



**IN THE HIGH COURT OF SWAZILAND**  
**JUDGMENT**

Reportable

Criminal Case No: 291/10

In the matter between:

**REX**

and

**BHEKITHEMBA NGWENYA**

**Neutral citation** : Rex v Bhekithemba Ngwenya (291/10) [2013] SZHC 198  
(11<sup>th</sup> September 2013)

**Coram** : MABUZA J

**Heard** : 28/01/2013, 29/01/2013, 20/02/2013, 26/6/2013 and 28/6/2013.

**Delivered** : 11<sup>th</sup> September 2013

**Summary** : **Criminal Law: Accused charged with two counts of attempted and one count of robbery – Case turns on identification - Identification parade flawed – Evidence thereof inadmissible – Defence raises defence of alibi – Requirements thereof discussed - Onus not on Accused to prove alibi but on Crown – Crown fails to disprove alibi – Accused acquitted and discharged.**

## JUDGMENT

### MABUZA J

- [1] The facts herein relate to a robbery that took place at the Blue Corner Bar at Nhlanguano on the 7<sup>th</sup> November 2009, whereby the sum of E2235.50 (Two thousand two hundred and thirty five Emalangenani fifty cents) was taken from Nhlanhla Mkhwanazi (PW10) at gun point. During the robbery two men, Phumelela Gamedze (PW1) and Sicelo Dlamini (PW3) were shot and they sustained certain bodily injuries from which they had recovered at the start of the trial.
- [2] The Accused was charged with having committed the above crimes namely, that of robbery and two attempted murders; it being alleged by the Crown that he intentionally and unlawfully committed the said crimes jointly with other accused persons unknown to the Prosecutor in furtherance of a common purpose.
- [3] Count one is the charge of attempted murder of PW1; Count 2 is that of attempted murder of PW3; and Count 3 that of robbery of PW10. When the charges were put to him he pleaded not guilty to all three counts and his

attorney, Mr. Gama confirmed the pleas as being consistent with his instructions.

[4] Phumelela Gamedze (PW1) who is the complainant in Count 1, testified that on the 7<sup>th</sup> November 2009 he was at Blue Corner bar in Nhlango. He was seated outside on the verandah together with Sabelo Mamba (PW2), Nkosikhona Dlamini and Thulane Gamedze. He testified that he knew Sicelo Dlamini (PW3) and Nhlanhla Mkhwanazi (PW10). While he was at the pub with his friends four men arrived and sat about eight (8) metres away from him and his colleagues. The men were unknown to him and his friends.

[5] Sicelo Dlamini the complainant in Count 2 was also present but was inside the bar. PW2 went to the four men in order to find out who they were and PW1 joined him but they were unsuccessful in finding out the identity of the men and returned to their seats. PW1 went to urinate out in the open and while doing so he heard a gunshot and realized that he was injured, he was shot on his right thigh. The shot came from where the four men were seated as the gun flared up after each shot. He ran away together with other people who were at the bar. There were two more gunshots as he ran away. Along

the way he fell down as he was losing strength. Sipho Dube and Vusi Simelane came and picked him up and took him to the police station, whereupon the police conveyed him to the Nhlanguano Health Centre where he was treated. He was referred to Hlathikhulu Government Hospital where he was admitted for two days and discharged.

[6] About three months later some police officers came and took him to an identification parade where he says that he identified one of the four men who had come into the bar on the 7<sup>th</sup> November 2009. When the identification parade was conducted Jabulane Hlophe and Nkosikhona Dlamini were also in the room but were not able to identify anybody even though they saw the man that PW1 identified.

[7] PW1 described the man whom he identified as someone tall and dark in complexion with a scar across the bridge of his nose. He stated that on the 7<sup>th</sup> November 2009 the man whom he identified at the parade was wearing a black trouser and a black hip length leather jacket and he had a school bag on his back. He stated that the man that he had described and identified was the one that shot him; and that he was the Accused. When he identified him at the identification parade, the police took photographs of them both which

were handed into court as exhibits. He stated that he was able to recall his features because when the four men entered the bar they sat down about three (3) metres away for about forty-five (45) minutes before he and PW2 approached them. He stated that the shooting took place at about 8.00 pm. The veranda was lit by an electric bulb which made it easy to see what was happening.

[8] When he was cross examined he disclosed that after the incident he informed the investigating officer that he could identify two of the four men who were at the bar on the 7<sup>th</sup> November 2009. He told the officer that one had a scar on the bridge of his nose and the other was short and light in complexion, and wore a short sleeved checked shirt, a black trousers and black shoes. At the identification parade he picked out a man who had a scar on the bridge of his nose; and that out of ten or eleven men in the room only one man had a scar on the bridge of his nose. The second man that he could remember was not at the identification parade. It was put to him that the Accused was never at the bar on the 7<sup>th</sup> November 2009, he was at a wedding at Nongoma, Natal but he was adamant that the Accused was at the Corner Bar, Nhlanguano. It was suggested to him that one of the police

officers had directed him to pick out the Accused in the identification parade but he denied this.

- [9] PW3, Sicelo Dlamini the complainant in Count 2, testified that on the 7<sup>th</sup> November 2009 he was in the Blue Corner Bar when he got injured. He said that while he was having a drink he heard a bang and shortly thereafter PW2 came into the bar and reported that there was some trouble outside the bar. PW2 was followed by two men who carried guns, they ordered everybody to lie down and one man jumped onto the bar counter and spoke to the bar man. Instead of laying down PW3 squatted down. He noticed that one of the assailants whom he identified as the Accused remained standing at the door. Because he remained squatting he was able to observe the Accused clearly from 6 metres away. He described the Accused as tall and slim with sideburns with a scar on his nose and another scar on his cheek at one side of his nose. He was wearing a hat commonly called a kotoi, a black leather jacket and a black trouser. PW3 says that when their eyes met with the Accused, the latter shot him on the thigh and the bullet exited through his stomach. He did a dock identification of the Accused. He was taken to the Nhlanguano Health Centre, thereafter to the Mbabane Government Hospital where he was operated upon. He spent over a month in hospital.

[10] PW10, Nhlanhla Mkhwanazi is the complainant in respect of Count 3. He testified that on the 7<sup>th</sup> November 2009 he was the barman on duty at the Blue Corner bar at Nhlango. He says that at about 3:00 p.m. two men came into the bar purchased cigarettes and left. They returned again at about 8.00 p.m. in the company of two other men. He only noticed the four men when he went to serve customers outside the bar who were on the verandah. When he returned to the bar, he heard a bang and thought that it was a fire cricket he went back outside but discovered on investigation that the sound was a gunshot as people were running away. He returned to the bar and hid under the bar counter; but one of the assailants who was carrying a gun jumped onto the bar counter and saw him. He pulled PW10 from under the counter, clapped him and demanded money which the latter handed over. The assailant wore a leather jacket. He took some cigarettes and left. The amount of money he was robbed off totaled E2235.00. He testified that he could not tell whether the assailants were the men who had come to the bar during the day as he was in shock. When he had gone out earlier he had noticed the four men and he noticed features of three of them. One was dark and the other two had come in earlier to buy cigarettes. One of them was dark and had a scar on his face but he did not take note on which side the

scar was. When PW10 gave his evidence with regard to identification he was very hesitant and slow and had to be prompted. This indicated to me that he was uncertain about the identification of the Accused. Consequently I shall disregard his evidence in respect of the identification of the Accused.

[11] The medical reports in respect of PW1 and PW3 were handed in by consent. The medical report pertaining to PW1 (Exhibit F) records that he had a gunshot wound on the abdomen and the right leg. The medical report pertaining to PW3 (Exhibit G) records that he had a gunshot wound on upper third of right thigh. There are certain aspects of the medical reports which disturb me and I shall advert to these shortly when I assess the evidence.

[12] Sabelo Mamba (PW2) was also at the Blue Corner Bar on the evening of 7<sup>th</sup> November 2009 and professes that he witnessed all that happened. While he was drinking in the bar a certain Mxolisi Dlamini came in and informed him that some unknown men had arrived at the bar premises. PW2 went outside and indeed found four men seated outside and spoke to them. He was suspicious of them because there were a lot of thefts especially of television sets in the area. PW1 joined him while he was still talking with the men. Barely five minutes later one of the men took out a gun and started shooting.



The shooter shot the glass door; he fired three shots outside and one shot into the bar. PW2 ran into the bar and exclaimed that there was trouble outside. The unknown men followed, three entered and one remained at the door and ordered everyone to lie down and PW2 lay down.

[13] One of the assailants jumped onto the counter and took something from the barman while pointing at him with a gun. As they were leaving the bar, one shot PW3. The witness described the man who shot PW1 and PW3 as being tall with a medium complexion; not dark and not fair. He said that he wore a black track suit trouser, a black kotoi hat and had an orange school bag on his back; he had a scar on the cheek and on the bridge of his nose. He was carrying the gun. PW2 did a dock identification of the Accused as the one who was carrying the gun and who had shot PW1 and PW3.

[14] When he was cross-examined he stated that he heard the report of the first gunshot while he was still talking with PW1 on the other hand PW1 stated that the first gunshot struck him while he was a distance away urinating. There were other inconsistencies that Mr. Gama pointed out to him with regard to his evidence for example:

- When he recorded his statement at the police station he recorded that he had seen only two men and when he gave his evidence in chief he stated that he had seen four men. When confronted with this inconsistency he glibly responded that he mentioned two men to the police because only two of the four men responded to him when he talked to them.
- When he recorded a statement with the police he recorded that he could identify all four men but when he gave evidence he said he could only identify two of the four men.
- He testified that the Accused had a scar on the cheek and another on the bridge of his nose. When he was invited to examine the Accused face he responded that the Accused only had one scar on the bridge of his nose; he lamented that he had not observed the Accused properly.
- He testified that he was drunk when he recorded the statement and perhaps that is why he recalled that he had signed a

statement in a big book that the police were carrying instead of one recorded on the police form RSP 79.

### **Identification**

- [15] In order to rebut a suggestion of recent fabrication with regard to the dock identification of the Accused by several crown witnesses, the crown called as witnesses the police officers who had mounted an identification parade. This evidence sought to demonstrate that prior to the dock identification PW1 had identified the Accused consistent with his evidence in court. This is referred to in the law of evidence as a previous consistent statement.
- [16] The Accused was arrested on the 26<sup>th</sup> February 2010. Shortly after that he was taken to an identification parade mounted by the police where he was identified by PW1 from a group of inmates who were dressed in a soccer kit.
- [17] Even though two 9mm cartridges and a live bullet were found at the scene of the crime and were handed in as exhibits the weapon was never found. The exhibits value as evidence merely confirms that a firearm was used as stated by the Crown witnesses. The Accused stated that the guns he and his friends

were carrying at Mbulungwane were 2 x 38 pistols; the police witnesses did not identify what type of firearm the bullet and cartridges matched.

### **The Alibi**

[18] The Accused advanced an alibi as his defence which was put by his attorney to the Crown witnesses during cross-examination. He denied that he was at Blue Corner Bar on the 7<sup>th</sup> November 2009. He stated that he was at Nongoma, Natal where he had gone to attend a lobola ceremony. In order to rebut this defence the Crown called Sabatha Zwane (PW11) to testify that the Accused was in Nhlangano on the 5<sup>th</sup> November 2009. PW11 testified that the Accused who was in the company of three friends; two men and a woman slept at her home in Nhlangano on the 5<sup>th</sup> November 2009. He told her that they were going to attend a lobola ceremony for their female friend the following day at Hlathikhulu initially she refused but ultimately agreed and they all spent the night at her home and left early the next morning. It was suggested to her during cross-examination that she had misunderstood the Accused, he had in fact told her that his female companion hailed from Hlathikhulu and that he was bound for South Africa where the lobola ceremony was due to take place; she disputed this.

[19] Lommemo Mahlalela (PW12) testified that she and the Accused conspired to rob a women's association of their money at Mbulungwane area where she lived. Indeed as the date of the women's meeting drew near she fetched him from Nhlangano bus rank on the 5<sup>th</sup> November 2009 but because it was already late and there was no transport, they decided to spend the night in Nhlangano and proceed to Mbulungwane the following day. The Accused was in the company of two other men. He took her and these men to PW11's home where they spent the night. He introduced her to PW11 as a Shongwe and that they were going to Hlathikhulu to attend a lobola ceremony. They left early the following morning for Mbulungwane. However, their mission to rob the Women's association failed and they parted ways. She had earlier seen that the Accused and his friend Beegee carried guns. This was on the 6<sup>th</sup> November 2009. On the 7<sup>th</sup> November 2009 after 8.00 pm. the Accused telephoned her and informed her that he was at a pub at Nhlangano and that something had gone horribly wrong. When she was cross-examined Mr. Gama highlighted some critical inconsistencies with her evidence and the contents of her statement that she recorded with the police at Nhlangano on the 10<sup>th</sup> November 2009. For example, in the statement that she recorded with the police, she did not disclose that the Accused had telephoned her after 8.00 pm. on the 7<sup>th</sup>

November 2009. In her evidence in chief she stated that the Accused was with two men including one Beegee whom she knew and another that she did not know and yet in her statement to the police she recorded that the Accused was with three men who included one Ntokozo Mbingo. It was put to her that the Accused telephoned her on the 8<sup>th</sup> November 2009 and not on the 7<sup>th</sup> November 2009 as she had stated in her evidence in chief and yet this crucial piece of evidence was not included in her recorded statement to the police. It was of course strange why she would recall that the Accused telephoned her on the 7<sup>th</sup> November 2009 when she gave her evidence after so many years and fail to record with the police such a vital piece of evidence.

[20] I am skeptical about the truthfulness of her evidence implicating the Accused with regard to the robbery at Blue Corner Bar and have no choice but to reject it. I suspect that she was schooled to implicate the Accused. She was not a very impressive witness; she was probably embarrassed by her involvement in the failed robbery of the Women's association at Mbulungwane of which she was a member.

[21] After PW12 had concluded her evidence, the Crown closed its case and the Accused took the witness stand.

[22] He testified that on the 6<sup>th</sup> November 2009 he was at Mbulungwane with three male friends to rob the Women's association of their money but they failed to do. They decided to abandon the plan and left the area because he had to attend a lobola ceremony at Nongoma, Natal. He parted with his friends at Hlathikhulu. He arrived at Nongoma at about 10.00 a.m. on the 7<sup>th</sup> November 2009. The lobola ceremony lasted until the 9<sup>th</sup> November 2009. On the evening of the 8<sup>th</sup> November 2009 he telephoned PW12 and reported to her that he had a safe trip and that he had been left by a car which had offered free transport. He denied that he had told her that he was in a pub in Nhlanguano and that something had gone wrong there. And indeed if this was true it would appear in her recorded statement made to the police on the 10<sup>th</sup> November 2009 which was admitted into evidence as Exhibit "H". He left Nongoma on the 9<sup>th</sup> November 2009 and headed for Johannesburg.

[23] The Accused states that he was arrested on the 26<sup>th</sup> February 2010 after his deportation from South Africa back into Swaziland. He says that upon

arrival at the Mahamba border gate he was taken by PW4 a police officer to his office and while there PW1 arrived and saw the Accused. PW4 informed PW1 in the presence of the Accused that the police had arrested the Accused and indeed PW1 was able to pick him out during the identification parade. When the Accused was taken to the police identification parade he was made to board a kombi while the complainant followed in a van. Upon arrival at the venue for the parade PW1 together with the potential witnesses alighted first followed by the Accused. He says that even though he was taken to a separate room, PW1 and the other witnesses had ample time to see him ahead of the identification parade.

[24] The Accused further stated that when he arrived at the identification parade he was the only one in the lineup who had a scar on the bridge of his nose thus making it easy for PW1 to easily identify him; more so after seeing him in the office of the police officer and after seeing him in the police kombi.

[25] During cross-examination he stated that on the 5<sup>th</sup> November 2009, he was not at work because he had taken five days off in order to attend the lobola ceremony at Nongoma. He stated that he did not have a passport or travel document and that whenever he travelled to and from Swaziland to South



Africa he used the informal crossing between the two borders. He stated that he had obtained a TEBA book by using his Identity Card. When asked where he had slept on the 6<sup>th</sup> November after parting from his friends at Hlathikhulu he stated that he had slept at the Nhlangano bus rank and left for Nongoma early the following morning on the 7<sup>th</sup> November 2009 arriving there at 10.00 a.m. When asked by Mr. Nxumalo why he did not disclose this evidence he responded that he had forgotten all about it. The defence closed its case after cross-examination of the Accused.

[26] An analysis of the evidence shows that the Accused and his friends were in Nhlangano on the night of the 5<sup>th</sup> November 2009 as they slept at the home of PW11. This is stated by PW11, PW12 and the Accused. On the 6<sup>th</sup> November 2009 the evidence shows that they were at Mbhulungwane where their attempts to rob a Women's association failed. This is stated by PW12 and the Accused.

[27] PW1 testified that the Accused and his friends were at the Blue Corner Bar on the 7<sup>th</sup> November 2009 and that he was shot on this day. The medical report (Exhibit "G") pertaining to him says that he was examined on the 17<sup>th</sup> November 2009 and the police stamp thereon is also the 17<sup>th</sup> November

2009. There is evidence from the doctor to verify the contents of the medical report nor was there any evidence to support PW1 that he was transferred to Hlathikhulu Government Hospital where he remained for two days and thereafter discharged. The doctor who completed the police form RSP 88 stated that he did so on the request of the Nhlango police.

[28] PW3 testified that he was shot on the 7<sup>th</sup> November 2009 at the Blue Corner Bar. He stated that he was taken for treatment to the Nhlango Health Centre and thereafter transferred to the Mbabane Government Hospital where he was operated upon; he spent over a month in hospital. The medical report (Exhibit “F”) RSP 88 pertaining to him records that he was examined on the 7<sup>th</sup> November 2009 at 10.00 p.m. at the request of the Hlathikhulu police. The medical report has the Health Centre stamp and no police stamp. Once more the doctor who completed Exhibit “F” was not called to testify or verify his or her findings nor were any hospital authorities called to confirm the evidence of PW3. It is equally not clear why the Hlathikhulu police requested the Nhlango Health Centre to carry out a medical examination of PW3 in an incident that occurred at Nhlango under the jurisdiction of the Nhlango police. It is equally not clear why PW1 was only examined on the 17<sup>th</sup> November 2009 approximately seven days

after his release when he says that he was taken to the Nhlanguano Health Centre shortly after he was shot.

[29] Consequently, I have great difficulty in accepting the authenticity of the medical reports namely Exhibits “F” and “G”. In fact I am extremely doubtful about their authenticity and the law says I should exercise this doubt in favour of the Accused. That being the case I reject both medical reports which leave the Crown evidence with no corroboration of the injuries allegedly incurred on PW1 and PW3.

[30] Having rejected the evidence of PW12 with regard to her version of what happened after they parted with the Accused and his friends at Mbhulungwane, her evidence that the Accused was at Nhlanguano on the night of the 7<sup>th</sup> November 2009 is no longer relevant. I agree with Mr. Gama’s submission that her evidence that the Accused telephoned her soon after the commission of the offence is not proof that he was at the Blue Corner Bar when the offences were committed.

[31] Having rejected the evidence of PW10 with regard to the identification of the Accused I turn now to the evidence of PW1 with regard to the

identification of the Accused. The witnesses who purported to identify the Accused are PW1, PW2, PW3 and PW10. All four witnesses are known to each other and PW1, PW2 and PW3 were known to each other as being from the same area and obviously must have discussed the distinguishing features of the Accused namely the scar on the bridge of his nose. PW1 was called by the police to attend an identification parade. He said that the Accused was the only one with a scar on his nose among the ten or eleven men that were lined up in the parade; making it easy to point out the Accused as he was the only one with a scar on the nose. Furthermore, the Accused testified that PW1 had seen him earlier on before the identification parade at one of the offices belonging to the police; this made it doubly easy to pick him out.

[32] It is my considered view that in the present case the identification was conducted in a manner that was prejudicial to the Accused and I share the learned judge's sentiments in **R v Msimango** 1950 (2):

“Where identification rests upon the testimony of a single witness and the Accused was identified at a parade which was admittedly conducted in a manner which did not guarantee the standard of fairness observed in the recognized procedure, but was conducted to

prejudice the Accused such evidence standing alone can have little weight.”

[33] Initially PW2 testified that the Accused had an additional scar at the side of his face but under cross-examination was called upon to take a closer look at the Accused and to point out the scar on the side of his face but was unable to do so as the Accused had no scar on the side of his face.

[34] PW2 pointed out the Accused in the dock as one of the assailants and was never called to attend the identification parade. He too stated that the Accused had a scar on the side of his nose and on the bridge of his nose, but alas the Accused turned out not to have a scar on the side of the nose because PW2 also failed to point it in court. PW2 also conceded under cross-examination that he had seen the Accused being escorted on the court premises on previous occasions when the matter could not proceed. It is trite that dock identification is of very little probative value. In **R v Rassool** 1932 NPD 112 at 118 it was said:

“Therefore it seems to me that the evidence of previous identification should be regarded as relevant for the purpose of showing from the very start that the person who is giving evidence in court identifying the prisoner in the dock is not identifying the prisoner for the first

time but has identified him on some previous occasions in circumstances such as to give real weight to his identification”.

[35] For the foregoing reasons the evidence of PW2 with regard to the identification of the Accused is hereby rejected as being unreliable.

[36] As stated earlier the Accused raised an alibi defence which I must now assess and in doing so I am guided by the following principles identified by M.J. Strydom J in **S v Malefo** 1998 (1)SACR 127 (W) 158 A – E as the correct approach in assessing such a defence namely:

(a) There is no burden of proof on the Accused to prove his alibi. See **R v Mhlongo** 1991 (2) SACR 207 (A) 210d; **S v Zwayi** 1997 (2) SACR 722 (CK).

(b) If there is a reasonable possibility that the Accused’s alibi could be true, then the prosecution has failed to discharge its burden of proof and the Accused must be given the benefit of the doubt. See **S v Khumalo** 1991 (4) SA 310 (A) 327H; **S v Ntsele** 1998 (2) SACR 178 (SCA) 187g -188f.

(c) ...

(d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the Accused is reliable. See **Jochems 1991 SACR 208 (A) 212 a.**

(e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt and for this purpose a court may take into account the fact that the Accused had raised a false alibi. See **S v Nkombani 1963 (4) SA 877 (A) 893 G.**

[37] In *casu* the alibi was raised timeously when PW1 gave evidence and the matter which was heard over a long span and adjourned on several occasions gave the Crown ample opportunity to investigate the alibi. What the Crown did investigate very late in the day was the evidence led by the Accused that he used his identification card to obtain a mining book at TEBA. Mr. Nxumalo submitted from the bar without leading evidence that the officials at TEBA had informed him that it is impossible to obtain a mining book without a passport as the fact that a person has been recruited to work in the mines has to be endorsed in the recruitee's passport. Mr. Gama correctly persuaded me to reject this submission as I do made by Mr. Nxumalo from the bar as the Crown did not lead this evidence and was therefore not entitled to make such a submission.

[38] Consequently, I find that the evidence against the Accused is not strong enough to sustain a conviction and it is my finding that the Crown has failed to prove its case beyond a reasonable doubt and I accordingly acquit and discharge the Accused.

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**Q.M. MABUZA**  
**JUDGE OF THE HIGH COURT**

For the Crown : Mr. M. Nxumalo  
For the Accused : Mr. L. Gama