

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN GAUTENG HIGH COURT, PRETORIA)**

Appeal no 30/04

CASE NUMBER: A47/2009

DATE: 15/05/2009

UNREPORTABLE

In the matter between:

THABO SHIBAMBO

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] The appellant, who was dully represented at the trial court, was charged at the Regional Court of North Regional Division at Pretoria on one count of robbery with aggravating circumstances, two counts of unlawful possession of firearms and one count of possession of ammunition and one count of pointing a firearm.

[2] The appellant was charged, convicted and sentenced as follows:

2.1 On count one: robbery with aggravating circumstances (firearm used) convicted and sentenced to 15 years imprisonment;

2.2 On count two: pointing a firearm convicted cautioned and discharged;

2.3 On count three and four, respectively possession of 9 millimeter parabellum and possession of ammunition, for purposes of sentence these two counts taken as one and he was sentenced to 3 years imprisonment .

2.4 It was a ordered that 2 years of the 3 years must run concurrently with the sentence of 15 years.

2.4 The appellant was declared not fit to possess a firearm.

[3] The appellant approached this court to appeal against both conviction and sentence after he was granted leave to appeal against both conviction and sentence. The grounds of appeal, I summarize them to be that the magistrate erred in accepting the version of the state witnesses. It is submitted that the state witnesses contradicted themselves and or one another. In respect of sentence the grounds relied upon are that the magistrate ignored the fact the appellant was a first offender, and that complainant's loss was very minimal and the fact that the appellant was not directly involved in the robbery.

[4] The appellant was duly represented during the trial. He pleaded not guilty to all five counts. Admission in terms of section 220 of the Act was made' namely the date and place where the offences were committed were admitted, but disputed the rest of the allegations.

- [5] The State's case is premised on the evidence of Mr. Ensamisi Andries Nukeri, the complainant Mr. Enoch Masupye a member of the South African Police Serves, his sister Ms Jacobeth Masopye, inspector Preston Fanyane Zwane; the appellant also testified on his own defence but did not call any witness.
- [6] According Mr. Nukeri, he stays in Atteridgeville and is employed as a police reservist. On the 22 March 2003 he was at Madjadji and Makaza streets in Saulsville in Atterridgdevile waiting for the police transport to take him to the shooting practice at Hammanskraal. There were still stars and streets lights. The time was about 4.30 in the morning. He found four young men. When they were near where he was standing, three of these young men hurriedly approached him. When the three came to him one of them had a firearm. He says that the fourth person was busy following him. The one who had a firearm instructed him to lift his hands into the air and instructed him to kneel. These men started searching him. The fourth man cocked his firearm and pointed it towards inspector Masupye. He says that when the three we searching him; the fourth person was also approaching him.
- [7] He says that he had with him a lunch pack, police book, and plastic ear plugs which he was going to use at the shooting range. He says that he could see the firearm that these men had with them, it was a pistol.

- [8] He says that he saw inspector Masopye when he arrived at the scene. After he had been instructed by these men who were busy searching him, he heard a shot being discharged. The three that were searching him ran away, taking every thing. The fourth person who had cocked his firearm fell with his firearm. He says the fourth person who fell is the appellant and he was shot on the collar bone. He says that the value of the goods he was robbed off could be about R70, 00.
- [9] Under cross examination he said that he was walking from South of Modjadji. He says that the young men were walking towards Modjadji Street on the side of Makaza Street, walking towards him. He says that there were street lights illuminating the area. He could see for a distance of about fifteen meters. He could see from that distance the colours of what a person was wearing. He said that at the time when he was kneeling he was facing eastwards. He said that two of the men who were searching him were in front of him and the other one was behind him. The fourth person was already close to him. He says that he kept his eyes on the fourth person because he was not in the company of the other three. The reason he says that the fourth person cocked a firearm, is because he heard the sound of a firearm being cocked. He did not see the firearm itself. He says that this person was about three meters away from him at the time he heard him cocking his firearm.

[10] Mr. Nukeri says that inspector Masupye approached from the left hand side and the appellant was standing on the right hand side. Masupye came towards the side where he Nukeri was standing. He literally saw inspector Masupye, he did not recognize him on his voice. He did not see who fired the shot; he merely heard the shot being fired. He reiterated that he heard the firearm being cocked by the appellant and he also saw him holding it. He says that he had an opportunity to look at the fourth person although the others were busy searching him.

[11] Mr. Nukeri disputed the version of the appellant put to him that the appellant that approaching the corner of Modjadji and Makaza where he noticed a group of unknown people who looked to him as if they were involved in a fight as they were shoving one another, and that he the appellant waited a distance away since it was dark he could not see who these people were. Mr. Nukeri says that the appellant was part of the three people who were robbing him.

[12] Inspector Masupye, the second witness for the state testified that on the 22 March 2003 at about 5:30 he was in the company of his sister Jacobeth on their way where the latter was to catch her police transport to the shooting practice. Transport point was at corner Modjadj and Makaza Street at Saulsville. He approached the place from northerly direction. When he reached the corner of direction of the Modjadj and

Makaza he noticed the first state witness with his hands in the air and three men surrounding him and searching him. He screamed at these men saying that leave that man. When asked whether there was any other person in the vicinity, he said that there was, although he was not aware of this fourth person. After he had screamed that they must leave that man, another person emerged from the dark, coming to the scene and cocked his firearm. He says that there were street lights in the vicinity. When this person cocked his firearm and directed towards him, inspector Masupye took his own firearm, cocked it and fired one shot at this person, directly hitting him before he could use his firearm. He did not hear any other shot thereafter. This person fell and his firearm also fell. The other three men fled down Makaza Street. He picked up the firearm and two bullets, one of which was in the magazine.

- [13] Masupye summoned other police to the scene. The first to arrive was inspector Zwane. He himself picked one empty shell. When he picked the firearm from the ground, there were two bullets, one of which was in the magazine. He says that the firearm was a Z88 pistol. He says that he handed the firearm to inspector Zwane and the firearm was booked at the police station. He says that he picked up the firearm at the scene while the appellant was still there. He does not know whether the three other men had firearms with them.

[14] Under cross examination he was confronted with the statement he had made shortly after the events. It was pointed out to him that in the statement he said that the three men one of them had a firearm. When asked to describe the firearm these men had he said that he could not remember it. He says that Zwane picked up one shell. Asked whether Zwane picked any other thing he says that it was only the bullet and the firearm. He says further that he made the firearm safe and wrote its serial number Q004870. The firearm was a one millimeter parabellum caliber vekta model Z88 semi-automatic. He was shown exhibit A which he confirmed to be the same firearm he had picked up at the scene. He said that the person he had shot was struck on the collar bone "halslyn" on the right in front. He says that he is unable to give a discretion of the firearm the three had because they ran away scattering in different directions.

[15] He said that according to his observation the three men and the fourth person he shot were all together. The reason for this induction is because when he screamed at the three to leave Andries, the fourth person emerged and cocked his firearm. One of the fleeing people went to stand about 20 meters and looked back, when the fourth person fell, he himself then pointed his firearm towards this person who then resumed running away. He says that the person he shot is the appellant.

[16] When asked by the court, he says that the appellant when he saw him for the first time emerging from the darkness he was in the middle of the road about ten meters from him. The court estimated the distance the witness pointed out in court to be about fifteen meters. He further said that the fourth person came alone from his own direction towards where Andries and the other three were. The proceedings were then adjourned to another day as the result of time constraints.

[17] When the proceedings resumed, inspector Masupye was further cross examined. He said that the first thing he observed on his arrival at the scene was that Andries was being searched by three boys. He reiterated that he screamed at these three to leave that man and another person emerged from the dark and cocked his firearm. He says that he specifically saw this person cocking his firearm. He could have been between fifteen meters way from him. He could see him clearly. He reiterated his answer he had given when asked by the court, that he says that this person was part of the group of three because he emerged from the dark and cocked his firearm. This person did not fire a shot, but had pointed his firearm towards him. When asked how many bullets were lying on the ground when he examined the firearm, he said that there were two, one on the ground and one in the magazine. The version of the appellant put to him was that he was coming from a night vigil walking home and he stopped when he saw a group of people who were fighting and he suddenly heard a shot being fired from the direction of the

group and was not part of the group. Inspector Masupye insists that the appellant was part of the group of three. He reiterated that he saw that one of the three men had a firearm after he had already fired a shot and when they were running away. He denied that there were several shots fired. He insists that the appellant was struck by the single shot he fired. He further explained that the appellant had come from the dark into the light that is when he saw him cocking his firearm. When it was again put to him that the appellant says that he was not part of the group, he said he is not certain whether he was part of the group but he had cocked his firearm and pointed it towards him.

- [18] Ms Jacobeth Masupye was then called. She confirmed that she was with his brother, the previous witness walking along Modjadji Street approaching Makaza Street, where they had agreed with Nukeri to meet for their transport to the shooting practice. Before they could arrive where Nukeri was standing they saw three boys approaching him. One of them was behind them, this was the fourth. "The one who was coming from behind these three, people, when he arrived where these three people were busy searching Nukeri, he cocked a firearm." She could hear the sound of a firearm being cocked. Her brother managed to draw his firearm and managed to fire a shot. She says that she heard only one shot. She says further that they took the firearm which the appellant had with him and they ran with it towards Hlakola Street. When they arrived at Hlakola Street they found their transport having arrived. They got into

their transport and went back to the scene and the driver advised them to phone the police. They did phone the police as well as the ambulance. The firearm was handed to the police; it was a Z88. She says that there were street lights in the vicinity of the scene. She says when the fourth person, who is the appellant, he was about five and a half to six meters from the group of three and Nukeri. She says that because she saw one of the three people who ran away having a firearm, she thought that the appellant was part of them, coupled with the fact that after her brother had shot at the appellant they ran away. She says that her brother had shouted at the three "What are you doing to these people?" She says that her brother uttered these words after the appellant had cocked his firearm. And he was holding it in his hands. She said that where they had to get their transport, it was two blocks further away from the scene. On arrival at the place where they had to get their transport, they had to drive back to the crime scene. The appellant who had been shot by her brother was still there. For purposes of this appeal, for the reasons that will follow herein below, I deem it not necessary to chronicle the rest of this witness' evidence under cross examination.

- [19] Inspector Zwane was then called by the state. He confirmed that he is an inspector in the South African police services stationed at Atteredigville and was on duty on Friday 21 March 2003 and on extended duty until early morning of Saturday 22 March 2003 when he received a radio call about an incident at

corner Makaza and Modjadji Street in Atteridgeville. He proceeded to where the incident occurred, where he found inspector Masupye as well as his sister and Andries Nukeri. He also found the appellant with a firearm wound on the side of the neck, bleeding and lying on the ground. The appellant at that moment could not give his name. Paramedics were busy with him. Both the Masupye and Niukeri made a statement to him. At the scene he also found caption Monkwe, the driver of the police transport to go to shooting range. He says that he picked up one nine milliliter cartridge near the place where inspector Masupye had fired a shot. He also picked up one live ammunition on the side where the person who was shot was lying. He says that inspector Masupye gave him a nine millimeter Z88 pistol, but another captain who was at scene took it from him. He says that he found two live bullets in this firearm. He says all in all there were three live ammunition, the two live rounds and the firearm were given to him and he picked one. These were subsequently handed in at Attridgeville police station under entry 210 and made SAP13. He says that Inspector Masupye gave him the two live ones, which were inside the magazine which was in the firearm. The one he says that he found next to where the appellant was lying. He says that he did not see inspector Masupye picking up the firearm, but the latter gave it to him. He says that the firearm of Masupye and the other one that was picked up are both nine millimeters He says that inspector Masupye handed him the firearm with his hand. He says that the empty shell which he

found was next to the stop sign board opposite where the victim was lying and that is opposite where Masupye was standing, which was a distance of about fifteen to twenty meters across the street. That concluded the evidence of the State.

[20] Inspector Enock Masupye was recalled to the witness box. The defence did not object thereto. The inspector confirmed that he was not seated in court during the testimony of his sister, Jacobeth Masupye, nor did he discuss the case with her. He said that after the shot he picked up the firearm of the appellant and waited at scene with the firearm. He said that the transport that was supposed to pick up Nukeri at corner Makaza and Madjadji Street where the incident happened. He says that his sister ran away, to a church nearby after the shooting. He further said that it is not correct that they left the appellant at the scene and went away to Masupye Street. He said that the firearm he picked it up and it was not on the ground until the police arrived at the scene.

[21] The appellant was called to testify in his own defence. He was asked in chief to explain what transpired on 22 March 2003 at the corner of Madjadji and Makaza streets at about 4: 30 in the morning. The appellant said that on that particular morning it was a Friday and he was coming from college and going to his home. He said that he had attended a night vigil that Friday night. He says that he was walking along Madjadji Street in the direction of Makaza Street. He noticed a group of persons and

it seemed that they were pushing one another; he does not know whether these people were fighting with one another. He says that from a distance he stopped to see whether he could walk past the fighting people. He then heard a gun shot. He says that he had to run back towards where he had come from but he could not and fell. He regained his conscience at hospital some three days after. He says that Modjadji and Makaza streets form a T-junction. He could not make out whether the group of people he saw at the corner what they were doing. He says that he could not identify the group. He thinks that there were three shots fired. He says that when he heard the first shot, he started running and it kept on fire ring and that is when he fell. He says that he knows nothing about the three and the fourth person. He further said under chief that he knows nothing about a firearm. He denies that he had with him a Z88 firearm. He further says that it was dark on that morning. He says that he did not speak to any person at the scene of this incident.

- [22] Under cross examination the appellant said that there was a street light in the vicinity, although he could not see the people fighting as the result of the distance where he was standing. He said that he was about 25 to 30 meters away from the group. He says that the group could have been between 7 and 8. He says that the group could not have been between 3 and 4 people. He said that the group looked like people pushing one another. He says that only two people pushed each other and

the other two merely followed the people who were pushing each other. He says that when he saw these people pushing each other he decided to stop because he realized that there was something terrible about happen, and he then heard a shot (page 73 line) He says that he could not see the faces of those people. He says that he did not hear the sound of a firearm being cocked. He also contradicts himself by saying that he grew in that vicinity and he did not expect any trouble. He then says that not far from the scene there is a tavern and when people are drunk there is always a fight.

- [23] It was put to him that his attorney never put to the state witnesses that he did not have any weapon. The appellant responded by saying that he knows nothing about a firearm. The appellant further said that he was from a night vigil of an old friend of his, by the name of Leslie Sithole, at Hlakola Street. He said that it could have taken about 15 minutes walking from Hlakola to the corner of Modjadji and Makaza streets. He said that he left from the night vigil at something past 4:00. It was put to the appellant that if the distance from the night vigil to the corner where the incident happened takes 15 minutes, it would mean that he must have been at the intersection at about 4:10. The appellant said that he could have been at the intersection at about between 4: 20, 26 or 5: 30. It was pointed put to him that the incident took place at 4: 00, he then said that he did not have a watch with him.

[24] The appellant pointed to the court the location of the entry bullet wound in front on the right side of the neck a centimeter above the collar bone and about three centimeter left of the middle line and the exit point above the left bladder above the shoulder head. He conceded that with the location of his wounds he must have been shot from. He concedes that he was not shot from behind. He says that he thought that the shot came from the group of people. He says that there was no one near him and behind him when he was shot. He said that he run away for a distance of about four, five to six meters when he heard the first shot and then fell. He says that with the first shot that was when he began turning and with the second and third shots he had already turned and ran about two to three meters. He says that he knows nothing about the firearm.

To the court's question he said that with the first shot the people were still pushing. He could not give any explanation why the people who were fighting were not shot but him.

[25] The court appreciated the fact that there were contradictions on the part of the state witnesses; in particular Ms Jacobeth who it found was not a good witness. The court did not accept her evidence that the appellant was left alone on the scene while inspector Masupye and Jacobeth ran to another block of the street. The court had regard to the fact that there was no reason for the police to run away; it rejected the evidence of Jacobeth, in that regard. The court found inspectors Masupye and Zwane to be good witnesses and accepted their evidence.

The court found that the evidence shows that there was only one empty shell found where the inspector Masupye shot and that there were two live ammunition found at the vicinity where the appellant had fallen. The court found that there was one live ammunition found where the appellant had fallen and it accepted that that ammunition most probably fell out of the appellant's firearm when he was cocking it. The court found that it is highly improbable that inspector Zwane would shoot at an innocent bystander and not at the culprits who were busy robbing his colleague. The court found that the appellant was part of the group who were robbing inspector Masupye although he did not directly participate in the robbery. The court held that once the appellant cocked his firearm when inspector Masupye shouted at the three culprits, he directly associated himself with their misdeed. The court proceeded to find the appellant guilty of the count of robbery, the count of possession of the firearm Z88 and ammunition and the count of pointing a firearm. The court was not satisfied with the count of possession of the other firearm, because there was no evidence that the appellant was aware that the other three were armed with a firearm. In so far as the pointing.

- [26] In the matter of *S v Francis* 1991 (1) SACR 198 (a) at 198j-199a et 204a-e, the approach to an appeal is set out as follows: "The power of a Court of Appeal to interfere with the finding of fact of a trial Court is limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a

witness' evidence is presumed to be correct. In order to succeed on appeal the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence-a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony".

[27] In the matter of S v Hadebe and others 1997 (2) SACR 641 (SCA) at 645E-F it was decided that:

"...in the absence of demonstrable and material misdirection by the trial Court, its finding of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong" Vide also R v Dhlumayo and another 1948 (2) SA 677 (A).

[28] On behalf of the appellant it is submitted that the contradictions between the evidence of Masupye and Zwane are such that the court should not have found that they are honest and reliable witnesses.

[29] Inspector Masupye when asked whether the three persons were armed, he said that he could not see whether they were armed (page 20 lines 20-24). In his statement which he conceded that he made it whilst the events were still fresh, he

said that one of these people had a firearm, although he could not describe the firearm (page 21 lines 14-18). At page 31, after he had refreshed his memory through looking at his statement, he said that after he had fired a shot, when they were running away he could see one holding a firearm.

In my view, this contradiction on this aspect shows that the inspector testified from memory and without having accessed his statement. I assume that his statement was made in March 2003. The trial was heard in April 2004. It does not seem to me that inspector Masupye deliberately mislead the court in that regard. As correctly stated in *S v Mokhele* 1990 (1) SACR 95 (A) 98F that:

“Contradictions *per se* do not lead to the rejection of a witness’s evidence, they may simply be indicative of an error. Not every error made by a witness affects his credibility: in each case the trier of fact has to make evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on the other witness’s evidence.”

- [30] Inspector Masupye testified that he picked up an empty shell and one live ammunition. They picked the firearm and it had one bullet which it seemed to him that it fell when the firearm was cocked (page 19 lines 4-15). Inspector Zwane said that he picked one cartridge near the place at the stop sign where Masupye told him he was standing when he fired. He also

picked up a live bullet on the side where the person who was shot was lying. (Page 54 lines 3-7 and 13-14 respectively.

[31] Much was said about the contradictions between the evidence of inspector Masupye and Zwane, in particular the amount of live bullets that were picked up at the scene. Inspector said that there was only one live bullet picked up, whereas inspector Zwane said that he was handed three live ammunition. Again, in my view, this discrepancy can be attributed to the fact the witnesses testified long after the event and also that one of them made an error in regard the number of live bullets found.

[32] In casu, there is only one empty shell that was picked up from the scene, particular where Mr. Masupye was standing when he fired. The only shot fired struck the appellant. The appellant does not say that there was any shot directed towards the fleeing people. The improbability of the version of the appellant that he was not part of the group and that there was no reason why he was shot, lies in the very fact that he was neither a threat to Nukeri nor to Mr. Masupye. There was no reason at all, according to this version, for inspector Masupye to shoot at the appellant and not at the three persons robbing his colleague Nukeri.

[33] On the other hand inspector Masupye testified that he saw saw three people around and searching his colleague Mr. Nukeri. Inspector Masupye further said that he heard the

appellant cocking his firearm and saw him pointing it towards him (Masuoye). Inspector Masupye further says that he then pulled his firearm, cocked it and shot at the appellant.

[34] It has been quite correctly pointed out in *Mattioda* 1973 (1) PH H 24 (N) that: “The proper approach in a criminal trial is to consider the totality of the evidence, that is to say, to examine the nature of the state case, the nature of the defence case, the probabilities emerging from the case as a whole, the credibility of all witnesses in the case, including the defence witnesses, and then to ask oneself, at the end of all this, whether the guilt of the accused has been established beyond a reasonable doubt. It is not a proper approach to hold that, because a court finds that the State witnesses have given evidence in a satisfactory manner ergo the defence evidence must be rejected as false.”; vide *Mgedezi* 1989 (1) SA 687 (A) and *Makobe* 1991 (2) SACR 456(W). The court must evaluate the totality of the evidence before it; vide *S v Jochem* 1991 (1) SACR 208 A at 211 i-j.’

[35] *S v Makobe* 1991 (2) SACR (W) at 460i-j Zulman, as he then was said:

“The test is, and remains, whether there is a reasonable possibility that the appellant’s evidence may be true. In applying that test one must also remember that the court does not have to believe her story; still less has it to believe it in all its details.

It is sufficient if it thinks there is a reasonable possibility that it may be substantially true (*R v M* 1946 AD 1032 at 1027.)”

[36] If the version of the appellant is true, it would mean that Masupye decided to ignore his friend who was at that point in time being robbed and threatened. Masupye would then have directed his shot towards the appellant who was in no way a threat to either Nukeri nor Masupye himself. This version of the appellant, is in my view not reasonably possibly true, having regard to the inherent improbability in it and it must be rejected as falls.

[37] On the other hand, Masupye is being corroborated by the appellant himself that there were people who were pushing one another. Masupye says that there were three people around Mr. Nukeri. His attention after he had shouted to these three youths to leave his colleague, was diverted to the sound of a firearm that being by the person who emerged from the dark. This person who emerged cocked his firearm and pointed it towards Masupye, who in turn drew his firearm, cocked it and fired it at this person.

[38] This version of Masupye is in my view more realistic than that of the appellant and is reasonably possibly true. At that point in time, Masupye was being pointed with a firearm. He had not as yet seen any weapon on the people who were searching

Mr.Nukeri. He shot once at this person pointing at him with the firearm. His life was, in my view, placed in danger that he had no option but to shoot the appellant.

[39] I am of the view that the version of the appellant is not only improbably but it is beyond any reasonable doubt false, and needs to be rejected, as I do; vide Makobe case (supra) at 460d-h.

[40] The three youths were in the process of robbing Mr. Nukeri. Masupye shouts these youths to leave Mr. Nukeri. The appellant emerges and pulls a firearm and points it at inspector Masupye. In my view, the inference to be made is that he intended to stop Masupye at his tracks from foiling the robbery that was in progress.

[41] *In S v Motaung and Others* 1990 (4) SA 485 at 510F-511A the Appellate Court said:

“The net of common purpose will enmesh only an accused who consciously recognizes that his mind and that of the actual perpetrator are directed towards the achievement of a common goal. In this connection Botha JA remarked at 712B-C:

‘Inherent in the concept of imputing to an accused the act of another on the basis of common purposes is the indispensable notion of an act in concert. From the point of view of the accused, the common purpose must which is merely coincidentally and independently the same in the case of

the perpetrator of the deed and the accused is not sufficient to render the latter liable for the act of the former.'

The practical implications of the principle enunciated in the passage quoted above are indicated in the judgment in *Mgedeza* case. At 705H-706B Botha JA stated:

'In the absence of proof of a prior agreement, accused N 6 who was not shown to have contributed causally to the killing or wounding of the occupants of the room 12, can be held liable for those events, on the basis of the decision in *S v Sefatsa and Others*... only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault of the inmates in room 12. Thirdly he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly he must have manifested sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens reas*, so, in respect of the killing of the deceased, he must have intended them to be killed, or must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

[42] The appellant emerged from the dark and pointed his firearm at Masupye, while the three youths were robbing Mr. Nukeri. When Masupye tried to intervene, the appellant pointed his firearm at Masupye. In my view, the pointing of the firearm, must have been done with a singular purposes, to stop Masupye in foiling the robbery which was in progress.

[43] The incident happened in the early hours of the morning. In my view, from the circumstances of the case, it can be inferred that the appellant and the three youths had at one or other stage planned that they would commit an act such as robbery. The appellant knew and in fact was aware what was happening around Mr. Nukeri, otherwise he would not have pulled his firearm and directed it at Masupye. In my view, his conduct manifested his intention to associate himself with the robbery. By pointing his firearm at Masupye he must have had a singular intention to stop him on his tracks so that the robbery can be eventuated. This conviction is premised on the evidence of Mr. Nukeri and Mr. Mosupye. I have already earlier referred to the fact that whatever discrepancies there is with regard to these witnesses, that does not mean that their evidence must therefore be rejected. I have pointed out that whatever discrepancies there may be these can be attributed to the fact they testified a year after the incident. The magistrate found these two witnesses to be reliable. A court of appeal will not interfere with credibility findings of the magistrate, unless there are demonstrable and material differences that do not fit in to the entire matrix of the evidence lead.

[44] Mr. Masupye's evidence that the appellant pointed him with a firearm is corroborated by inspector Zwane who says that around the scene where Mr. Masupye fired a shot, he found an empty shell. He received the Z88 9millimetre firearm from Mr

Masupye. Mr. Masupye has testified that he picked the said firearm next to where the appellant had fallen. The criticism that there was no evidence on gun powder residual on the fingers of the appellant produced by the State, is in my view ill conceived. The State does not have to close every speculative noose in its case to achieve a conviction.

[45] There is exhibit A which was admitted in terms of section 212 (4A). This is the affidavit of captain Swelabo where in he says that he is a captain in the South African Police Service and attached at the ballistic Unit of the Forensic Laboratory and tested the said Z88 firearm. He says that he has received training in forensic ballistic training. He conducted test on a 9 millimeter Parrabellum caliber Vektor model Z88 semi-automatic pistol with serial number Q004870. He found that this firearm was in a working condition and its trigger pressure was normal and it was a single action when its hammer is in rear position and double action with the hammer in forward position. He found the firearm to be self loading.

[46] I am of the view that the magistrate quite correctly found that the appellant was in possession of this Z88 9mm pistol. It is in my view, of no consequence that there are some contradictions in the evidence of inspector Zwane who said that he was handed two live ammunition where the appellant was found lying. On the other hand, inspector Masupye said that and that of inspector Masupye who says that he found one live

ammunition. This court need not speculate, as it was invited to, as to how it came about that the firearm of the appellant could have disgorged out of the chamber, be it one or more bullet(s) and to draw conclusion that it is not possible that when the appellant cocked his firearm that there could have been still a bullet in magazine. The court is confined to the four corners of the record. There was no expert evidence led as to what could have or not happened when the firearm was cocked and also as to how the bullets are fed into the chamber from the magazine.

[47] For purposes of this case, I am satisfied that the magistrate quite correctly convicted the appellant on the possession of the ZC 88 firearm and the ammunition that were found next to where the appellant had fallen after he had been shot. The evidence proves that this firearm was in a working condition. This evidence was accepted by the magistrate. It cannot therefore, on the speculative evidence given over the bar be said that it has not been proved that the firearm was not in a working condition. Also the exact quantity of the bullets found next to where the appellant was found, is of no consequence with regard to the conviction of possession of ammunition, one or two qualifies that the appellant be found guilty on this count of possession of ammunition.

[48] The magistrate quite correctly, in my view, acquitted the appellant on count 5, of possession of the pistol which was

dropped by the fleeing persons, since it could not be proved that the appellant knew about this firearm and that it was going to be used in the robbery.

[49] In the result I am satisfied that there was no misdirection on the part of the magistrate in accepting the evidence of the State and rejecting that of the appellant. I am also of the view that the magistrate quite correctly found the appellant guilty on count 1, count 2, count 3 and count 4 and the convictions on these counts should be confirmed.

[50] With regard to sentence, in respect of possession of the firearm and the ammunition, I do not intend to discuss those sentences, since there was no submission made in that regard. Besides, it cannot be said that those sentences are shockingly inappropriate. I shall address myself in respect of the sentence of 15 years that was imposed on count 1 of robbery.

[51] It brooks no argument that count 1 of robbery falls squarely within the ambit of the Minimum Sentence Act. The appellant was according to the charge sheet 22 years old at the time of arrest and 23 at the time of sentence. The highest standard the appellant passed at school is standard 9. He was a first offender. He sustained gunshot injury during the commission of the offences.

[52] It was submitted on behalf of the appellant that his personal circumstances I have referred to herein above, are such that the magistrate should have found that there were substantial and compelling circumstances and that magistrate should have exercised his discretion and imposed a lesser sentence than the minimum sentence of 15 years.

[53] Criminals who sustain injuries during their unlawful escapades must accept such injuries as perennial occupational hazards of their chosen unlawful escapades. It does not follow that any injuries sustained in such circumstances, as in *casu*, automatically qualifies them to be treated differently. However, the court in deciding whether there exists substantial and compelling circumstances entitling the court to depart from imposing the minimum sentence, must still put on the balancing scale that very fact of injuries, consider it together with all relevant facts in that particular case.

[54] The appellant did not get any financial benefit out of this robbery. The items robbed were a lunch pack, police book, and plastic ear plugs that were to be used at the shooting range. All these items were estimated by Mr. Nukeri to be worth R70, 00. It does not seem that the magistrate paid any attention to this fact. I must hasten to say that the value of the loot in robbery, is not *per se* a major consideration. It cannot however, be ignored.

[55] The prospect of rehabilitation is a major consideration, vide *S v M* 1994 (2) SACR 24. The magistrate was wrong in his approach by adopting a simplistic approach and stating that in his view, the personal circumstances of the appellant are not substantial and compelling circumstances, without applying his mind on the rehabilitation prospects of the appellant, especially having regard to his age. I am of the view that the magistrate misdirected himself in finding that there were no substantial and compelling circumstances in this matter.

[56] The fact that the appellant was shot and spent some time at the hospital, coupled with the fact that at his age, there is a good prospect of rehabilitation gleaned from the fact he is a first offender, as well as the value of R70 and involved in the robbery, taken together these facts qualify to be regarded as substantial and compelling circumstances. In my view the magistrate misdirected himself on the aspect of substantial circumstances and therefore this court is entitled to interfere with the sentence of 15 years imposed.

[57] I am of the view that the sentence of 15 years in the circumstances of this case should be set aside and substituted with the sentence herein below. As I have stated herein above, there is no need to interfere in the sentence imposed on counts 2, 3 and 4. For purposes of convenience, I shall herein below make an order that the magistrate should have given.

[58] In the result I make the following order:

1. That the conviction on counts 1, 2, 3 and 4 are confirmed;
2. That the sentences imposed on counts 2, 3 and 4 are confirmed;
3. That the sentence of 15 years imprisonment on count 1 is set aside and substituted as set herein below:

- “1. that on count 1: The accused is sentenced to eight
(8) Years imprisonment;
2. That count 3 and 4, possession of firearm and
Ammunition is for purposes of sentence taken as
one. The appellant is sentenced to three (3) years
imprisonment.
3. That it is ordered that two (2) years of the three years
imprisonment to run concurrently with the sentence in
count 1.
4. That the accused is declared unfit to possess a
firearm”

HEARD : 04 MAY 2009

DELIVERED: 15 MAY 2009

N. M. MAVUNDLA

JUDGE OF THE COURT

I AGREE

T. PHALANE

ACTING JUDGE OF THE COURT

