

SOUTH AFRICA / JUDGMENT

Mfikili v S (CC56/01) [2009]

ZAECBHC 11 (8 December 2009)

[2009] ZAECBHC 11

COURT

Eastern Cape High Court, Bhisho

BEFORE

Plasket, Ebrahim, Nhlangulela

CASE / FILE NUMBER

CC56/01

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE - BHISHO)

CASE NO: CC56/01

HEARD: 20/11/09

DATE DELIVERED: 8/12/09

NOT REPORTABLE

In the matter between:

SIYABULELA

MFIKILI

APPELLANT

and

THE

STATE

RESPONDENT

The appellant was convicted of four counts of robbery with aggravating circumstances. In an appeal against conviction, it was held in respect of the first two counts that the State had failed to prove the identity of the appellant beyond reasonable doubt, the dock identification of the appellant having been compromised by the police bringing the witnesses and the accused to court together in the same vehicle. His appeal succeeded in this respect. It was held further that evidence of a pointing out that connected him to the last two counts was admissible as his rights had been sufficiently explained to him. His appeal in this respect was dismissed.

JUDGMENT**PLASKET J**

- [1] The appellant was convicted of four counts of robbery with aggravating circumstances. He was sentenced to 12 years imprisonment in respect of the first two robberies, taken together for purposes of sentence, and to 10 years imprisonment in respect of the last two robberies, also taken together for purposes of sentence. Four years of the second sentence were ordered to run concurrently with the sentence imposed in respect of the first two robberies. (I shall refer to the first two robberies as counts 2 and 3 and to the last two robberies as counts 4 and 5.) The appellant appeals against conviction only.

[A] THE FACTS

- [2] On the evening of 14 January 2001 four men arrived at a tavern run by one Khaliphile Mpamana in NU1, Mdantsane. After ordering wine and then drinking for a while, they accosted Mpamana and threatened him with firearms. They robbed him of his firearm. They also robbed his girlfriend Asanda Blom of R11.00 in cash, two quarts of beer and a litre of cool drink. Finally, one of the robbers shot and killed Mpamana.
- [3] On the same evening, and also in Mdantsane, four men armed with firearms robbed one Makhaya Dlanga of his motor vehicle, a leather jacket, a pair of shoes, a toiletry bag and 24 compact discs. They also robbed his companion, one Luthando Nkonya, of a cell phone and a wallet containing R200.00.
- [4] Four people, including the appellant, were arrested in connection with these offences and the murder of Mpamana. One of them died prior to the trial, so three accused stood trial. Accused number 1 was convicted of the murder of Mpamana (count 1) as well as the robberies that occurred at the deceased's tavern (count 2 and 3). Accused number 2 was convicted of these robberies too while accused number 3 – the appellant – was, as I have indicated above, convicted of these robberies and those committed against Dlanga and Nkonya (counts 4 and 5).

[B] THE ISSUES ON APPEAL

- [5] The issues in this appeal are narrow. They are, in respect of counts 2 and 3, whether the identity of the appellant was proved by the State beyond reasonable doubt and, in respect of counts 4 and 5, whether a pointing out by the appellant was admissible.
- (1) Counts 2 and 3: The Identification Evidence
- [6] Two State witnesses identified the appellant as one of those who robbed Mpamana and Blom. They were Nyanisile Mpamana, the brother of the deceased, and Blom. In both instances the appellant was identified by way of so-called dock identifications, the witnesses stating that they had never seen the appellant before the events of 14 January 2001. It emerged in the evidence of Mpamana that he and Blom had been conveyed to court by the

police with the accused in the same vehicle before they testified. He had also seen the accused when they first appeared in court some time before the trial.

- [7] It is trite law that evidence of identification must be approached with caution. The reason is set out in the well known case of *S v Mthetwa* in which Holmes JA held:[1]

‘Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R. v Masemang*, 1950 (2) SA 488 (AD); *R. v Dladla and Others*, 1962 (1) SA 307 (AD) at p. 310C; *S. v Mehlahe*, 1963 (2) SA 29 (AD).’

- [8] The cases make it clear that evidence of a dock identification is not inadmissible, as had been suggested in *S v Maradu*,[2] but that a dock identification ‘may be relevant evidence, but generally, unless it is shown to be sourced in an independent

preceding identification, it carries little weight’, as has been held in *S v Tandwa* and others.[3] As with all evidence of identification, dock identifications carry with them dangers of which a trial court must be acutely aware. There is a danger that a lay person on seeing accused persons in the dock, ‘feels reassured that he is correct in his identification, even though this may not have been the position were they not there’: and that ‘[t]o any member of the public ... the fact that an accused is standing in the dock must naturally be suggestive of him being one of the parties involved in the crime, and no witness can be blamed for making such an assumption, even though it is incorrect’.[4]

- [9] There is no indication in the trial court’s judgment that the issue of identification was approached with the requisite caution to ensure that the identification of the appellant was both honestly made and reliable. Indeed, all that is said in respect of Blom’s evidence is that she was consistent, she had sufficient time to look at the men in the house, which was lit by electric lights and that the impression was gained by the court that she was honest. All that was said of Mpamana is that he had sufficient time to observe the men in the house. No mention is made of countervailing considerations such as that the scene was a moving one with people entering the house, leaving it, re-entering and going to different rooms, and that the experience must have been particularly traumatic and frightening for the witnesses. It is also unclear how long the entire incident took.

- [10] In my view, the trial court failed to consider and give proper weight to the fact that Mpamana and Blom gave contradictory evidence about what the appellant did in the house. They also gave contradictory evidence concerning what the men wore. In addition, when

Mpamana was cross-examined, his description of what each of the men wore was different to what he had described in his evidence in chief. He had said too that they all had worn Panama hats but Blom never noticed this. Her explanation as to how she could have missed such an obvious feature – that she was concentrating on their faces – is far from convincing. It does not help to say that one of the witnesses must be incorrect and that his or her observations were faulty, because there is no way of knowing which one is mistaken. Neither of the witnesses could describe any identifying characteristic of the appellant of any significance that could have given their identification of him some guarantee of reliability.

- [11] When these factors are taken into account along with the dock identification, preceded as it was by the witnesses travelling to court in the same vehicle as the accused, I am of the view that little weight can be attached to the evidence identifying the appellant. No matter how honest Blom and Mpamana may have been, their identification of the appellant as one of the robbers cannot be said to have been reliable. Because of this, it cannot be said that the State has proved its case against the appellant beyond reasonable doubt. As a result the appellant ought to have been acquitted on counts 2 and 3. His appeal must succeed in this regard.

(2) Counts 4 and 5: The Pointing Out

- [12] Soon after his arrest, the appellant, according to the investigating officer, Constable Tile, agreed to point out certain articles. He took Tile to a house in Mdantsane that is owned by his father and he pointed out a number of compact discs. These were identified by Dlanga, the complainant in count 3 as his compact discs. Although the compact discs bore no specific identifying features, he was able to identify them by their titles. Most were readily available from music shops but some were not: he had ordered these from an outlet linked to the Seventh Day Adventist Church which was initially in Cape Town and later in Bloemfontein.
- [13] One central point is taken in relation to the evidence of the pointing out of the compact discs. It is that no proper warning was given to the appellant of his rights. (The ancillary issue of what one makes of the fact that the compact discs were pointed out was also raised and will be dealt with in due course.)
- [14] No trial-within-a-trial was held to determine the admissibility of the pointing out. The reason may be pieced together from how the evidence of Tile unfolded. It was obviously not in issue that the appellant had been warned of his rights in terms of the Constitution prior to undertaking the pointing out. I say this because: (a) no indication was given by the appellant's counsel that the admissibility of the pointing out was in issue on the basis of his rights not having been explained to him; (b) when the prosecutor led Tile, he asked him leading questions on issues that were obviously not in dispute, including that he had warned the appellant of his rights – and this without objection; and (c) when the appellant was led on the pointing out, he was never asked whether he was warned of his rights and never stated that he had not been warned.

- [15] Despite this, when Tile was cross-examined by the appellant's legal representative, it was put to him that he had never informed the appellant of his rights. Tile said that this was a lie. He admitted readily, however, that while he gave the usual warning of an arrested person's rights in terms of the Constitution, he did not tell the appellant specifically of his right to decline to point out anything if he did not wish to. When he was asked why he had not done so, he said that he saw no reason to do so. He obviously took the view that the warning he had given was sufficient.
- [16] Even though Tile's evidence can be criticised in certain respects, I am of the view that his evidence that he informed the appellant of his rights, but for the right to decline to point out anything if he did not wish to, was correctly accepted by the trial court, and that the appellant's evidence to the contrary was correctly rejected as false. In particular, I accept that he warned the appellant of his right to silence and while he did not specifically say that the appellant had the right to decline to point out anything if he did not want to, he told him that the pointing out had to be done freely and voluntarily and that any pointings out that he made could be used in evidence against him.
- [17] The question that must be answered is whether Tile's omission renders the evidence of the pointing out inadmissible. In circumstances strikingly similar to this matter Jones J, in *S v Nombewu*,^[5] held that an appellant's trial had not been unfair when, having been warned in terms of the Judges' Rules but, not having been warned that admissions by conduct could be used against him, he had pointed out a car that he had been accused of stealing. Jones J held:^[6]

'But Mr. Koekemoer's argument is without substance in the light of the circumstances under which the appellant pointed out the motor car in this case. The police warned the appellant that he was not obliged to say anything in answer to the charge, and that if he did so it could be used against him in evidence. His immediate and spontaneous reaction was to make disclosures to them which are not admissible in terms of ss 217 or 219A of the Criminal Procedure Act, and then to show them the motor car, which is admissible in terms of s 218. The police were not in addition called upon to give an explanation to the appellant that conduct can amount to a statement, and that evidence of such conduct can also be used against him in the same way as evidence of an oral or written statement. It is unrealistic and indeed absurd to suggest that the warning that they gave did not cover this situation, and that he has been unfairly treated as a result. Any accused person in the position of the appellant would readily understand that if he disclosed information to the police it could be used against him. This would obviously include, for example, showing the police stolen property or giving them the weapon used in an assault, whether or not the accused's action was accompanied

by an oral or written explanation. The appellant could not have thought otherwise.'

- [18] In my view, the failure on the part of Tile to give the appellant a specific warning that he did not have to point out anything if he did not want to does not render the evidence of the pointing out inadmissible. The appellant was warned of his right to refrain from making a

statement and that if he did make a statement it could be used against him. He was told that any pointing out had to be free and voluntary and that any pointed out could be used against him. He must have understood that he had the right not to incriminate himself by pointing out objects that might link him to the robbery in question.

[19] Even if I am wrong in this respect and the evidence of the pointing out of the compact discs was unconstitutionally obtained, the court has a discretion in terms of s 35(5) of the Constitution to admit it nonetheless. The section provides that evidence ‘obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice’.[7]

[20] I accept that a full warning in terms of the Constitution was given to the appellant; that as Tile failed to give the appellant the specific warning, not in order to trick him to point out, but because he believed that it was not necessary, he acted in good faith; that no unfairness resulted for the appellant; and that the evidence that was discovered as a result – the compacts discs – was real evidence that speaks for itself. In these circumstances, I am of the view that the admission of the evidence would not render the appellant’s trial unfair. I also take the view that the exclusion of the evidence would tend to bring the administration of justice into disrepute and would be an over zealous, technical approach to the law at the expense of common

sense. The admission of the evidence would not therefore be otherwise detrimental to the administration of justice. I would consequently

exercise my discretion in favour of the admission of the evidence of the pointing out, even if it was, strictly speaking, unconstitutionally obtained.

[21] As I have stated, many of the compact discs were readily available from music shops but some were not. They had to be obtained from a distributor in Cape Town, which later moved to Bloemfontein, which was linked to the Seventh Day Adventist Church. In my view, the appellant’s version that these were the compact discs of his brother who lives in Johannesburg cannot reasonably possibly be true: the probability of the coincidence that his brother owned precisely the same compact discs as were robbed from Dlanga – including those that had to be ordered from the Seventh Day Adventist Church’s distribution arm – is so remote that it can be discounted entirely. In addition, the appellant’s two sisters testified that they had never seen the compact discs before, apart from one that is common.

[22] What is the court to conclude from the fact that the appellant pointed out Dlanga’s compact discs to the police? As the

appellant’s explanation for the compact discs being where they were was false, the only reasonable inference to be drawn from the fact that he led the police to Dlanga’s compact discs is that he was one of the four men who robbed Dlanga and Nkonya of their possessions. When his alibi is considered ‘in the light of the totality of the evidence in the case and the Court’s

impressions of the witnesses', as it must be,[8] it cannot reasonably possibly be true. I conclude therefore that the trial court correctly convicted the appellant of counts 4 and 5. His appeal against these convictions must fail.

[C] THE ORDER

[23] For the reasons set out above, the following order is made:

- (a) In respect of counts 2 and 3, the appeal succeeds and the appellant's convictions (and sentence) are set aside.
- (b) In respect of counts 4 and 5, the appeal is dismissed and the appellant's convictions are confirmed.

C. PLASKET

JUDGE OF THE HIGH COURT

I agree,

Y. EBRAHIM

Z. NHLANGULELA

APPEARANCES

For the appellant: Mr P. Dukada of Legal Aid South Africa, King William's Town
For the respondent: Mr K. Jairam of the office of the Director of Public Prosecutions, Bhisho

[1] 1972

- (3) SA 766 (A), 768A-C. See too Van Der Merwe 'Parade-Uitkennings, Hofuitkennings en die Reg op Regsverteenwoordiging: Enkele Grondwetlike Perspektiewe' (1998) 9 Stellenbosch Law Review 129, 129 who states: 'Die identiteit van die misdadiger is heel dikwels die enigste of belangrikste geskilpunt in 'n

strafverhoor. 'n Mens sou ook – miskien effe ongevoelig – kon sê dat 'n alibi 'n gAewilde verweer in strafsake is. Feit van die saak is egter dat daar in regspraak, amptelike verslae, handboeke en regstydskrifartikels beweer word dat die grootste enkele rede vir werklike en potensieële wanbevindings in 'n strafhof, toegeskryf moet word aan foutiewe uitkennings van beskuldigdes deur eerlike ooggetuies – die gevalle van sogenaamde "honest but mistaken

identifications".'

[2] 1994

- (2) SACR 410 (W), 413j-414a.

[3] 2008

- (1) SACR 613 (SCA), para 129. See too S v Matwa 2002 (2) SACR 350 (E), 355i-j.

-
- [4] S v Maradu (note 2), 413g-h, cited with approval in S v Daba 1996 (1) SACR 243 (E), 248d-h.
- [5] 1996
- (2) SACR 396 (E).
- [6] At 401i-405d.
- [7] For a discussion of the factors that are relevant to the exercise of this discretion see Schwikkard and van der Merwe Principles of Evidence (3 ed) Cape Town Juta and Co: 2009, 214-259. See too S v Swanepoel en 'n ander SECLD 20 December 2004 (case no. CC85/03) unreported; S v Hena and another 2006 (2) SACR 33 (SE); Zuko v S [2009] 4 All SA 89 (E).
- [8] R v Hlongwane 1959
- (3) SA 337 (A), 341A.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECBHC/2009/11.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mfikili-v-s-unknown-topic-aecbhc-2009>

Prepared on 12 October 2026 · Esheria