



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 614/10

In the matter between:

THABO VINCENT SHILAKWE

Appellant

and

THE STATE

Respondent

Neutral citation: *Shilakwe v The State*
 (614/10) [2011] ZASCA 104 (1 June 2011)

BENCH: BRAND, PONNAN, SHONGWE JJA

HEARD: 25 MAY 2011

DELIVERED: 1 JUNE 2011

CORRECTED:

SUMMARY: Appeal – no live issue – court should avoid giving advisory opinion; evidence – mosaic of proof – useful aid to break down evidence into its component parts – evidence ultimately to be assessed holistically.

ORDER

On appeal from: Gauteng High Court (Circuit Local Division - Vereeniging) (Prinsloo J sitting as court of first instance).

The appeal is dismissed.

JUDGMENT

PONNAN JA (BRAND and SHONGWE JJA concurring):

[1] On Sunday, 30 November 2003 at approximately 5pm Ms Florence Mazibuko was standing together with her friends Maria and Abdul outside Adam's Store in Klipriver when she observed four men enter the store and emerge with a two litre coldrink. Whilst they were drinking the coldrink one of four complained that he was hungry. Two of them then re-entered the store ostensibly to purchase bread. After a short while one of the two who had remained outside approached Ms Mazibuko and her friends. He drew a firearm, threatened to shoot them if they made a noise and ordered them into the store. Ms Mazibuko described the firearm as a handgun that was brown in colour with a wooden handle.

[2] According to Ms Mazibuko when they entered the store one of the four men was emptying the cash register. Another had what she described as a long firearm trained on Ms Hawa Ebrahim, the proprietor of the store. He then struck Ms Ebrahim on her face with the firearm, grabbed her hair and stamped on her. He threatened to shoot her if she did not supply him with the keys to the safe. When she did not comply he discharged his firearm. Ms Ebrahim eventually relented and produced the keys from her person and accompanied her assailant to the safe. Ms Mazibuko became aware that a certain Mr Witbooi, who was alongside her, was whimpering. Concerned that he would attract

attention to himself and her, she asked him to keep quiet. She then observed that a liquid was oozing out of his mouth and heard one of the group tell the person who was in possession of the long firearm 'You have shot him'. The group then made good their escape with two boxes that they had filled with cigarettes and other goods from the store. On leaving the store one of the four locked the door to the store from the outside.

[3] Shortly after the robbers had fled Mr David Mbakaza, a security guard, arrived in a marked security vehicle at Adam's Store to purchase food. He was alerted by Ms Mazibuko to the occurrence of the robbery and informed that someone had been shot during its course. Mr Mbakaza set off in his vehicle in pursuit of the robbers. As he approached a railway bridge in close proximity to Adam's Store he noticed a white Toyota Venture motor vehicle parked under some trees. He drove past the Venture and proceeded in the direction of a nearby informal settlement. He took the precaution of recording the registration particulars of the Venture. At the informal settlement Mr Mbakaza made a u-turn. On his way back he observed two males, who upon seeing him, started to run. He telephoned the police emergency number 10111 but there was no response. He thereafter dialled 112 and reported the matter. He then realised that the Venture, which was being driven by a person with dreadlocks and had another occupant in the front passenger seat, was following him. No sooner had that realisation dawned on him when he fortuitously came upon a police vehicle and signalled to them.

[4] Captain Molotsi of crime intelligence and Constables Matsose and Molefe had just set out from Adam's Store in pursuit of the perpetrators of the robbery when they came upon Mr Mbakaza. Responding to his signal they stopped the Venture and arrested its two occupants. Acting on the information furnished by Mr Mbakaza those police officers then set off in pursuit of the two men who had earlier been observed on foot.

[5] When the police officers came upon those two men, one of whom was dressed in a white T-shirt and the other in a black T-shirt, they started to run. Constable Matsose chased after the one in the black T-shirt, who turned and shot at him with a shotgun.

Constable Matsose lost sight of that person in the veld. In the meantime Mr Corné Kriek, a commando member, who had been alerted to the robbery, joined the police in their search for the suspects after having received a report from Captain Molotsi. He was alerted by the screams of a group of children who pointed in the direction of a male in a black T-shirt running in the veld. As he approached that person with his firearm at the ready that person appeared to lose his footing and fell in the tall grass. Mr Kriek arrested him, handcuffed him and handed him over to one of the other police officers who had also joined the search, Sergeant Malindi. Sergeant Malindi, who searched the person in the black T-shirt immediately after his arrest, found a 12-bore shotgun cartridge in his pocket. Constable Matsose immediately recognised the person in the black T-shirt, who had been arrested, as the one that had earlier fired on him with a shotgun, whilst being chased.

[6] According to Captain Malotsi, the person in the white T-shirt was prevented from making good his escape by a group of men who had arrived on the scene in response to his call for back up. The person in the white T-shirt surrendered and he was also arrested and informed by Capt. Malotsi that he was suspected of having been involved in the robbery at Adams store. The next day a search was conducted of the area. Inspector Erasmus, who took over as the investigating officer of the case, came upon some boxes under the railway bridge. The contents of those boxes were subsequently identified as having been stolen from the store during the robbery. And, Sergeant Alfred Retief, whilst undertaking a sweep search of the area where Accused 2 had been arrested found a shotgun, which according to him, appeared as if it had been recently discarded at that spot.

[7] The four persons arrested that day were formally charged with robbery, murder, the attempted murder of Constable Matsose and the unlawful possession of firearms and ammunition.

[8] The driver of the Venture, Mandla Innocent Sehatsane, was initially indicted as accused number 1; the passenger of the Venture, Roro Sitzuzu, as accused number 2;

the person in the black T-shirt, Ayanda James Maseko, as accused 3; and the person in the white T-shirt, Thabo Vincent Shilakwe, as accused 4. According to the Inspector Erasmus, two further suspects came to be implicated in the commission of the offences. Inspector Erasmus arrested those two suspects, Thabang Jacob Rapoluti and Queen Bulelwa Nomogena, who were joined as accused numbers 5 and 6, respectively. Ms Nomogena died before the commencement of the trial. At the commencement of the trial before Prinsloo J (sitting with assessors) in the High Court (Circuit Local Division - Vereeniging) the trial of accused no 1, Mandla Sehatsane, who had fallen ill, was separated from that of the remaining accused. In the result the accused came to be renumbered thus: Mr Sitzuzu - accused 1; Mr Maseko - accused 2; Mr Shilakwe - accused 3 and Mr Rapoluti - accused 4.

[9] Accused 1 was acquitted on all charges. Accused 2 was convicted on all five charges whilst accused 3 and 4 were acquitted on the attempted murder and convicted on the remaining charges. Having found that the Criminal Law Amendment Act 105 of 1997, the so-called minimum sentencing legislation, was applicable to the convictions on the murder, robbery and attempted murder, each was sentenced to life imprisonment, 15 years' imprisonment and 5 years' imprisonment (solely in respect of accused no 2), respectively. In respect of counts four and five, which did not fall within the purview of the minimum sentencing legislation, each was sentenced to two years and one year imprisonment respectively.

[10] This appeal, with the leave of the trial judge, solely by accused 3, Mr Shilakwe lies against his convictions on all of the charges as well as the sentences imposed pursuant thereto.

[11] Whilst in the ultimate analysis the evidence must be looked at holistically in order to determine whether the guilt of the appellant was proved beyond a reasonable doubt, the breaking down of the evidence into its component parts is obviously a useful aid to a proper evaluation and understanding of it. The evidence adduced by the State linking the appellant to the offences consisted of the eyewitness testimony of Ms Mazibuko; the

evidence of Mbakaza and the various police officers, who were present when he was arrested; the appellant's statement to the investigating officer, Inspector Erasmus; the appellant's pointing out to Captain Majaja and his statements accompanying the pointing out and accused 4's statement to Inspector Erasmus.

(a) The eye witness evidence

During her testimony Ms Mazibuko identified the appellant as one of the robbers. She testified that she had had adequate opportunity to observe him in good natural lighting whilst he was outside. According to her, he was the person who possessed the handgun and who had ordered her friends and her into the store. She stated that the firearm that she had observed in his possession was similar to Exhibit 1 before court. Exhibit 1 was described in the evidence as a 9mm Beretta pistol which did indeed have a wooden handle as she had earlier described in her evidence. Ms Mazibuko had identified the appellant at an identity parade. Before us there was some attempt by counsel to suggest that the identity parade did not comply with the internal departmental orders adopted by the South African Police Services in relation to the conduct of identity parades. Accordingly, so the submission went, 'the probative value of the identification parade was seriously compromised' and offered 'little value in finding corroboration for Ms Mazibuko's identification'. What stood in the way of that submission though was a formal admission by the appellant, in terms of s 220 of the Criminal Procedure Act 51 of 1977, to the following effect:

'8.1 Dat Kaptein J Fouché op 22 November 2004 'n uitkenningsparade te Leeuwhof gehou het."
U edele, hier gaan net 'n wysiging kom in paragraaf 8,8.1: Die beskuldigdes 2 en 4 ek wysiging dit. Waar "3, 4 en 5" was is dit nou "2, 3 en 4 as verdagtes op die parade verskyn het.

"8.2 Dat die parade aan alle statutêre en gemeenregtelike voorskrifte en reëls voldoen het.

8.3 Dat die inhoud van die uitkenningsparade, BEWYSSTUK E, erken word en ingehandig word.'

Thus whether or not the various criticisms levelled by counsel at the identity parade were indeed well-founded were not investigated by the trial court. In those circumstances it could hardly be expected of this Court, absent a proper factual foundation, to do so.

(b) The evidence of Mbakaza and the police witnesses

Each of David Mbakaza, Captain Molotsi and Constable Motsotse placed the appellant together with accused 2 in the vicinity shortly after the robbery had been committed. All testified that he was the person wearing the white T-shirt, who they observed attempting to flee. On those crucial aspects they materially corroborated each other. Moreover by the end of the case it came to be undisputed that he was indeed the person in the white T-shirt who was arrested whilst attempting to flee.

(c) The appellant's statement to Inspector Erasmus

Inspector Erasmus testified that the appellant made a warning statement to him in which he inter alia implicated accused 4 and Queen Nomogena. He moreover, according to Inspector Erasmus, took the latter to their respective homes and pointed them out.

(d) The appellant's pointing out

The statement accompanying the appellant's pointing out reads:

'The suspect Thabo is not familiar with Meyerton Area and ask to be taken back to Kliprivier at Thokoza/Heidelberg Road near the four way stop and request is granted. D/Insp. Bedford drives to the four way. . . . Thabo request that we make a u-turn and drive back towards Meyerton on Old Kliprivier/Meyerton road. Reach four way stop Karee kloof/Meyerton and Thabo request us to turn left at intersection. Drive under train bridge and Thabo request driver to slow down as he looks around and suddenly tell the driver to turn left at a side road junction and point to the direction of shops and specifically points at a shop to the right and informs me it is where they committed the robbery. Thabo ordered the driver to stop at the shop he pointed out. The shop is green in colour

Near the entrance of the shop Thabo point to the left of the shop a foot path that he and three accomplices namely, Motlalepule Thabang and Sibusiso approached the shop from.

Thabo then pointed out how he entered the shop through the door and went to the counter where he bought 2litre Cola drink. Thabo then went back at the entrance at the door while Motlalepule entered the shop and went further back into the shop. Thabo pointed out a spot where Motlalepule stood when he shot the deceased with the pump gun he was having and also the spot were he hit an old Indian woman with the butt of the pump gun. Thabo also pointed out the shelves where Thabang and Sibusiso took cigarettes from before they left the shop.

Depart from the shop at 14:25 back to the main road and turn left at the main road. Stop a few metres just past a train bridge and Thabo point out the direction Thabang and Sibusiso took when they left the shop. Got back into vehicle and drove a few hundred metres and Thabo requested us to stop . . . and Thabo points out a spot where the Toyota Venture they were using was waiting for them. At this point Thabo and Motlalepule boarded the Venture. The Venture drove in an Easterly direction and stopped a few hundred

metres where Thabo and Motlalepule got off. Thabo asked that the Venture went back to go and collect Thabang and Sibusiso and when they did not come back Thabo and Sibusiso decided to leave the scene. . . . Thabo offered to show me the place where he was arrested and where he hid the firearm he was carrying. At this time Thabo had a problem with the exact spot because we were travelling in a vehicle whereas he was walking through the fields and his sense of direction was confused. I order Insp. Bedford to drive around the area in case Thabo recognised some of the features but without success.

The odometer reading was climbing as we drove around.

At 14:55 I asked Insp Bedford to contact the arresting officer to join us at the bridge where the suspect Thabo seem to think he had crossed before he got arrested. At 15:05 we met Insp Molotsi who was the arresting officer. I explained the problem to Insp. Molotsi and asked him to take [us] to the place where he had arrested the suspect Thabo. Insp. Molotsi then took us to Plot 46 Gardenvale. Immediately [when] we reached this plot. Thabo recognised the place and ordered us to stop at an open space near Plot 46 Gardenvale. Thabo then informed me that he had hidden the firearm at this open veld but he could not point the exact spot but we had to look around while searching the place. Insp. Molotsi found the firearm and called us all to it, The firearm was concealed by weed/grass. I let Insp. Tlali took photo of the firearm and also Thabo pointed the scene where he had hid the firearm. The time was 15:18.

I let Insp. Bedford take the firearm, a 9mm Pietso Beretta with one (1) round inside the chamber and eight (8) rounds inside the magazine. The firearm have no serial number. The firearm had it's butt covered with wood on the sides. Insp. Bedford was instructed to book the fire arm into the SAP 13.

At 15:25 we departed back to Meyerton SAPS'

The appellant formally admitted in terms of s 220:

' "Dat beskuldigde 3 T V Shilakwe, 'n formele uitwysing gemaak het aan kaptein P S Majaja. Dat kaptein Majaja, 'n offisier in die Suid-Afrikaanse Polisie Diens is en aangestel as 'n vrederegter soos bepaal onder die relevante wetgewing, insluitend Wet 51 van 1977." (Dit is die Strafproseswet)

. . .

"Dat die uitwysing aan alle statutêre en gemeenregtelike voorskrifte en reëls voldoen het. Die beskuldigde sy regte verstaan het en vrywillig en sonder onbehoorlike beïnvloeding ten volle by sy positiewe nugter die uitwysing gemaak het. Dat die inhoud van die uitwysingsnotas korrek is en as BEWYSSTUK G erken word en ingehandig word.

Dat die inhoud van die foto's geneem voor, tydens en na uitwysings (uitwysing moet dit wees, u edele) erken word en ingehandig word as BEWYSSTUK H." '

(e) The statement by accused 4

Relying on the authority of *S v Ndlovu* 2003 (1) SACR 331 (SCA), the trial judge ruled that the statement of accused 4, which had implicated his co-accused including the appellant, was admissible in evidence against them as well.

[12] To the evidence adduced by the State, must be added that of accused 1 and 2, both of whom testified in their defence. Accused 1, who was found not guilty largely because his version could not be rejected, testified that on the day of the incident he came upon the erstwhile accused 1, Mandla, who was driving a white Venture close to his home in Khatlehong. Mandla, who owned the Venture and who he knew to be a good person, asked accused 1 to accompany him. When accused 1 enquired where they were going to, Mandla replied that he was taking the other occupants of the vehicle to Klipriver. When they got to Klipriver, two of the other occupants - the appellant and accused 4 - alighted from the vehicle and made a telephone call at certain public telephones. After having made the call, they told Mandla to drive to a nearby bridge. At the bridge, the appellant, accused 2, accused 4 and a fourth person alighted from the vehicle where they met a young woman. Another young woman, who arrived in a Toyota Cressida, joined the group. Whilst that group were in the midst of a discussion, Mandla suggested that they drive to the nearby informal settlement to purchase cigarettes. When they returned to the bridge the appellant and accused 2 attempted to board the vehicle but were prevented from doing so by Mandla, who noticed that they were possessed of firearms. A short while later the police arrived and the two of them, who were still in the Venture, were arrested. Under cross-examination accused 1 admitted that upon their return after having bought cigarettes he observed two of the four that had earlier alighted from his vehicle disappear under the bridge with some big boxes.

[13] Accused 2, Ayanda James Maseko, confirmed accused 1's version that he and his co-accused had travelled together with Mandla in the latter's Venture to Klipriver with the purpose, so he stated, of securing the services of prostitutes. The appellant and accused 4 were well known to him. According to him, when they got to the bridge he negotiated with a prostitute and accompanied her into the veld. When he returned the

Venture was gone. He was on his way to the taxi rank to secure a taxi to get back home when he was arrested.

[14] It is now necessary to step back a pace and consider the mosaic as a whole (*S v Hadebe* 1998 (1) SACR 422 at 426g-h). In my view the trial court could in this case have rested its conviction of the appellant on one of two edifices. First, there was the evidence of Ms Mazibuko, supplemented by that of the accused 1 and 2, taken together with that of Mbakaza and the police witnesses who testified as to the appellant's arrest. And second, the evidence of the appellant's pointing out and his statements accompanying the pointing out. Each edifice, independently of each other, called for a response from the appellant. As I have already pointed out, the appellant did not testify in his defence. That was his right. But it is not without its consequence. (*S v Tandwa* 2008 (1) SACR 613 (SCA) para53.)

[15] It is so that Ms Mazibuko was a single witness. Ms Hawa Ebrahim did not testify. The trial court was informed that on account of her advanced age and what was referred to as her senility she would not have been of any assistance to the court. Ms Mazibuko's evidence fell to be treated with caution, as indeed it was. I can find no warrant for rejecting her evidence. In short she was a good witness and her identification of the appellant as one of the perpetrators was reliable. Corroboration for her evidence is to be found in the evidence of the appellant's two co-accused, who testified. They put the appellant in the vicinity of the robbery, some 50 km from his home in Kathlehong. Moreover accused 1 corroborates her version that the appellant was indeed armed. The evidence of the appellant's two co-accused completes the mosaic. It establishes the movements of the group, including the appellant prior to the robbery. And the evidence of Mbakaza and the arresting police officers establishes the movements of the appellant and his co-accused immediately after the robbery. That body of evidence on its own, as I have stated, was sufficient to put the appellant on his defence. When, however, the pointing out and the statements accompanying it are taken together with that body of evidence the case against the appellant becomes overwhelming. Taken cumulatively, the appellant's statements accompanying the

pointing out, also lends material corroboration for Ms Mazibuko's evidence. His account of the robbery accords with Ms Mazibuko's in all material respects.

[16] Plainly, the evidence that I have alluded to established the guilt of the appellant beyond reasonable doubt. In arriving at that conclusion I have deliberately ignored from consideration the evidence ruled to be admissible pursuant to *S v Ngcobo*. In granting leave to appeal to the appellant the learned trial judge appeared to entertain some doubt as to the correctness of *Ngcobo* (See *S v Ralukukwe* 2006 (2) SACR 394 (SCA); *S v Balkwell & another* [2007] 3 All SA 465 (SCA) and *S v Libazi & another* 2010 (2) SACR 233 (SCA)). He thus granted leave to the appellant to appeal to this court. As I have shown, the convictions in this case are well founded without resort to the evidence that subsequently occasioned the learned judge feelings of disquiet. To turn to consider that issue in these circumstances would cause this court to involve itself in what may safely be described to as an abstract, academic or hypothetical question. That we should not do. For, as Innes CJ stated in *Geldenhuis and Neethling v Beuthin* 1918 AD 426 at 441:

'After all, courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'

And in *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), Ackermann J said the following at para 21 (footnote 18) with reference to *J T Publishing (Pty) Ltd & another v Minister of Safety and Security & Others* 1997 (3) SA 514 (CC):

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

(See also *Radio Pretoria v Chairman, ICASA* 2005 (1) SA 47 (SCA).)

[17] As to sentence. It is trite that this court will not interfere with the sentence imposed by the court below unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. No misdirection has been alluded to, nor can it be said that the sentence induces a sense of shock.

[18] It follows that the appeal against the convictions and the sentences imposed pursuant thereto must fail and in the result it is dismissed.

V M PONNAN
JUDGE OF APPEAL

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