**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR765/14
REPORTABLE

In the matter between:

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| **NKOSIKHONA NKWANYANA** | **First Appellant** |
| **THOKOZANI NTANZI** | **Second Appellant** |
| **SKHUMBUZO MTHETHWA** | **Third Appellant** |

**Vs**

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| **THE STATE** | **Respondent** |

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**APPEAL JUDGMENT**

**Delivered: 21 June 2016**

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**MBATHA, J**

[1] The appellants in this matter were granted leave to appeal by the court *a quo* against conviction only. The first appellant was convicted for robbery with aggravating circumstances, the unlawful possession of a prohibited firearm and five counts of attempted murder. The second appellant was convicted of possession of a prohibited firearm and five counts of attempted murder and appellant 3 was convicted of only the five counts of attempted murder.

[2] On 13 August 2010, the complainant, Sibongile Bulewephi Ngcongo, was robbed at her shop of various goods and money by armed robbers. She described them as travelling in a cream white Toyota Cressida with a Durban registration

number. She made a call to the police at Kranskop, wherefrom the police pursued the cream white Toyota Cressida.

[3] The police officers gave evidence that they pursued the said motor vehicle. As soon as the occupants of the Cressida realised that the police were in pursuit of them they pulled off the road. The occupants of the Cressida got out, fired shots at the police officers and ran into the bush. Subsequently their commander, Colonel Minaar, arrived in a helicopter, whereupon two officers joined him in search of the occupants, who had fled from the Cressida motor vehicle. It was the Officers Mhlongo's and Cele's evidence that appellant 1 was caught and was found in possession of an Uzzi firearm. Appellant 2 was arrested a few days later in Mandeni and was also found to be in possession of a prohibited firearm at the time of his arrest. Appellant 3 had handed himself over to the police officers a few days after that. It was also the evidence of the officers who arrested appellant 1, that one of the suspects was found lying dead in the forest, with a revolver next to him. He had been shot in the chest and had succumbed to his injuries.

[4] The state had led the evidence of Ms Ngcongo and that of all five officers who had pursued the Cressida, namely, Constable Muzi Makhubela, Constable Nokuphiwe Cele, Constable Mikion Nzimande, Constable Siyabonga Sibeko and Constable Thandoluhle Mhlongo. It also led the evidence of Warrant Officer German Sosibo who arrested appellant 2 as well as the evidence of Warrant Officer Mlungisi Hadebe who collected the exhibits from the scene of the shooting, photographed the area and forwarded the firearms and spent cartridges to the ballistic laboratory for analysis. Captain Ndima, a senior forensic analyst also gave ballistic evidence regarding the firearms, ammunition and spent cartridges that had been forwarded to the ballistic laboratory for analysis and testing.

[5] A trial within a trial had also been held in respect of a statement made by appellant 3 to the Magistrate, Mr Du Toit. All the appellants testified in their trial.

[6] It is trite that as we sit as the Court of Appeal, we can only interfere with the trial court's judgment if there is a misdirection either on law or fact as stated in various *dicta*, including *S v Bailey*,[1] where the court had this to say:

'The powers of the Court of appeal findings of a trial court were strictly limited. If there had been no misdirection on the facts, there is a presumption that the trial Courts' evaluation of the factual evidence is correct.'

[7] The learned regional court magistrate, with regard to count 1 of robbery with aggravating circumstances, found that the complainant's evidence was clear and persuasive, that she had made a positive identification of appellant 1 and had found her to be a reliable and trustworthy witness. Ngcongo's evidence was that the incident occurred in broad daylight at midday, which enabled her to identify her assailants. Her evidence is that two males had entered the shop, two stood at the door and one had remained in the motor vehicle. Appellant 1 had also demanded that she give him the money and her late husband's firearm. As a result of the robbery they took all the money, cigarettes, sweets and a cellphone belonging to a customer. She was locked inside the shop by appellant 1 when they exited. Her evidence is that the person who had pointed a gun at her was not present in court, but she made a dock identification of appellant 1 as the person who demanded money from her.

[8] It is trite that in respect of count 1 her evidence must be treated with caution as it is the evidence of a single witness. It transpired during the trial that Ngcongo had given two statements to the police officers. The first one is undated but one can deduce from its contents that it was taken down after the arrest of appellant 1, as it states that Ngcongo and others proceeded to follow the police motor vehicles to the direction taken by police officers in chasing the Cressida, whereupon they came upon a police motor vehicle convoy. Ngcongo and others stopped when they saw a cream white Cressida that was being towed amongst police motor vehicles. She then approached a police van where she saw a male person of medium size, light in complexion and of about 24 years of age. She then realised that this was the man who had pointed a firearm at her, as he wore white 'All Star' takkies. She had asked him for his name, whereupon he said he was Nkwanyana from Mhlangandlovu. She

[1] 2007 (2) SACR 1 (C) para 16.

also learnt that he was 24 years old. Upon realising that appellant 1 had been one of the occupants of the Cressida she asked him for the name of the person who had died after the shooting with the police officers.

[9] Ngcongo thereupon proceeded down the hill to take a look at the deceased. She observed that the deceased was dark in complexion but had visible traditional marks on his face. She identified the deceased with a green t-shirt that he was wearing when he pointed a gun at her.

[10] The second statement deposed by Ngcongo on 13 August 2010 does not give any description of her assailants save that there were five men and that one of them came inside the shop to the counter, grabbed her and pointed a small black firearm at her.

[11] It is clear from these two statements that Ngcongo was never given any opportunity to describe her assailants to the police officers. Her statements were taken after she had gone to the police van to look at the person who had been arrested by the police officers. When Ngcongo gave her evidence in court her evidence was that appellant 1 was not in possession of the firearm, but in her statement, she positively identified him as the person who had pointed a firearm at her. When she was cross-examined specifically on how she identified her assailants she admitted that she did not recall what they were wearing nor could she give any discerning features of any of her assailants. Ngcongo gave a general description of a young man, tall and light complexioned, a description which could fit any other person. Ngcongo's evidence cannot be relied upon as she tried to deny under cross-examination that appellant 1 and the deceased had been shown to her to identify before the trial started. In that regard her evidence-in-chief is suspect as to the identification of her assailants. I find it to be very convenient for her that in her statements having seen appellant 1 and the deceased she mentions that appellant 1 and the deceased pointed firearms at her. This is contrary to her evidence-in-chief. It is also not in dispute that a firearm was found next to the deceased's body.

[12] It is trite that when the issue is one of identification, that the court must treat such evidence with caution because of the fallibility of human observation. It is not

enough for the identifying witnesses to be honest; the reliability of his/her observation must also be tested. This depends on various factors such as lighting, visibility and eyesight. The proximity of the witnesses; his or her 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, built; gait and dress; the results of identification parades if any and; of course the evidence by and on behalf of the accused. The list is not exhaustive. The aforementioned principles were held in *S v Mthethwa*[2] by the Appellate Division as it was then. In the same case, the court went on further to state that these aforementioned factors or such factors as they 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.

[13] It is important to mention that in the exercise of caution it must be borne in mind that though the incident took place at midday it occurred unexpectedly and that the element of surprise and fear could be factors that may have affected the observation faculties of the complainant. In *R v Shekelele and another*,[3] the court held that in all cases that turn on identification the greatest care should be taken to test the evidence. If the evidence remains untested, it leaves the door wide open to mistake.

(a) In this case dock identification of appellant 1 was made by Ngcongo. The complainant had already seen the appellant in the police van and had interviewed him prior to her giving a statement to the police. Dock identification is not admissible in our courts, though it may be relevant when considered with the totality of all the evidence before court. Identification of the accused in court is of very little probative value. Prior identification carries more weight. Evidence that a witness had previously, to the police and before trial, identified a person is admissible. This was not the case in this matter. An identification parade ought to have been held prior to Ngcongo identifying appellant 1.

[2] 1972 (3) SA 766 (A) at 768A-C.
[3] 1953 (1) SA 636 (T) at 638G-H.

(b) Constable Mhlongo also confirmed that they could not have held an identification parade as the complainant had already seen the appellant previously prior to the hearing of this matter. This made her dock identification to be of little probative value. In this case the court solely relied on her evidence though it was open to criticism in that the statements were taken after she had seen the appellant and the deceased. Her evidence in chief also contradicted her statements in a material way.

(c) The trial court also misdirected itself in accepting the two statements of Ngcongo as forming part of her evidence in chief on the basis that it is in the interest of justice to do so. The court was not dealing here with the admission of hearsay evidence, to have applied the principles applied in Section 3 of the Law of Evidence Act.[4]

(d) The previous inconsistent statements of Ngcongo were handed in, in the interests of justice, without her confirming that she made the statements, without establishing whether it was read back to her and establishing if she had been asked to confirm the correctness of the contents thereof. She should have been asked if her signature appeared thereon and confirm the signature or mark on the statement. This was not done in respect of the one statement that was signed by the complainant. The other statement bore no date, and was not commissioned.

(e) She was not given an opportunity to explain the inconsistencies and discrepancies in her statements. The failure to allow cross-examination on the contents of the statements and admitting a previous inconsistent statement in the interests of justice is a fundamental irregularity which we cannot ignore in this matter.

[4] Act 45 1988, as amended.

(f) The learned magistrate has made findings on the credibility of the complainant irrespective of the previous inconsistent statements that were handed in court. They are clearly inconsistent to her evidence in chief. The statements were accepted as evidence. It is my view that a witness statement is never treated as evidence of facts.

[14] The complainant was allowed by police officers to question appellant 1 after his arrest. The complainant's statement admitted as Exhibit 'A' states that she enquired about the personal details of both appellant 1 and the deceased as well as the whereabouts of the cell phone from appellant 1. The appellant's response was that the cell phone was left with Thokozani Ntanzi, Skhumbuzo Mthethwa and Sizwe Mkhize. This is inadmissible evidence, as it forms part of the statement which was wrongly admitted by the court in the interests of justice. It must be excluded as appellant 1 responded to her questions whilst he was in the custody of the police. The evidence which she in fact elicited from the appellant is in fact incriminating evidence against him. We cannot ignore what was stated in *S v Matlou and another*:[5]

> 'Relying on the authority of *R v Samhando* 1943 AD 608 and *S v Sheehama* 1991 (2) SA 860 (A) the learned judge admitted the evidence concerning the alleged discussion which the first appellant allegedly had with the deceased's spouse, during which, at the suggestion by the police, she asked him where the deceased's missing head was, and to which he replied that, when he threw the deceased's body in the bush, it still had its head intact. The learned judge found that this conversation was in a different category, as opposed to a disclosure to the police. He further found that the first appellant could either have responded or refused to respond to this question by the deceased's spouse. To my mind, the learned judge erred in this respect. It is clear that the first appellant was under arrest and in the presence of more than one police officer at this critical stage of the investigation. It is the police that instigated or prompted the deceased's spouse to ask the first appellant this question which elicited such an incriminating response. The possibility that the first appellant was under the undue influence of the police at the time cannot be excluded. To my mind, this negated any volition which he might have had to refuse to answer. See *R v De Waal* 1958 (2) SA 109 (GW) at 111A - 112F.'

[5] 2010 (2) SACR 342 (SCA) para 23

[15] When appellant 1 spoke to her, he was not advised of the right to remain silent or not to make any incriminating statements and the consequences thereof. This was in violation of subsections 35(1)(a), (b) and (c) of the Constitution[6] which provides as follows:

> '(1) Everyone who is arrested for allegedly committing an offence has the right;
> (a) to remain silent;
> (b) to be informed promptly
> (i) of the right to remain silent;
> (ii) and the consequences of not remaining silent;
> (c) not to be compelled to make any confession or admission that could be used in evidence against that person.'

The evidence given by appellant 1 to Ngcongo was improperly elicited as the appellant was in police custody. The admission of such evidence by the trial court rendered the trial unfair.

[16] In the light of the aforementioned, I also find that the evidence of the complainant against the first appellant was not satisfactory and the court *a quo* on her evidence alone should not have convicted appellant 1 on the armed robbery count.

[17] The trial was mired with a lot of procedural issues which led to arguments, regarding the admissibility of evidence. The presiding officer's use of vulgar language in reprimanding the witness, Warrant Officer Sosibo, is unacceptable. He should not have stooped so low as to taint the dignity of the office that he represents. It was not fair on the witness concerned, particularly when he was the one who should protect witnesses in cases where harsh, unbecoming words or rude cross-examination by the other officers of the court is done. Section 10 of the Constitution[7] provides as follows:

> 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[6] Constitution Act 108 of 1996
[7] Constitution Act 108 of 1996

[18] The evidence relating to the attempted murder charges was rightly accepted by the court. The only discrepancies or contradictions were in respect of the evidence given by Constable Makhubela, who could not recollect exactly what happened when they approached the Cressida. The other four officers confirmed that appellant 1 was identified by his blue jersey, the deceased wore a green t-shirt and appellant 2 had a big winter navy coat on. They all confirmed that it was the driver of the Cressida who got out first and fired in their direction, which was followed by a volley of bullets from the rest of the persons who disembarked from the Cressida. The evidence of Constable Mhlongo, the investigating officer, who was present at the scene when the occupants of the motor vehicle fired at them, was conclusive in a material respect. Mhlongo being in the police motor vehicle that was in the front positively identified all the occupants thereof not only by what they were wearing but also by their physical features too. He saw appellant 1, 2 and 3 alight from the Cressida. His evidence is that they are all from his neighbourhood, they grew up together and even identified the places where they live. He knew appellant 1 when he had been previously arrested as he had to serve him food whilst in custody between the years 2006 to 2010. He had recently seen appellant 3 who had come to the police station to sign in terms of the bail conditions relating to another matter. Appellant 3 and his family are well known to him. They used to hunt buck with appellant 3. Appellant 3 had also handed himself over after Mhlongo had contacted his brother and left a message with him to the effect that appellant 3 was required to report to the police at Kranskop.

[19] Appellant 1 was also convicted of being found in possession of a prohibited firearm, commonly referred to as an Uzzi, a fully automatic Walter Model MP. The evidence of Captain Ndima, a senior forensic analyst was heard in regard to the ballistic findings regarding the firearm found by the police officer in possession of appellant 1. His evidence was that the trigger mechanism of the Walter Model MP, was defective and it could not discharge ammunition. He described it as not a rifle but a hand carbine, which requires the use of both hands when it is fired as it is heavy and that it uses the same ammunition as the 9mm pistol.

[20] Ndima's evidence was that the trigger mechanism was dysfunctional as it was rusted. It was examined on 10 September 2010 a few weeks after the incident. His

evidence is that it could not have been capable of firing ammunition even on 13 August 2010. Ndima's evidence can only mean that the 9mm spent cartridges could have been discharged from the policemen's handguns or any other handgun. He also found that the 21 cartridges found on the scene of the shooting were fired from the .38 Taurus special, which was found next to the deceased. The cartridges identified in 'K3', 'K4', 'K5' and 'I' were fired from another firearm. There was no evidence from any of the spent cartridges that indicated that they were fired from the Uzzi. It was not canvased at the trial whether the defect in the Uzzi could have been rectified by repairing the firearm. It is my view that in the light of its defect it is not a firearm as it is not capable of firing ammunition and the appellant should be given the benefit of the doubt.

[21] We accept that appellant 2 was found in possession of the .38 Rossi and that it qualifies as a prohibited firearm. It was found in his presence at his home. There is no link of this firearm to the scene of the shooting and the only person who was in possession thereof, was appellant 2 who had no licence.

[22] The trial court, also considered the appellants' versions given in their defence. An accused's version can only be rejected if the court is satisfied that it is false beyond a reasonable doubt. An accused is entitled to an acquittal if there is a reasonable possibility that his or her version may be true. In this matter the appellants relied on the defence of an alibi. There is no onus on any accused person to prove an alibi defence, if it might be reasonably possibly true he must be acquitted. However, the alibi must not be considered in isolation, it must be considered with all the evidence given at the trial. If an alibi is raised or a bare denial is advanced as a defence, the state has a duty to lead evidence that will link the accused with the crime, which evidence must be sufficient and credible.

[23] Despite the shortcomings in the state's case, the court had to be satisfied that the truth has been told. Certain items were found inside the Cressida. However, this aspect of evidence was not fully canvassed at the trial. This court could not then infer that the cigarettes and sweets found in the Cressida were those stolen from the shop. This was merely mentioned in passing and no details as to the nature and quantity thereof was given so as to tally with the goods stolen from Ngcongo.

Therefore, the trial court rightfully did not infer that those items were the proceeds of the robbery.

[24] The court accepts that the trial court rightfully convicted the appellants on the attempted murder charges because of the direct evidence given by the witnesses thereto. This is corroborated by the ballistic evidence given by Captain Ndima. As to the common intention of the perpetrators on the attempted murder charges this can be inferred from the facts of the case as they abandoned the motor vehicle, fired shots and ran into the forest.

[25] In the examination of the facts and the probabilities, the court came to the conclusion that their versions were not possibly true. The trial accepted the state's version and rejected their defences. I am satisfied that the state has proved its case beyond a reasonable doubt in respect of the .38 special revolver found in possession of appellant 2 and the attempted murder charges. The appeal in respect of appellant 1 in respect of count 1 and 2 is upheld. The appeal in respect of counts 4, 5, 6, 7 and 8 is confirmed in respect of all three the appellants. The appeal on count 3 in respect of appellant 2 fails.

Regarding Sentence

[19] In the light of the setting aside of the conviction on counts1 and 2 in respect of accused 1. I make the following order:

"1. (a) The convictions in counts 1 and 2 in respect of accused 1 are hereby set aside.

(b) The sentences of ten (10) years and seven (7) years imprisonment imposed in respect of accused 1 are hereby set aside.

2. (a) The convictions on counts 4, 5, 6, 7, and 8 are confirmed in respect of accused 1, 2 and 3. The sentence of eight (8) years imprisonment in respect of each count is confirmed.

(b) The sentences on counts 4, 5, 6, 7 and 8 are to run concurrently with each other.

3. (a) The conviction on count 3 in respect of accused 2 is confirmed.

(b) The sentence of seven (7) years imprisonment imposed in respect of count 3 is confirmed.

(c) The sentence of seven (7) years will run concurrently with the sentences imposed on counts 4, 5, 6, 7, and 8.

4. Accused 1, 2 and 3 are each effectively sentenced to eight (8) years imprisonment.
5. The sentences are antedated to 19 December 2013."

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**MBATHA J**

I agree:

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**HEMRAJ AJ**

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| Date of Hearing: | 07 June 2016 |
| Date of Judgment: | 21 June 2016 |

Appearances

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| Counsel for the Appellant: | Adv D Franklin |
| Instructed by: | Legal Aid South Africa<br>Pietermaritzburg |
| Counsel for the Respondents: | Adv IP Cooke |
| Instructed by: | The Director of Public Prosecutions<br>Pietermaritzburg |