THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 411/10

In the matter between:

JAMES NKOSI **First Appellant**

ZWELI ALBERT MTHETHWA **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: *James Nkosi v The State* (411/10) [2011] ZASCA 83 (27 May 2011)

Coram: PONNAN, MAYA JJA AND PETSE AJA

Heard: 17 March 2011

Delivered: 27 May 2011

Summary: Appeal against convictions and sentences **–** whether appellants ought to have been discharged at close of state case in terms of s 174 of the Criminal Procedure Act 51 of 1977 – whether convictions and sentences imposed appropriate.

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ORDER

On appeal from: North Gauteng High Court (Pretoria) (Hussain J sitting as court of first instance):

1. The first appellant's appeal succeeds. His convictions and sentences are set aside.
2. The second appellant's appeal is dismissed.

JUDGMENT

MAYA JA (Ponnan JA and Petse AJA concurring):

[1] In the early hours of 9 September 2004, a gang of heavily armed robbers travelling in a blue Toyota Tazz motor vehicle attacked Fidelity Cash Management Services (Fidelity) security guards who were transporting cash from Boksburg to a Benoni pension pay-point, east of Johannesburg. The attempted cash-in-transit heist occurred on the busy N12 highway between Benoni and the Etwatwa off-ramp, between 06h00 and 07h00, in heavy early morning traffic. The Toyota had been violently robbed at gunpoint from its driver, Mr Joao Ananias Matembu, on the previous evening.

[2] Unbeknown to the robbers, Fidelity had received a tip-off of an impending robbery. The police had been duly alerted and strategically positioned themselves along the relevant route. The attack occurred as anticipated. During the course of the attempted robbery, one of the two Fidelity vehicles and a passing motorist, Mr Johannes Hendrik Humphries, were shot by the gang. However, the police were waiting in the vicinity and a gunfight ensued between them and the gangsters who were armed with AK47 assault rifles and semi-automatic 9mm pistols. In the melee, the police shot four men. Two of them died at the scene. The other two, one of them, the second appellant, were arrested and conveyed to hospital. The third man died in hospital on the same day.

[3] A Mazda 626 vehicle which had been observed at the crime scene during the commission of the offences was seen driving away. The police gave chase and a similar vehicle was subsequently found at a taxi rank in Daveyton, a township about 30 to 40 kilometres away. Its driver, the first appellant, was arrested.

[4] The appellants were subsequently charged (a) on count 1, with robbery with aggravating circumstances of the Toyota; (b) on count 2, with attempted robbery with aggravating circumstances of the Fidelity vehicle, alternatively unlawful conspiracy with Sibanda (an employee of Fidelity who was murdered before the trial) to commit robbery; (c) on count 3, with the attempted murder of Humphries; (d) on counts 4,5 and 6, with the murders of the three would-be robbers Prince Hlophe, Philip Mahlaba and Vunokwakhe Mtshali; (e) on count 7, with unlawful possession of two AK47 rifles (f) on count 8, with unlawful possession of six 9mm pistols and (g) on count 9, possession of 7,62mm, 7,65mm and 9mm calibre ammunition.

[5] The appellants pleaded not guilty to all the charges. After hearing evidence, the court below acquitted them in respect of the counts of the robbery of the Toyota (for lack of evidence against them) and the three counts of murder (the court found that the dead gangsters had been lawfully killed by the police acting in private defence). They were, however, convicted on counts 2, 3, 7, 8 and 9. They were then each sentenced to undergo 15 years imprisonment on count 2, seven years imprisonment on count 3, five years imprisonment on count 7, three years imprisonment on count 8 and 2 years imprisonment on count 9. The sentences on counts 7, 8 and 9 were ordered to run concurrently with those imposed on counts 2 and 3. Thus, they were each sentenced to an effective term of 22 years imprisonment.

[6] The court below granted both appellants leave to appeal against their convictions and sentences. The state also sought leave to cross-appeal against their acquittals on the murder charges, which was granted, but abandoned its appeal before the hearing. Only the appellants’ appeals remain for adjudication.

[7] The state called several witnesses to support its case. The evidence of the first of those witnesses, Matembu, is not relevant for present purposes as it concerned the robbery of the Toyota which is no longer in contention. Humphries, the next witness, testified that he was driving his bakkie along the N12 highway from the Witbank direction on his way to work in Johannesburg at about 06h20. He noticed two Fidelity vehicles approaching from the opposite direction. The one ahead suddenly swerved and turned around towards Johannesburg whilst the other one stopped. There was commotion as traffic halted abruptly and those who could, realizing that something was wrong, turned around to escape.

[8] He stopped his bakkie in preparation to turn back. But before he could move, a blue Toyota Tazz came from the opposite direction and stopped in the middle of the highway, about 150 metres from him. A man carrying an AK47 rifle alighted from the vehicle and walked

towards him, firing shots directly at his bakkie. One bullet penetrated his vehicle and struck his right shoulder. At that moment, a number of police vehicles swooped and a police helicopter landed behind his vehicle on the highway. His assailant was shot by the police and fell in front of his vehicle. The Toyota sped off pursued by the police who were shooting at it. It swung around and stopped at a nearby field. One of the vehicles that he noticed at the crime scene was a 'white Mazda 626' which drove away towards Johannesburg, behind the fleeing Fidelity vehicle, when the trouble started. A policeman assisted him out of his vehicle and he was taken to hospital.

[9] One of the police officers monitoring the N12 highway before the incident was Inspector Jacobus Johannes Redelinghuys of the Serious Violent Crime Unit, Pretoria. According to him, members of his unit travelled to the N12 highway early that morning with an order to scout the road for a possible robbery. He travelled with a colleague, Captain Viljoen. They chose a spot along the highway and lay in wait. Not long thereafter, a green Fidelity vehicle drove past slowly towards Witbank followed closely by a 'gold Mazda 626' which drove on the yellow line of the road. Behind the Mazda followed another police vehicle from his unit, which was also on the stake-out. They joined the traffic and followed about 100 to 150 metres behind the Mazda, separated from it by one vehicle. At some stage, the Fidelity vehicle and the Mazda drove around a bend and disappeared from their sight momentarily.

[10] They saw traffic suddenly turning around and speeding away and heard the sound of gunfire. They drove on and saw a blue Toyota Tazz, which travelled parallel to the highway, drive onto the nearby field, alongside the highway, and stop. The front passenger jumped out of the vehicle before it came to a complete standstill. Redelinghuys jumped out of his vehicle and approached the Toyota. The driver and a left rear passenger who remained in the Toyota alighted and he ordered them to lie on the ground. He confiscated the cellular phones he found upon searching them and noticed that they both had gunshot wounds. The man who jumped out of the Toyota earlier lay about 10 to 20 metres from it and had

been apprehended by the other police officers. He was wounded. He searched him and removed his cellular phone. He found a 9mm pistol on the road near the Toyota. A man lay dead in the middle of the road and next to his body was an AK47 rifle. He did not see the Mazda again and had noticed neither its registration details nor its occupants as he had seen it from a distance of about 200 to 250 metres.

[11] Captain Johannes Fryer was in one of the police vehicles which lay in wait at various observation points along the N12 highway. He testified that his party received a radio message alerting them to the approach of the Fidelity vehicles. They were shortly passed by one of the vehicles and followed it from behind a large volume of traffic spanning about 200 metres. Sudden gunfire erupted from the opposite direction bringing the traffic to a standstill. They weaved their way through and saw a blue Toyota Tazz parked on the right-hand side of the highway, facing the Witbank direction. Two men stood near it. One carried an AK47 rifle and was shooting at the Fidelity vehicle which tried to turn around towards the direction from which it had come. They could not see what the other man carried in his hands.

[12] Superintendent Blom, who drove their vehicle, stopped and activated its blue light. They approached the gunman and ordered him to stop shooting, but he turned around and shot at them. They returned fire and the man dropped to the ground. Inspector Bambeger, one of his crew, approached the injured man to arrest him. Meanwhile, he and Blom pursued the Toyota which was driving away into the field. The vehicle stopped and he saw a man running away from it. He ordered him to surrender and subsequently arrested him. He then handed him to another colleague and left to join the helicopter crew to pursue a brown or beige Mazda 626 which, they were told by radio control, was involved in the offences and was

fleeing the crime scene towards Daveyton. However, they were informed shortly after take-off that the Mazda had been apprehended at the Daveyton taxi rank and returned to the crime scene.

[13] According to Constable Gaba Magaqa of Daveyton police station, a message came through radio control, reporting a robbery along the N12 highway, some 30 to 40 kilometres away, and that a 'light brown Mazda 626' with two occupants had been seen speeding towards Daveyton. He set off in chase with the assistance of a helicopter which flew overhead. He saw the vehicle pass a local college, Isidingo, at high speed and followed it to the local taxi rank for a distance he estimated initially between 200 to 250 metres, then a kilometre to a kilometre and a half and, finally, 40 to 50 metres. Once the vehicle stopped, two people jumped out and ran towards different directions. One of them, the first appellant, went to hide under a parked motor vehicle from which he dragged and arrested him in the presence of other police officers and the helicopter which still hovered above them.

[14] A few more witnesses testified briefly on behalf of the state to tidy up some loose ends. Captain Sebola Mampane of the East Rand Services and Violent Crime Unit said that he arrived late at the crime scene, after it had been 'contained' and followed up on the whereabouts of the second appellant who was reported to have been arrested there. He found him at Springs Police Station on the following day, wrapped in bandages, and charged him. Inspector Jacobus van der Linde of Fidelity's Investigations Services Intelligence Unit confirmed receiving a tip-off about a possible robbery. Only the rear wheels of their vehicle were damaged in the incident and its occupants were treated only for shock. Another witness was Mr Lunga Mthombothi, a paramedic of the Etwatwa Fire Department and one of the crew who attended to the injured men at the crime

scene, who identified themselves as Dumisani Hlophe and Zweli Mthethwa (the second appellant). He conveyed them to hospital and had them admitted. The last witness was the investigating officer of the case, Inspector Goosen. He confirmed the death of Sibanda who, he said, would have been a key state witness but for his murder.

[15] At the close of the state case, the first appellant's legal representative expressed an intention to apply for his discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977. However, the court below brusquely informed him that to do so would be 'a waste of court time' as 'the practice was not to grant discharges piecemeal where there are multiple accused involved' although ' it would have been a very different matter if [the first appellant] had been on his own'. Thus, the application was aborted.

[16] Both appellants then testified in their defence and denied any involvement in the commission of the offences. It emerged from their evidence that they were old friends and that the vehicle driven by the first appellant on the day of the incident, a brown Mazda 626 as he described it, belonged to the second appellant. According to the first appellant, a taxi owner, he had purchased the vehicle on the second appellant's behalf in December 2003. He borrowed it on the day preceding the incident because his vehicle had broken down. When it transpired during his cross-examination that he owned several vehicles which were in good working order at the material time, he said that he intended to use the Mazda to track down one of his taxis which had been stolen. The taxi rank from which he operated was strictly patrolled on Tuesdays and Thursdays and all taxi owners were expected to be present or face penalties which included a fine. As he would not be able to remain at the taxi rank and the disciplinary committee had already queried his frequent absences, in writing, he used the Mazda to avoid detection by the

patrollers when he left because they knew his vehicles.

[17] He left his home in Katlehong shortly before 06h00 on the fateful day and drove straight to the taxi rank in Daveyton using the Wattville Road. It appeared that the vehicle's engine was faulty as it kept 'cutting'. He thought that it might have run out of fuel and could not rely on its petrol gauge. He parked the vehicle near a public telephone shop and asked around for an empty container in order to buy petrol. Whilst waiting for the container he approached one Bheki Molotwa whom he had asked to repair his cellular phone. The special task force police arrived at that juncture and summarily arrested them together with four or five other people.

[18] After being handcuffed, they were handed over to another team of police officers. According to him, Magaqa was not among his arrestors and he recalled being arrested by Inspector Moleka. They were led to the nearby Daveyton police station and, later, were conveyed by car to the Germiston Murder and Robbery Unit. On the following evening he heard Molotwa's name being called. He did not see him again and when he asked the investigating officer about his whereabouts, he was informed that he had been taken to Rustenberg for another case. He met the second appellant during a subsequent court appearance and learnt that he had also been arrested on the day of his own arrest. He denied travelling on the N12 highway, which he estimated to be about 30 to 40 kilometres from the taxi rank.

[19] The gist of the second appellant's testimony was that he was inadvertently caught in cross-fire between the police and the would-be robbers and that he was arrested whilst on his way to fetch his vehicle from the first appellant in Daveyton. He said that he left home after 05h00 after receiving a telephone call from the first appellant reporting that the Mazda had a fault. The vehicle's petrol pump was

generally not in a sound condition and, as he knew how to fix it, he went to assist the first appellant who advised him to call for directions to his location when he reached Etwatwa. He travelled to Germiston and, from there, caught another taxi to Benoni where he would catch the last taxi to his destination, Daveyton taxi rank. However, upon arrival at the Benoni taxi rank, he found no available transport. He then took a lift in a truck travelling to Middleburg on the N12 road which dropped him off at the Etwatwa off-ramp just as the gunfight started. He was then arrested in the confusion whilst fleeing the scene which he had not even had the opportunity to observe.

[20] On the basis of this evidence, the court below found that the state witnesses were credible and that the state version of the events was largely unchallenged. Adverse credibility findings were made against the appellants who were described by the court as very unsatisfactory, evasive and lying witnesses with improbable versions which could not reasonably possibly be true. In the court's view, the evidence established beyond reasonable doubt that the appellants received information from Sibanda which they used to execute the attempted robbery using the Toyota, in which the second appellant travelled, and the Mazda carrying the first appellant and Sibanda, who fled the scene upon encountering the police but were nonetheless seen and followed to Daveyton where they were arrested.

[21] I deal first with the first appellant's conviction. What linked him to the case is only the fact that he drove a Mazda 626 vehicle belonging to the second appellant on the morning in question. I have a grave difficulty with the description of the Mazda 626 observed at the crime scene. The witnesses variably testified about a 'white', a 'gold' and a 'light brown or beige' vehicle. Humphries and Redelinghuys each saw the same vehicle model but in starkly different colours travelling towards the opposite ends of the highway. Whatever description is

accepted, it could hardly be the brown vehicle found subsequently. Significantly, neither witness had observed the 'white' or 'gold' vehicle being used in a manner which singled it out from the numerous vehicles said to have been on that road, other than following behind the Fidelity vehicle. But then Redelinghuys believed the one he saw to have followed the flow of traffic towards Witbank as he did not see it again. Humphries saw the white one turn around and drive towards Johannesburg behind the Fidelity vehicle as other vehicles did. Neither witness got close to either vehicle sufficiently to see its registration numbers or its occupants.

[22] Most importantly, other than the cryptic radio message from a faceless individual mentioned by Fryer and Magaqa, to pursue a 'light brown or beige' Mazda believed to be involved in the attempted robbery with no other distinguishing features given, no evidence at all was led to establish that such 'light brown of beige' vehicle (a) had been observed at the scene, (b) what rendered it suspicious and (c) if it was the same vehicle seen by Magaqa, some 30 to 40 kilometres away. Magaqa's evidence that he tracked it with the helicopter's assistance merely created more uncertainty because Fryer who was in that helicopter (the state led no evidence to show that more than one police helicopter was involved in the incident) said that they abandoned the chase quite early without once sighting the Mazda or going anywhere near Daveyton taxi rank, as Magaqa claimed, because of the radio report that it had already been captured. And, as indicated above, it turned out after some prevarication by Magaqa on this point in his cross-examination that he pursued the vehicle for a negligible distance, a mere 40 to 50 metres.

[23] These inconsistencies in Magaqa's evidence, especially when he was a single witness on this crucial aspect, seem to lend credence to the first appellant's denial, put to Magaqa during his cross-examination, that he was arrested by

someone else – a version which the state surprisingly ignored, despite the fact that the first appellant named the policeman he claimed to have arrested him, and did not call any of the several officers said to have been present during the arrest. But with or without Magaqa's dubious account of the pursuit of the light brown Mazda and capture of the first appellant, there remains a yawning gap between the seemingly innocent white and gold Mazda 626 vehicles last seen driving towards Johannesburg and Witbank, respectively, without taking any part in the commission of the offences and the light brown one observed by Magaqa hurtling past Isidingo College in Daveyton.

[24] As the court below itself seems to have realized, judging from its remarks mentioned in paragraph [15] above, the state had not established any evidence against the first appellant on which a reasonable man could convict him at the end of its case. The court below obviously refused to entertain his application for a discharge in the hope that his co-accused might provide incriminating evidence against him and supplement the state case. By so doing, counsel for the first appellant argued, the court below improperly exercised its discretion and violated his Constitutional right against self-incrimination.

[25] In *S v Lubaxa*,[1] this court found it an unlawful breach of an accused's rights under ss 10 and 12 of the Constitution[2] to refuse him a discharge if there is no possibility of a conviction except if he testifies and incriminates himself. But the court held that the same considerations may not arise where the prosecution's case against one accused might be supplemented by the evidence of a co-accused and explained the basis for the distinction as follows:

'[20] The prosecution is ordinarily entitled to rely upon the evidence of an accomplice and it is not self-evident why it should necessarily be precluded from doing so merely because it has

1 *S v Lubaxa* 2001 (2) SACR 703 (SCA) paras 18 ff.

2 The Constitution of the Republic of South Africa, 1996.

chosen to prosecute more than one person jointly. While it is true that the caution that is required to be exercised when evaluating the evidence of an accomplice might at times render it futile to continue such a trial (*Skeen* (*op cit* at 293)) that need not always be the case.

[21] Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances.'[3]

[26] As I have said, there clearly was no evidence upon which the court below might reasonably have convicted the first appellant at the close of the state case. Neither was there any reasonable basis, in my view, for an expectation that his co-accused might incriminate him. The second appellant had given no plea explanation and no indication whatsoever during the cross-examination of the state witnesses that he might do so. In fact, it did not emerge that the second appellant was ever at the scene until the evidence of Mthombothi and Captain Mampane was led in the late stages of the state case. And even then, there was no hint that he might augment the state case from the very terse and vague cross-examination of these two witnesses.

[27] Plainly, the court below failed to properly evaluate the evidence at the end of the state case and wrongly exercised its discretion. The first appellant was entitled to a discharge (which he was not even given a proper opportunity to apply for) and placing him on his defence in these circumstances undoubtedly denied him a fair trial. I should perhaps add briefly that even a consideration of all the evidence, including the defence version, did not warrant his conviction despite the flaws in his own testimony as the critical gap in the evidence remained. The court

3Compare *S v Ndlangamandla* 1999 (1) SACR 391 (W) at 393f-h*; S v Legote* 2001 (2) SACR 179 (SCA) para 9.

below misdirected itself in a number of material respects by giving insufficient attention to serious discrepancies in the state version and making findings (for example, that he tried to conceal that he was good friends with the second appellant, fabricated the character of Molotwa and was with Sibanda on the morning of the incident) which were not supported by the evidence on record.

[28] The position of the second appellant is, however, an entirely different matter. He was wounded and arrested at the scene of the crimes, a mere 10 to 12 metres from the gangsters' Toyota. The striking feature of his testimony is his extreme reluctance to reveal his capture at the scene by Fryer and that he had been injured there which he acknowledged only at the very end of his cross-examination. It seems incredible that an innocent bystander wounded by state agents and then, to add insult to injury, wrongly arrested would hide that fact instead of indignantly proclaiming his innocence and perhaps even seeking redress for the injustice.

[29] There are other features of the second appellant's version which cast doubt on its veracity. The first appellant said nothing at all about their alleged arrangement to meet that morning when he testified. Instead, he gave a contrary version during his cross-examination which went as follows

'After you fetched his motor vehicle, when did you see [second appellant] again? I saw him again at Springs after he was arrested … I was at court where we were all about to appear … Did you ask [second appellant] why he was arrested? … Yes … Did he tell you which place was it where there was shooting? … Yes … Did he perhaps explain to you where he was heading? Yes … he said he was going to fetch his car from me … at Daveyton. And how he was travelling? I did not ask him. I also told him that I did phone him to inform that his car was giving me trouble'.

[30] It was never put to Fryer that the second appellant informed him when he

was placing him under arrest that he had just alighted from a truck which had given him a lift. And the second appellant could not explain satisfactorily why he ventured on a long and arduous trip at the crack of dawn to fetch (or, irreconcilably, fix as he testified at some stage of his questioning) a car which was mobile, even if faulty, from the first appellant who had several vehicles instead of simply asking him to return it.

[31] The court below found it improbable that there would have been no taxis at Benoni taxi rank which is situated near a train station during the morning peak period as the second appellant claimed in an effort to explain his odd presence on the busy highway. I agree with that view. Furthermore, his evidence that he was unfamiliar with that area raises the question how he would have known about the seemingly obscure footpath to Etwatwa which traverses the mealie-field which he said he was planning to follow upon alighting from the truck.

[32] It was contended on the second appellant's behalf that the evidence of Redelinghuys and Fryer which suggested that he emerged from the Toyota was unreliable because the scene was mobile and dusty. I see no reason to doubt the reliability of these witnesses' observations. Redelinghuys was certain that the man he saw get off the Toyota was the same one they captured shortly thereafter, at no more than 20 metres from that vehicle. Fryer stated that even though it was dusty because of the ploughed field, one could still see clearly. He insisted that he saw no pedestrians in that vicinity and that even though he did not see the passenger get off the vehicle there was nowhere else that he could have come from but the Toyota. Photographs of the crime scene taken directly after the foiled robbery depict a flat, straight strip of a multi-lane road flanked by expanses of recently ploughed fields with no buildings in sight. They show no vegetation or any objects which would have obstructed the view of Redelinghuys or Fryer once they had their sights on the Toyota and make plain the sheer improbability of a pedestrian going unnoticed instead of standing out on the barren terrain, a version which was, in any event, never put to the two policemen.

[33] The second appellant's explanation for his presence at the crime scene simply did not bear scrutiny. The evidence presented by the state established beyond reasonable doubt that he was a passenger in the Toyota. The conclusion that he was one of the gang which set out to commit the foiled robbery is ineluctable in the circumstances. His convictions were, therefore, proper and should not be disturbed.

[34] Turning to the question of sentence, it should be reiterated that sentencing is pr-eminently a matter for the discretion of the trial court and that this court does not have an overriding discretion to interfere unless the sentences imposed by the court below are vitiated by irregularity or misdirection or are disturbingly inappropriate.[4] Although the appeal had been directed at the sentences imposed on the second appellant as well, his counsel conceded their correctness during the hearing.

[35] The concession seems to me proper in view of the judgment of the court below which shows that it carefully considered all the factors relevant in the enquiry – the second appellant's personal circumstances, the nature of the offences involved and the interests of society. Some of the sentences were, fairly, ordered to run concurrently with the sentences imposed in respect of the main counts.

[36] Section 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years imprisonment, which was imposed here, for the completed offence of robbery and makes no specific provision for attempted robbery of which the second appellant was convicted on count 2. In my opinion, there is little in the circumstances of this case to distinguish between a completed robbery and the heinous, foiled attempt by the second appellant, who runs a seemingly decent paving business, and his associates, which involved the use of heavy artillery and gratuitous violence with no regard for the safety of innocent civilians or police. The offence of robbery was all but completed and it is a miracle that Humphries survived and more people were not maimed or killed. The offences committed in this case count among the most violent and, unfortunately prevalent in this country. The harshest form of punishment is undoubtedly warranted.

[37] I am satisfied in the circumstances that there is no legal basis to interfere with the sentences and they must stand. The following order is accordingly made:

1 The first appellant's appeal succeeds. His convictions and sentences are set aside.

2 The second appellant's appeal is dismissed.

MML Maya

4 *S v Rabie* 1975 (4) SA 855 (A).

Judge of Appeal

APPEARANCES

APPELLANT:	H L Alberts Pretoria Legal Aid Centre
RESPONDENTS:	KM Mashile Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein