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**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

**Case no: CC30/2014  
Dates heard: 3-11.12.2015;  
16.3.2016;  
22.3.2016  
Date delivered: 18.4.2016**

**In the matter between:**

**THE STATE**

**vs**

**MZIYANDA PARLEY**

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**JUDGMENT ON MERITS**

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**TSHIKI J:**

[1] The accused herein *Mr Mziyanda Parley* has been charged with eight (8) counts that hereinafter follow:

- |         |   |   |
|---------|---|---|
| Count 1 | - | Robbery with aggravating circumstances (read with section 1(1)(b) of the Criminal Procedure Act 51 of 1977  |
| Count 2 | - | Kidnapping  |
| Count 3 | - | Unlawful possession of a firearm – in contravention of section 3 read with sections 1, 103, 117, 120(1)(a), section 121 read with Schedule 4 of the Firearms Control Act 60 of 2000 and further read with Section 250 of the Criminal Procedure Act 51 of 1977. |

- Count 4 - Unlawful possession of ammunition – in contravention of section 90 read with sections 1, 103, 117, 120(1)(a) and section 121 read with Schedule 4 of the Firearms Control Act 60 of 2000 and further read with section 250 of the Criminal Procedure Act 51 of 1977.
- Count 5 - Robbery with aggravating circumstances (read with section 1(1)(b) of the Criminal Procedure Act 51 of 1977.
- Count 6 - Murder
- Count 7 - Unlawful possession of a firearm – in contravention of section 3 read with sections 1, 103, 117, 120(1)(a), section 121 read with Schedule 4 of the Firearms Control Act 60 of 2000 and further read with Section 250 of the Criminal Procedure Act 51 of 1977.
- Count 8 - Unlawful possession of ammunition – in contravention of section 90 read with sections 1, 103, 117, 120(1)(a) and section 121 read with Schedule 4 of the Firearms Control Act 60 of 2000 and further read with section 250 of the Criminal Procedure Act 51 of 1977.

[1.2] The accused pleaded not guilty to all the counts.

[1.3] There is also a list of exhibits from A-L which reads:

- A: Admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977
- B: Affidavit by J Swanepoel
- C: Copy of the register at Dora Nginza Hospital
- D: Photo album compiled by Constable Ceasar
- E: Sworn statement by Constable Ceasar

- F: Affidavit by M Mgwadleka
- G: Affidavit by NH Sonwabo
- H: Statement by L Davathe
- I: Statement by W/O M Devenish
- J: Affidavit by M Mgwadleka
- K: Statement by W/O Devenish
- L: Statement by O Dhaura

## [2] Evidence

[2.1] The evidence of the first witness *Wonga Titima* a security guard at Stormwater in Missionvale in Port Elizabeth was robbed of his work firearm when he was on duty on the 7<sup>th</sup> November 2013 at about 18h15. It was his service firearm that belonged to his employer, described as a Lager-semi-automatic firearm. According to the evidence of this witness he was approached by three men who entered and pointed him and his two colleagues with a firearm. The three men robbed and stole their cellphones, two way radios and a sim card. The witness was also slapped on the right side of his face by one of the culprits. They also tied their hands behind their back with cable ties. The first witness *Mr Titima* could not be able to identify his culprits.

[2.2] The next witness *Thembakazi Maphosa* confirmed the evidence of the first witness. Her black cellphone a Nokia E63 cellular phone which was valued at R1 999.00 was also forcefully taken away from her by the three men. The two witnesses were in guard of the Wendy house on the premises of their employer at Stormwater. The witness could also not be able to identify her culprits.

[2.3] After some time the first witness was called to identify the firearm that was stolen during the robbery and had identified it by, *inter alia*, it's serial number.

[3] The next witness called by the state was *Mr Luzuko Maneli* who is employed by the South African Police Service and has been in the police service for about 12 years. At the time of his testimony in this case, he was a sergeant by rank and was stationed at Kwadwesi police station. He was on duty on the 8<sup>th</sup> November 2013 from 18h00.

[4] At that stage, he was still a constable by rank attached to the Visible Crime Prevention. He was in full uniform. His duties were to conduct patrol crime prevention, stop and search and other daily duties which are necessary to perform. He was the driver of the marked police vehicle they were using. He was on the same duties with constable *Ngcuka*. At about 22h30 he and constable *Ngcuka* were approached by an African man who informed them that his motor vehicle had been hijacked by African men who had used firearms in committing the offence and they took away his vehicle. According to the complainant he had been robbed by three men. His motor vehicle's registration number was DRM 082 EC. When the man was still relating the information the man saw his vehicle driven past them. He informed the police about this and that the men who robbed him of his vehicle were in possession of firearms and when this happened they were at the Zwide satellite station and were about to drive out to proceed to their area of policing. At the time when they were approached by the complainant, they were still in the vehicle and not yet proceeded out and their vehicle was still stationery. They had to first calm the victim down a little bit so as to be able to get the core issues that concerns the incident. The man had to inform them of the registration number and the occupants

and other information relative to the manner in which the incident took place. After they had calmed him down as he was still anxious and at some stage he gave them its original registration number. When they were discussing about how the vehicle was robbed, the complainant's vehicle appeared and was driven past them. It was a white bakkie. The police witness then proceeded to chase the vehicle leaving behind the owner of the vehicle who was robbed of his vehicle. According to the witness there was no heavy traffic and they were able to locate and saw its particulars. According to the witness the hijacked van was the only bakkie that was on the road and the bakkie was not speeding as a result they were able to get closer to it and were able to note its registration plates. They noted that the registration plates were the same as those that were given to them by the owner.

[5] They were able to see three occupants inside the vehicle, one was at the back and the other two were in the front portion of the vehicle. According to the witness the number of the occupants correlated to the three people who were described by the complainant.

[6] Through the radio or loudspeaker the vehicle was stopped by the police. According to the witness he noticed the man in the back that was standing up and was already in a ready position with the firearm in his hand. Having noticed this, the witness became ready in case there was an attempt to shoot by the suspect who was in the back. After the shot was fired he noticed that their vehicle was jerking as if it was no more in control. The witness was not able to ascertain whether the man he shot fell or jumped. The other one who was in front was also getting out and at that stage the witness's partner was busy shooting at the direction of the passenger that exited in front. The firearm was also found at the back of the bakkie.

[7] *Mr Saziwa* questioned the witness at length.

[8] In his answers the witness informed the Court that he was in possession of 131 rounds of ammunition including the extra 15 ammunition. He conceded that he had no independent recollection as to the exact time that he was approached by the man whose vehicle was hijacked. He could not tell how far back the hijacking incident took place when he got to report it at the police station. The witness could not even know how long it took him before he went to report. The witness was also not able to know whether or not all the three men got into the vehicle when it was hijacked. There was also no description as to what these men were wearing or whether they were black or white or coloured. Neither did he inform the police whether the men were actually armed or had firearms with them. What he knows is that only two were armed. According to the witness the vehicle was with him for about 50 meters before it was hijacked. The witness also conceded that when the bakkie was taken away from him it was not driven at a high speed.

[9] According to the evidence of both state witnesses *Mr L Maneli* and *Constable Ngcuka* the injuries that accused sustained were on his upper body. *Mr Maneli's* evidence is that they struck the accused whilst they were standing at the back of their bakkie. The evidence of *Mr Maneli* clearly show that "the passenger got out and my partner shot at him.

Q: Do you confirm you said that – Do you recall saying that?

A: Yes.

Q: I also shot towards his direction.

A: correct

Q: I believe this person was also armed. Do you remember saying that?

A: Correct

The next question posed to Mr Maneli was:

Q: You were asked further again on this point and your response was "I did not see a firearm in his possession" What is your answer?

A: No

Q: Do you recall saying that?

A: No.

The record shows that the witness is misleading the Court because he had given the Court the answer that he did not see a firearm in the possession of the accused.

[10] The next question and answer which shows that there was no justification for the two policemen to fire directly towards the accused is on page 53 of the record which reads:

"*Mr Saziwa* : Thank you. M'Lord, I remember correctly yesterday the question that was asked was whether did he have a firearm when he was on the ground, and my answer was the firearm was at a distance, if I remember correctly the question that was asked .... You were starting from the point when the accused got out of the vehicle, you said the passenger got out of the vehicle. Do you confirm sir? That is the answer you provided. You made no mention of the accused carrying a firearm pointing it towards your direction at all yesterday ... to answer "I was not asked."

[11] The ultimate answer from the witness *Maneli* was that he did not see the accused before Court with a firearm in his possession which is why he said yesterday "I believed this person was not armed. I did not see a firearm in his possession... If that was the case we would not have engaged him on this point.

Under the same circumstances the same witness responded by saying “when you fired shots and --- I take it from your evidence yesterday you also fired shots towards him --- Answer: That is correct. The same conduct was exhibited by *Mr Ngcuka* against the same witness without any justification. See pages 55 line 1-20. This conduct is also exhibited by *Constable Ngcuka* on pages 9 of the record. None of the two state witnesses *Constable Maneli* and *Constable Ngcuka* had sustained injuries yet it is their evidence that there was an exchange of fire between them and the accused. It was also at night when the contention happened. Their evidence that the accused was in possession of a firearm is not reliable and cannot be accepted.

[12] During his evidence *Mr Ngcuka* also misled the Court by assuming that the accused was talking to the people at the front yet he did not see him talk to such people. This is so because there was no proof that the accused was heard talking with such people. He (the witness) in fact conceded that he never heard accused chatting with such people. The evidence on pages 102 line 1-20 shows clearly that the evidence of *Mr Ngcuka* should, like that of *Mr Maneli*, not be believed by this Court. It would be inconceivable of this Court to accept the evidence of a person who is heard to have whispered at the front portion of the vehicle whilst he is at the back of the vehicle more so a bakkie. In any event, the evidence relied on was heard by a person who was not in such vehicle.

[13] The evidence of the state witnesses in particular *Constable Ngcuka* on whether or not he touched the firearm that was found in the vehicle occupied by the accused. In this regard, *Mr Ngcuka* was also questioned as follows:

Q: Now with the position of that being the motor vehicle, where was this firearm?

A: It was in front but more to the side, not directly in front of the vehicle.



It is surprising for this witness to inform the Court he cannot remember whether or not he had moved or touched the firearm. As the person who had kept guard of the same firearm the witness should have given a direct and clear answer to the question posed to him in this regard.

[14] In my view, both witnesses *Maneli* and *Ngcuka* gave unreliable evidence on not only on this issue but also on whether the firearm was touched or not a point which is relevant to the outcome of this case. Yet according to the evidence of the accused is that the firearm in question was moved by another person. The accused version in that regard is not tainted with doubt as against what the two state witnesses have testified. There is also no evidence of the accused's DNA or fingerprints of the accused on the firearm in issue. There is also no proof by way of tests to show that the accused had touched or handled the firearm in issue, whether for positive gun powder residue at least there is no such evidence.

[15] The evidence of the accused is that he is 35 years old having been born in [.....] 1980. He has his own house in B. P. no BBO [.....]. He also has his parental home in [.....] M. Road, Kwazakhele in Port Elizabeth. He is married with wife and has his children. On the day in question the state alleges that accused went to sign at Kwazakhele police station as usual. He thereafter got to Veeplaas and ended up at Kwamavela tavern where he bought a soft drink. Whilst still there he met one *Zet* who was in company of his friend. He knows *Zet* from Kwazakhele location. *Zet* gave him a hike to his home. He allowed the accused to board in the back of the vehicle. On the way they met police near Vista University. He then told *Zet* to obey the police instructions. Ultimately *Zet* stopped for the police. After *Zet* stopped the vehicle, gun shots went off and it was the police that were firing shots. *Zet* then

opened the door. *Zet* had a firearm in his hand. The witness also opened and got out of the vehicle and also ran away towards the houses. He felt that his leg had been broken. He had been hit by a bullet. At the time he was struck by the bullets the witness was running. He then sat down because he could no longer run. He ran away because he could hear the gunshots and did not want to die in that vehicle. According to him he was saving his life. He was taken to the hospital.

[16] He did not know the name of the person who was with *Zet*. When *Mr Parley* was in the vehicle which it was hijacked he did not know that it had been hijacked. He only knew it to belong to *Zet*. He was also not aware that the vehicle was in possession of firearms. Accused says he was not aware that the occupants of that vehicle were carrying firearms and neither did he act in common purpose with people who had robbed that vehicle. Accused was never part of or possessed a firearm and/or ammunition on the 8<sup>th</sup> November 2013. He denies that he was the one who actually possessed the firearms and ammunition.

[17] During cross-examination the accused insisted that his own house is in Booysen Park. It is where he had been living for the past eight (8) years.

[18] The witness *Ms Merikjie Devenish* was called. She was called after the evidence of *Mr Phumzile Ngcuka*. She is a warrant officer by rank and has been employed in the SAPS for 22 years and eleven months. She is attached to the motor vehicle theft investigation section.

[19] On 8<sup>th</sup> November 2013 she was still in the same section but also included in the hijacking section. She was already a warrant officer by rank and was on duty on that day.

[20] She received a telephone call about the hijacking of the motor vehicle and it was about 23h00. The scene was at about near Johnson Road near Vista University. She arrived at the scene at about 23h40. Other police members of the police arrived in their vehicles. She found several marked vehicles at the scene. The area of the scene was marked and cordoned off before they got into the marked scene. There were a lot of police officers at the scene within their police vehicles. Her scene was also marked and did she not disturb the scene. It was surrounded by a tape and was cordoned off.

[21] She observed a Ford Bantam bakkie with doors open (this was the vehicle allegedly stolen).

[22] At the back of the bakkie on the load body there was a caps inside of which there was a 9mm firearm with 22 rounds inside the cap.

[23] There was also a suspect on the scene who was taken for treatment. The witness however did not see the suspect. She, however, had occasion to visit him in the hospital and interviewed him at about 02h30 in the early hours of the morning. It was at Dora Nginza hospital where she met the accused before Court. The witness asked the accused if he knew the person who was on the scene and he said he only knew him by the name *Mbu*. He, however, only knew the driver of the motor vehicle

as *Zet*. The witness could not interview the witness at length as he was under treatment.

[24] *Maneli* informed the witness that he had shot the accused with a firearm and had him handcuffed by him.

[25] When questioned, the witness testified that before she came to the scene *Captain Crouse* was at the scene and the witness could not say for how long was *Captain Crouse* on the scene. She could not know who was in charge of the scene before *Captain Crouse* arrived. She also could not know how many other people were walking on the scene before she arrived. When she arrived at the scene the only police officials were *Captain Crouse* and both *Messrs Maneli and Ngcuka*. The witness also informed *Ngcuka* and *Maneli* to get out of the scene an indication that prior to the instructions they were already inside or within the scene. They complied. *Captain Crouse* did not take the state case herein any further.

[26] The evidence of this witness is also that the bakkie in issue the one that was stolen had been removed if one compares the images in particular no 1. The witness's response was that she would not know if the bakkie was or could have been removed.

[27] Accordingly the witness said shots were exchanged at the scene presumably between the police officers and the occupants of the vehicle that was chased. This evidence contradicts the evidence told earlier in Court during their evidence. I say so because they told the Court that it was the suspects who fired shots at the police and not the contrary.

[28] In their evidence the main witnesses in this case, the police, did not give the Court the impression that there was an exchange of fire because they were attacked by the people in the bakkie (see pages 127 and 128).

(On page 127 of the written record notes)

[29] See page 128 – there was a difference in measurements some say 2-3 meters ie *Ngcuka* and the other saying 20-30 meters. The difference, in my view, is ridiculous to say the very least.

[30] There was also no explanation from both *Maneli and Ngcuka* how that firearm was wrapped in a cap.

[31] In his evidence *Mr Ngcuka* informed the Court that he searched accused and found a USB from the accused before Court. However, from the evidence of the same witness the USB was found next to the firearm, like the handkerchief that was also next to the firearm. The person who saw all these items decided to put all of these items in one place. According to the witness and in my view the only conclusion is that the scene was interfered with.

See pages 132-135

Page 49 lines 11-15

[32] When cross-examined the accused denied having robbed two security guards of a firearm, cellphones and other items listed in the charge sheet. The witness also

conceded that he is self-employed being a bricks manufacturer and an electrician. He is also a builder.

[33] During cross-examination the witness (accused) denied that he was telling lies in Court. According to him his story which he gave the Court is reasonably possibly true for the above reasons. He was cross-examined at length by *Mr Baartman* for the state and despite the rigorous and lengthy cross-examination he stuck to his version.

[34] The *onus* of proof in a criminal case is discharged by the state if the evidence established the guilt of the accused beyond reasonable doubt. The corollary is that he or she is entitled to be acquitted if it is reasonably possible that he or she might be innocent. These are not separate and independent tests, but the expression of the same test (the proper test) when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable each being the logical corollary of the other. In whatever form the test is expressed it must be satisfied upon a consideration of all the evidence.

[35] A criminal Court does not judge an accused's version in a vacuum as if only a charge sheet has been presented. The state case, taking account of its strengths and weaknesses, must be put into the scale together with the defence case and weaknesses. It is perfectly correct that the state case cannot be determined first and if found acceptable regarded as decisive. The state case if it is the only evidentiary material before the Court, must in all cases be examined first in order to determine

whether there is sufficient evidentiary material in respect of all the elements of the offence and whether there is not perhaps in any event a reasonable possible alternative hypothesis appearing therefrom. Precisely the same approach is applicable if the defence puts forward a version. Taking into account the state case, once again it must be established whether the defence case does not establish a reasonable alternative hypothesis. That alternative hypothesis does not have to be the strongest of the various possibilities that is, the most probable as that would amount to ignoring the degree and content of the state's *onus*. In his evidence *Phumzile Ngcuka* had told the Court that his statement was taken on the 9<sup>th</sup> the following day. The most important issue about the contents of this statement is the fact that *Ngcuka* told the Court in his evidence that the complainant came to report to them at about 22hrs whereas *Mr Maneli* informed the Court that the complainant had reported to the police at about 20hrs. When questioned about this he informed the Court that he may have made a mistake because he thought it was already past 20hrs. He also told the Court that if there was anyone who had touched the firearm he would have seen that. When the Court questioned him about his evidence earlier on this issue he could not give a penetrating answer on why earlier he gave an answer that he did not recall. He conceded to the Court that those were two different contradictory answers. When asked why he suddenly decided to change from his previous answer he told the Court that he was trying to change from his previous answer. He contended that by giving the last answer he was thinking that his last answer contradicts the previous one. He did not remember if there was anyone who touched the firearm. Further asked why he changed his answer he responded by telling the Court that he was asked the same question by both counsel for the state and for the accused. There can be no doubt in this case that the state evidence is not reliable for the reasons stated in this judgment.

[36] Furthermore the admissions in terms of section 220 of the CPA do not assist the state so as to secure a conviction on any of the counts. This cannot be so when the evidence relied upon by the state is in a poor state. The accused's denial of all the counts is reasonably possibly true. In view of the reasons for judgment herein the state cannot even rely on the *dolus indeterminatus* relied on by counsel for the state. The state case must also not be weighted up as an independent entity against the defence case as that is not how facts are to be evaluated herein. Merely because the state present its case first does not mean that a criminal Court has two separate cases which must be weighed up against one another on opposite sides of the scale.

[37] The answers given by the two police witnesses leave much to be desired. They appear to give answers which are inconsistent with what would have happened as described by the evidence led by other witnesses. For instance, on page 58 line 10-20 it was put to the witness:

Q: that accused was not in possession of a firearm and he was not when he was shot by you (*Mr Maneli*) and your colleague, when he fell he was not close to a firearm. Do you have any response to that?

A: No reply from *Mr Maneli*.

The Court had to insist for an answer after and after a long time the witness responded thus:

A: He was having a firearm.

The answers given by the state witnesses also do not make sense for *Mr Maneli* to tell the Court that he did not pay much attention as to where the accused fell yet he was shot by him and his colleague.



[38] Counsel for the state had insisted that accused should be convicted of the offence of robbery at Stormwater in Missionvale. In my view, there is no evidence which led to the legal conclusion that the accused was the person or was one of the people who robbed the victims at Stormwater. There is also no conclusive evidence from the state to conclude that the two offences at Stormwater and the hijacking were related to each other so as to be able to legally conclude that they were committed by the same people. The first offence at Stormwater was committed at about 18hrs in the early evening whereas the second offence of the robbery of *Mr Oswell Dhura's* motor was according to evidence not committed by one person. The first count was committed at about 18hrs whereas the car hijacking was committed at about 22hrs meaning that they were committed within a period of about four hours. As I have indicated *supra* no one was identified in respect of the first offence of robbery. The same applied to the other offence of robbery of a motor vehicle belonging to *Mr Dhura*. No one was identified as having committed the offence. The evidence led in Court is not sufficient to convict the accused.

[39] Accused defence to the offence of hijacking is that he had hitch hiked from that vehicle. In my view, there has been no conclusive evidence to show that the accused had acted in concert and in the execution of a common purpose with the people who committed the offences in issue. In my view, the accused's explanation that he never committed the offences is reasonably possibly true. This is confirmed by the evidence of the accused person which when compared to that of the state evidence it is reasonably possibly true. I have no reason to believe that the accused version is false beyond a reasonable doubt. This makes sense more so that the evidence of the state witnesses, the two police officers *Mr Maneli and Mr Ngcuka* had given contradictory and false evidence. I have no reason to believe that the

accused version is not reasonably possibly true. In my view, even the evidence relied on by the state contained in the list of exhibits does not improve the state case herein. Oral evidence led by the police witnesses *Maneli* and *Ngcuka* was very poor and therefore unreliable.

[40] In the result the accused is hereby given the benefit of the doubt and he is found not guilty and discharged on all counts.

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P.W. TSHIKI  
JUDGE OF THE HIGH COURT

Counsel for the State	:	Adv Baartman
Instructed by	:	Director of Public Prosecutions
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Counsel for the Defence	:	Mr Saziwa
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