and that he had a “very, very good look” at the appellant when he went towards the vehicle that was blocking the way. Clarke also identified Ngwilikane.

[9] Dock identification must always be approached with caution for the obvious reason that once a witness sees the accused in the dock he/she may be reassured that he/she is correct in his/her identification even though this may have not been the position were the accused not there. See **S v Maradu 1994(2) SACR 410 (W) at 413 g – h.**

[10] However, dock identification evidence is not inadmissible – it is more a question of the evidential value or weight that it must be given, and that will depend upon the circumstances of the case under consideration. See **S vs Matwa 2002(2) SACR 350(E)** where Leach J, as he then was, stated the following at **355i – 356g:**

“My conclusion is that in a case such as the present, the question in issue is not the dock identification but the evidential matter upon which the case must be

decided and I see no reason in principle to exclude it solely due to it having been done in court. In many, if not the majority of cases coming before our courts, the first occasion a witness has to identify the offender is when he or she gives evidence. No fixed rules can be laid down. In each and every case the judicial officer must decide upon what weight, if any, is to be afforded to the dock identification, regard being had to all the material circumstances – including those prevailing when the initial observation took place as well as those under which the identification in court is made. But to exclude evidence of identity as inadmissible purely on the basis of it being tendered in the presence of the accused in the dock, is in my respectful view, incorrect.”

[11] This matter does not involve identification by a single witness. Both Van Meyer and Clarke had no hesitation in identifying the appellant. They observed him in broad day light, they were in close proximity to him and they had ample opportunity to observe him. Van Meyer was concentrating on the appellant rather than the man at the other side of the vehicle and the fact that she did not identify Ngwilikane is, to me, indicative that her identification of the appellant was not made merely because the appellant was an accused person in the dock. In addition, the fact that the police were, since the date of the incident, aware of the identity of the appellant, tends to confirm the correctness of her identification of the appellant.

[12] The Regional Magistrate carefully considered the evidence relating to the identification of the appellant and I can find no fault in either his assessment of the evidence or his findings. I am satisfied that the evidence of both Van Meyer and Clarke was correctly accepted and that it was the appellant who wielded the firearm and drove away in Van Meyer's vehicle.

[13] The appellant denied that he was involved in the robbery at City Motors. He said that he had on that day been working in Port St Johns and that his employer drove him back to Mthatha and dropped him off at his sister's place in Fort Gale late at night. His sister was not there so he decided to go to his home at Mqanduli. He then walked with the intention of going to town to buy airtime for his cell phone and to go to a hiking spot. When he was in the close vicinity of City Motors, he was arrested by the police who claimed that he had been involved in a robbery. He denies that he was in possession of a shotgun or any other firearm.

[14] Insp. Maqubeni, a member of South African Police Service, testified that on the night of 28 July 2003 at approximately 1h00 he and Insp. Buswa were on patrol duty. As they drove past City Motors he saw a person in the Quickshop wielding a big firearm. They immediately went into the premises of City Motors and saw two people coming out of the shop. One of them fired a shot and ran away down the street and the other jump over a wall into the neighbouring premises. He called for back up which arrived within five minutes. One of the police officers who arrived was Insp. Miti.

[15] Both Insp. Maqubeni and Insp. Miti went into the neighbouring premises into which one of the fleeing persons had jumped. There they found a number of people, referred to as street children, sleeping on the ground in the open. Amongst them they found the appellant who was pretending to be asleep. When they approached him they found that he was lying on top of a shotgun. The appellant was searched and four shells of ammunition, R180.00 and a Nokia cell phone were found on him. Insp. Maqubeni referred to the Nokia cell phone being a 3310 model and Insp. Miti referred to it as a 3210 model. The appellant was then taken back to City Motors where employees there identified him as being one of the robbers.

[16] Siguba, in his testimony, stated that he identified the man who pointed the firearm at him in the restroom and who had the shotgun in the shop to be the appellant. He also confirmed that it was the appellant who the police brought back to City Motors shortly after the robbery.

[17] The appellant, after his arrest, told the police that his name was Lulama Maqota. He, when giving evidence, tried to justify the use of this name by saying that it was the name given to him at his mother's home. It is, however, clear from the evidence that the name he gave the police was a false name. His identity book reflects his name to be Chuma Ndibongo and his father, with whom he has lived for many years, does not know the name Lulama Maqota. The Regional Magistrate, in my view, was correct in his conclusion that the appellant gave a false name because he well knew that he was being looked for by the police.

[18] The appellant's version, on a consideration of the evidence in its totality, is highly improbable. He was caught almost in flagrante delicto and there is no basis at all to reject the evidence of Insp. Maqumo and Insp. Miti that he was found with a shotgun a short distance from the scene of crime. Their evidence in this regard confirms the correctness of Siguba's evidence that the appellant was one of the robbers. The Regional Magistrate was, in my opinion, correct in rejecting the evidence of the appellant as being untruthful and accepting the evidence of the State witnesses.

[19] I, in the circumstances, would make the following order:

The appeal is dismissed.

JUDGE OF THE HIGH COURT

PETSE, ADJP : I agree. It is so ordered.

ACTING DEPUTY JUDGE PRESIDENT

HEARD ON : 13 NOVEMBER 2009

DELIVERED ON : 03 DECEMBER 2009

ATTORNEY FOR APPELLANT

: Mr Somacala

: of Linyana & Somacala Inc.

COUNSEL FOR RESPONDENT

: Mr Lepheane

INSTRUCTED BY

: DPP