



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

Case No: AR503/2018

In the matter between:

MDUMISENI THEMBINKOSI KHUMALO

APPELLANT

and

THE STATE

RESPONDENT

ORDER

Appeal from: Regional Court, Ladysmith (Mr. P S Madida sitting as a court of first instance)

1. The appeal against conviction on count 1 is dismissed.
2. The appeal against sentence on count 1 is upheld

3. The sentence of fifteen (15) years' imprisonment in count 1 is set aside. It is replaced with a sentence of eight (8) years imprisonment.
4. The appeal against sentence in count 2 is upheld.
5. The sentence of ten (10) years' imprisonment in count 2 is set aside. It is replaced with the sentence of five (5) years' imprisonment.
6. The sentences imposed on count 2 and 3 are ordered to be served concurrently. The effective sentence is thirteen (13) years imprisonment.
7. The sentences are antedated to 28 August 2015.
8. No otherwise determination is made in terms of s103 of Act 60 of 2000. It means the appellant remains unfit to possess a firearm.

JUDGMENT

Mngadi J (Laing AJ concurring)

[1] The appellant with leave granted on petition appeals against conviction on count 1 and against sentences imposed on count 1 and 2.

[2] The appellant was charged before the regional court with three (3) counts, namely, one (1) of robbery with aggravating circumstances (count 1), one (1) count of unlawful possession of a firearm (count 2) and one (1) count of unlawful possession of one (1) live round of ammunition (count 3). When the charges were put, the appellant who was legally represented, pleaded not guilty to all the charges. He through his legal representative disclosed his basis of defense as bare denial.

[3] The learned regional magistrate after hearing evidence convicted the appellant as charged on all the charges. He sentenced the appellant to fifteen (15) years imprisonment on count 1, to ten (10) years imprisonment on count 2 and to one (1) year imprisonment on count 3. The court ordered that the sentences imposed on count 1 and 2 be served concurrently. It resulted in a total effective sentence of sixteen (16) years imprisonment.

[4] The State lead evidence of five (5) witnesses, namely; Elosn Tholumuzi Mpanza (Mpanza); Slindiso Knowledge Magubane (Magubane); Khulekani Zikalala (Zikalala); Xolani Ntshangase (Ntshangase) and James Thwala (Thwala). The appellant testified for the defence and he did not call any witnesses.

[5] The charge in Count 1 alleged that on 13 May 2014 at or near eZakheni the appellant did wrongfully and intentionally and with force and violence assault Alson

Mpanza and did take from him a wallet containing R450 cash and did attempt to take a taxi a Toyota Hiace NKR 14291 the property or in the lawful possession of Mpanza. The aggravating circumstances being wielding of a firearm. Count 2 alleged that on the date and place as in count 1 the appellant in c/s 4 (1) of the Firearms Control Act 60 of 2000 possessed a prohibited firearm to wit, a 9mm pistol being a semi-automatic firearm with its serial number or identification mark changed or removed without permission. Both count 1 and 2 were read with the relevant provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act No 105 of 1997 (the CLAA).

[6] Mpanza testified as follows. On the date in question, he drove a taxi from Ladysmith town to Nhlumayo area. He left town in the afternoon before it became dark. At about 7 pm at a turn off entering Nhlumayo a person at the back in the taxi asked to alight. He stopped the taxi, that person got off and a tall young-man with dreadlocks followed him. The young-man had been sitting in front in the taxi next to him. The tall young-man got off, turned and pointed a firearm at him. Another person opened the door on his side and he pushed Mpanza away from the driver's seat to the passenger seat. That person got into the vehicle and he sat on the driver's seat.

[7] Mpanza testified that he grabbed the firearm pointed at him and he struggled with the young-man with dreadlocks over the firearm. They fell to the ground. The person who got into the driver's seat tried to turn around the vehicle. The young-man he struggled with called the person driving the vehicle to come and assist him. That person came armed with a firearm and he pointed the firearm at Mpanza. Mpanza then raised his hands to surrender. He was instructed to give the assailants money. He took out his wallet with R450 in it, an Edgars card and the money constituting taxi takings for the day and he gave it to the person who came to assist the young-man with the dreadlocks. The two men retreated and went to the bushes. He phoned Silindiso a member of the family owning the taxi. Silindiso was nearby and he was driving a vehicle. He told Silindiso what happened. Silindiso who was following the taxi from town came to the scene. He told him what happened and how the assailants looked like. He then left to report at the home of Silindiso. Whilst he was making a report, Silindiso phoned him and told him that

they have apprehended the young-man with dreadlocks but his companion escaped. He took a vehicle and he drove where they had apprehended the young-man with dreadlocks. He found the young-man held and sitting down. It was at a clinic called Kwamsain. He identified the young-man as the assailant he struggled with. They took the young-man to the eZakheni police station. The firearm found on the tall young-man with one round of ammunition was handed over to the police.

[8] Mpanza testified when the young-man with dreadlocks got off the taxi, the light in the vehicle above the front seat was on. It provided some light and he was busy giving change to the person who was alighting. He noticed that the young-man with dreadlocks was wearing a brown jacket. The young-man with dreadlocks and his companions were apprehended about half a kilometer from the scene. It was after about 30 minutes when he saw the young-man having been apprehended at the clinic. He was no longer wearing the brown jacket he was wearing at the time of the attack. There are many people who have dreadlocks. He recognized him by his face and the dreadlocks. He saw the firearm and he held to it, it was the same firearm he saw at the clinic. From town to where he was attacked, it took him 45 minutes. The persons in the taxi paid the taxi fare when they got off from the taxi. The young-man paid and he was giving him change when he turned and pointed a firearm at him. The taxi had about eight (8) passengers at the time. The young-man was the appellant.

[9] Magubane testified as follows. He was driving home by the turn-off at Mziwonke. One Mthembu told him that Mpanza was hijacked. He drove to the scene and he found Mpanza. Mpanza told him what happened and how the assailants looked like. He then came along the two assailants, they tried to stop him but he did not stop. He proceeded and he met with other people. The two assailants approached. They asked for a taxi to town. He directed them to board a bluish taxi; they boarded the taxi and sat towards the back. He and Khulekani pounced onto the two assailants. They grabbed the one with dreadlocks and his companion jumped out of the vehicle through the window. He found a small firearm on the young-man with dreadlocks. He asked for the name of the young-man but he refused to tell them his name. He phoned Mpanza. Mpanza arrived and he

looked at the person they had caught and said it is he he struggled with. The person and the firearm were taken to Ezakheni Police Station.

[10] Zikalala testified that he was in the vehicle stopped by two people. The vehicle was greyish. They stopped and the two people boarded the vehicle. They phoned Mpanza. They grabbed the one with dreadlocks and his companion escaped. He searched him and he found a small firearm on his waist. Mpanza came and identified the person they caught as the assailant.

[11] Thwala testified as follows: He was a constable stationed at Ezakheni police station. On 15 May 2014, he searched the appellant and he found on him one round of live ammunition. He was searching him in order to place him in the cells. Ntshangase testified as follows. He was a constable based at eZakheni Police Station. On 13 May 2014 at 21h00 the complainant Mpanza came with other people, he opened a case of attempted car hijacking. They came with the appellant and the small firearm. The appellant had bloodstains on him and he was not dressed on top. He phoned an ambulance and the appellant was taken to hospital.

[12] The defense, as s220 of the Criminal Procedure Act 51 of 1977 (the CPA) admissions, admitted that the firearm in question was functioning normally without any obvious defects; it was a 9x17mm caliber semi-automatic firearm with an obliterated serial number. The ammunition referred to in count 3 was of 9x17mm caliber. The documents relating that were admitted as exhibits.

[13] The defense applied for discharge in terms of s174 of the CPA. The regional magistrate refused the application. The appellant took a stand and testified as follows. He was at a stop at C Section Ezakheni at about 18h30. He wanted a local taxi to B Section. He was alone. A powder blue taxi appeared. He stopped it. There was seven (7) young-men in it, they moved for him to sit in the middle. His phone rang he took it out to answer. He felt a person grabbing him from behind on his neck. The others came to him. The person that grabbed him asked him where the was the licence they had taken.

He was assaulted in the taxi with hands, fist and spanners. The taxi drove up and it passed with him where he was supposed to get off. It stopped at the clinic. They got off with him and they continued to assault him. It was in a rural area. He cried and he was dragged with a vehicle, he was shocked with a certain machine. A certain person intervened. He placed him on the boot of his car and took him to the police station. He was later arrested and charged. He had never seen the firearm he was arrested for and he was not in possession of any live ammunition.

[14] The appellant denies that he was involved in the robbery of complainant. He did not know as to which day the incident took place and he did not know where he was. He was with his girlfriend at C-section two rooms. She left at 16h00 to B Section to plait her sister's hair. He left to meet with her, she was afraid to travel alone. She phoned him at 18h30 to come and meet with her.

[15] Under cross-examination, the appellant testified as follows. He boarded the taxi and it travelled for about 40 minutes before it reached the KwaMyeni Clinic. The clinic is not at Ezakheni. He stopped the taxi he boarded after he signaled that he was going local. The occupants were young men. He boarded the taxi alone. He could not recall the cell number he used at the time. His girlfriend is Thobeka Lamula. He was with her from Monday until Tuesday. She was employed but if requested through employer she could come to court testify. He last spoke to her the previous day. He was assaulted and no firearm was produced. He was in hospital for 3 days and his girlfriend visited him. Police from Ladysmith took a statement from him relating to his assault but there was nothing further done relating to the case he opened. The appellant showed to the court scars on his head from the injuries sustained when he was assaulted. The clinic is near the turn off from where the robbery took place. He did not know why the people would drive all the way to put him up at C Section Ezakheni.

[16] The learned regional magistrate found that the state witnesses testified in a satisfactory manner. He found that their version accorded with the probabilities. On the other hand, he found that the appellant was generally a bad and an unreliable witness.

He gave evasive and equivocal answers showing that he was a person who was economic with the truth.

[17] In my view, the State witnesses gave their evidence in a fairly good manner, but I would differ from the trial court with regard to the appellant. The appellant's evidence on record shows that he gave his evidence in a fairly straightforward and confident manner. The regional magistrate whilst accepting that the appellant was seriously assaulted by the state witnesses who arrested him, with which they were not frank about, made no attempt to determine the impact of the assault on the appellant on the evidence of those that assaulted him. However, the appellant has not appealed against the convictions on count 2 and 3. It means he is not challenging the version of the state, which formed the basis of the convictions of those counts.

[18] The version which formed the basis of the convictions on counts 2 and 3 is that, soon after the robbery in count one and near the scene of robbery in count 1 and in possession of a firearm fitting the description of the firearm used in count 1 and with the companion as the assailant in count 1, the appellant was found. His companion escaped by jumping out of the window of a motor vehicle. In means, the appellant gave false version relating to his presence and the manner in which he was apprehended. The said factors taken together with the evidence of Mpanza identifying the appellant as the perpetrator in count 1, in my view, justify the rejection of appellant's alibi as false and they justify a conclusion that the State proved the guilt of the appellant on count 1 beyond reasonable doubt.

[19] It is trite that the court is required to approach evidence relating to identification with caution. In my view, the following are significant factors. The taxi left town before it became dark. The assailant sat next to Mpanza whilst Mpanza was driving the taxi. Mpanza looked at the appellant when he was interacting with other passengers in the taxi. The appellant faced Mpanza during the attack. The appellant and Mpanza struggled over the firearm and they both fell down. Mpanza saw and identified the appellant within an hour from the time of the attack. In the circumstances, Mpanza's identification of the

appellant is reliable and it can safely be relied upon for a conviction. There are no grounds to interfere with the factual findings of the learned regional magistrate. See *S v Francis* 1991 (1) SACR 198 (A) at p204; *R v Dhlumayo and another* 1948 (2) SA 677 (A) at 706.

[20] The imposition of sentence is primarily the function of the trial court. The appellate court can interfere with the sentence imposed in limited circumstances, namely; if the sentence imposed is disturbingly inappropriate, or it is vitiated by a material misdirection or it is so severe that it induces a sense of shock.

[21] The personal circumstances of the appellant were as follows. He was a first offender. He was 30 years old and not married with two children aged 5 and 2 years respectively. He passed grade 11. He was not employed but work as a builder.

[22] The trial court took into account the purposes of punishment, namely, deterrence, prevention, retribution and rehabilitation. Further, it took into account the triard namely, interest of the offender, interest of the society and the nature of the offence.

[23] The trial court pointed out that should it apply the minimum sentence prescribed in the legislation, it was looking at imprisonment of at least 25 years for counts 1 and 2. It understood the legislation to prescribe a minimum sentence of 15 years imprisonment on count 1 and of ten (10) years imprisonment on count 2. The court did not specify in the judgment which legislation prescribed a minimum sentence of ten (10) years on count 2. I have not been able to find such legislation. This constitute a material misdirection by the trial court which justify that the sentence imposed in count 2 be set aside and the appellant be sentenced afresh on count 2.

[24] On count 1, the trial court did not take it into account that although firearms were wielded they were not used. The assailants abandoned taking away the vehicle. The complainant was not injured. The appellant was found in possession of the firearm with no ammunition. These factors taken together with the fact that the appellant was a first offender is of significance. The appellant was severely assaulted resulting in him

sustaining injuries, which necessitated admission in hospital for a period of three (3) days, which left him with permanent scars. The assault was an unlawful punishment meted out to the appellant for committing the crime in count 1. The appellant was arrested on 13 May 2014 and he was sentenced on 28 August 2015. He was in custody awaiting trial for a period of fifteen (15) months.

[25] The said factors properly considered would justify a conclusion that in relation to count 1 there are substantial and compelling circumstances for a court to impose a sentence less than the prescribed minimum sentence of fifteen (15) year's imprisonment.

[26] The fact that the appellant was a first offender, taken together with the manner in which the crime in count one was committed, it shows that the appellant is capable of being rehabilitated. He as a first offender deserve a measure of mercy. In my view in count 1 the sentence of eight (8) years imprisonment is a fair, balanced and appropriate sentence. In count 2 a sentence of five (5) years imprisonment is appropriate. I find no grounds or reasons to order that the sentences imposed on counts 1 and 2 be served concurrently.

[27] I propose the following order:

1. The appeal against conviction on count 1 is dismissed.
2. The appeal against sentence on count 1 is upheld
3. The sentence of fifteen (15) years' imprisonment in count 1 is set aside. It is replaced with a sentence of eight (8) year; imprisonment.
4. The appeal against sentence in count 2 is upheld.
5. The sentence of ten (10) years' imprisonment in count 2 is set aside. It is replaced with the sentence of five (5) years' imprisonment.

6. The sentences imposed on count 2 and 3 are ordered to be served concurrently. The effective sentence is thirteen (13) years imprisonment.
7. The sentences are antedate to 28 August 2015.
8. No otherwise determination is made in terms of s103 of Act 60 of 2000. It means the appellant remains unfit to possess a firearm.



Mngadi, J

I agree, it is so ordered.



Laing, AJ

APPEARANCES

Case Number : AR 503/18

For the Appellant : X Sindane

Instructed by : Legal Aid South Africa
PIETERMARITZBURG

For the respondents : S I Sokhela

Instructed by : Deputy Director Public Prosecutions
PIETERMARITZBURG

Heard on : 27 August 2021

Judgement delivered on : 03 SEPTEMBER 2021