THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 076/2010

In the matter between:

MICHAEL NDUNA **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Nduna v S* (076/10) [2010] ZASCA 120 (30 September 2010)

Coram: LEWIS and BOSIELO JJA and EBRAHIM AJA

Heard: **13 September 2010**
Delivered: **30 September 2010**

Summary: Evidence – similar facts – modus operandi consistent on different charges of robbery – when inference of guilt can be drawn – presence of fingerprints on vehicle involved in robberies – probative value of fingerprint.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Goliath and Le Grange JJ sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

EBRAHIM AJA (Lewis and Bosielo JJA concurring)

[1] This appeal is concerned with the probative value of fingerprint evidence which formed the basis for the conviction of the appellant on two charges of armed robbery. He was arraigned for trial in the regional court in Cape Town and, on conviction, sentenced on each charge to a term of 15 years' imprisonment. The learned magistrate ordered that ten years of the sentence on the first charge was to run concurrently with the sentence imposed on the second charge, resulting in an effective sentence of 20 years' imprisonment.

[2] An appeal to the Western Cape High Court against these convictions was dismissed. The high court considered that the sentences imposed warranted interference on the ground that the trial court had not heeded their cumulative effect. The high court considered that a sentence of 15 years' imprisonment was appropriate. Accordingly the effective sentence of 20 years' imprisonment was set aside, and in its place an

order was granted that the sentences of 15 years' imprisonment imposed on each of the two charges were to run concurrently.

[3] The high court granted the appellant leave to appeal to this court against his convictions only. The appeal before us was argued on the basis that the only evidence linking the appellant to both charges against him was that of his fingerprints found on the two vehicles involved in the two armed robberies and that this was insufficient to prove guilt beyond reasonable doubt.

[4] Before dealing with this issue it is necessary to give an overview of the evidence presented by the complainants on the robbery charges. The trial commenced on 3 December 2007. David Alexander, a businessman, testified in respect of the first charge. He said that on the afternoon of Friday 11 June 1999 he left his offices situated in the Bo-Kaap area, Cape Town in the company of his driver, Nigel Julius, in order to go to Nedbank in Strand Street to draw cash to pay his employees' wages. Having drawn approximately R4 000 they left the bank at 2.55 pm and returned to the office just after 3.00 pm. He was a passenger in the vehicle, which he described as 'our little Nissan van' and in his hand he carried the money he had drawn from the bank, which was not in any kind of wrapping.

[5] On arrival at the office he alighted from the vehicle and as he and the driver walked towards the front door of the business, a white venture panel van pulled up, the right side rear door opened and a man got out and ran towards him. When this man was directly in front of Alexander he produced a firearm (a silver pistol) which he held against Alexander's head. Alexander dropped the money to the ground. The man picked up

the money and ran back to the white van, got in and the vehicle sped off. An attempt to apprehend the robber by an employee who gave chase was unsuccessful. Alexander said that he was unable to identify his assailant save to say that he was a 'dark complexioned person'. He provided the police with the registration number of the vehicle, CA 766235, which he managed to take down as the Venture made its getaway. He conceded that the robbery occurred in broad daylight. He explained that he was unable to make an identification because his attention was riveted on the firearm held to his head.

[6] His driver, Julius, corroborated this evidence in material respects. He also testified that the robbers climbed into the passenger side of the Venture van through a door which lifts at the rear of the vehicle. He was not able to tell the court if there were others in the Venture van but he did confirm that the man who had pointed the firearm at Alexander was not the driver of the vehicle.

[7] Joshua Abrahams, the complainant on the second charge of armed robbery, which occurred on the afternoon of 26 January 2007 at approximately 12.45 pm, testified that he had drawn cash in the sum of R54 300 from the Standard Bank, in N1 City, Cape Town. He was driving a white Isuzu bakkie, registration number CA 455247, belonging to the company that employed him. He placed the money in the cubby hole and drove back to work. As he turned into the parking area of his place of employment in Kensington, Cape Town, he saw a Mercedes Benz vehicle also turn into the parking area, make a u-turn and then reverse out of his line of vision. As he eased his vehicle into its parking place, he looked in his rear view mirror and saw three men come running from behind his vehicle, with firearms in their hands. He locked his door,

and the passenger side door of the bakkie. One of the men went to the front of his vehicle and the other two to the sides, one on the right and one on the left. The men broke the windows with their firearms, pointed these at him and shouted to him to hand over the money. Having broken the glass of the side window of the bakkie on the passenger side one of the men opened the passenger door, and took the money from the cubby hole. The man who took the money hit him on the shoulder with his firearm. The men then left.

[8] Abrahams said they were not wearing any gloves so that their hands were uncovered. He conceded under cross-examination that the Isuzu bakkie was used on a daily basis by himself and other employees throughout the Western Cape. He explained his inability to describe the robbers as a consequence of his state of shock. All he could see was 'guns in front of me, guns on the side'. He was adamant, however, that the man who was standing with his firearm on his side (that is the right side) of the bakkie had approached him from the rear of the bakkie. That was the only way to get to the vehicle as it was parked in a space limited by a wall in front of the vehicle and another wall on the right hand side of the vehicle.

[9] The expert evidence on fingerprints was as follows. At approximately 3 pm on 11 June 1999, Graham Crowster, an Inspector with the South African Police Services, with 20 years experience in the force, received a radio report whilst on duty in Adderley Street, Cape Town of the armed robbery which had taken place at Alexander's business premises requesting that he be on the alert for suspects. Approximately five minutes later, in front of the provincial offices in Wale Street, he came across a white Venture vehicle, with registration

number CA 766235, its windows and doors locked. He established that the vehicle had been stolen in Mitchells Plain. He waited for the investigating officer to arrive and then left to make a statement at the Cape Town Police Station.

[10] At 5.30 pm Greg Hail, a fingerprint expert from the local criminal record centre in Cape Town, examined the vehicle and lifted an identifiable left thumb print, taken from the left door, directly above the door handle. He produced photographic enlargements of the fingerprint lifted from the vehicle door and of a print taken from the left thumb of a set of fingerprints which he marked with the name 'Michael Nduna'. He concluded that they were identical, having established seven points of similarity between them. As a further test, before the commencement of his testimony, Hail took a fresh set of left thumb prints from the appellant which he then compared to the print lifted from the vehicle and to the left thumb print on the set of prints marked 'Michale Nduna' and found that all three sets were identical to each other. He concluded that the print which he had lifted from the left door of the white Venture vehicle was that of the left thumb of the appellant.

[11] Inspector Hendrik Johannes Schreuder of the SAPS, also an expert in the field of fingerprint evidence, attended the scene of the robbery in Kensington 26 January 2007 where he examined the white bakkie, with registration CA 455247. From the right hand side of the bakkie, on the canopy just behind the door frame, he lifted a palm print. In addition he also lifted fingerprints from both sides of the bakkie which he testified were not prints implicating the appellant. He lifted ten prints altogether. He said that in order to imprint a palm print on a vehicle surface, full pressure of the palm onto the surface is required. In this case, full

pressure of the palm was exerted on to the vehicle. Embarking on the same procedure as did Hail in order to establish the identity of the palm print, he compared the print he had lifted from the bakkie with a set of fingerprints which he received from the investigating officer. He concluded that the print was that of the right palm of the appellant, having found seven points of similarity.

[12] No questions were put to Hail or Schreuder challenging the authenticity of the prints lifted by them, nor was their evidence challenged on appeal. It must accordingly be accepted that the appellant's left thumb print and right palm print, respectively, were found on the vehicles involved in the two armed robberies. Although it was argued that the failure to give evidence on the age of the prints reduced their probative value, the appellant did not challenge the state's evidence that the prints lifted were his. In the light of this evidence, it was conceded by counsel for the appellant that the application in terms of s 174 of the Criminal Procedure Act 51 of 1977 for the discharge of the appellant at the close of the respondent's case was ill-conceived and had been rightly refused. The probative value of fingerprint evidence is undoubted: *S v Legote* 2001 (2) SACR 179 (SCA) para 3.

[13] The appellant testified in his defence. His response to the fingerprint evidence was that in 1999 he was employed by Blue Ribbon Bakery as a van assistant, delivering bread throughout the Western Cape, his hours of duty being from 6 am to 3 pm. His areas of delivery were Salt River, Woodstock and Cape Town. He knew nothing about the white Venture vehicle and nothing about the first robbery charge against him. In January 2007 he was unemployed and knew nothing about the second robbery. He frequently visited the N1 Centre in Cape Town with his

children, especially his youngest child who liked to play the games at the centre. He testified that he delivered bread in 1999 to shops in the Bo-Kaap area, from Monday through to Saturday, that the delivery to each shop was quick, with no break in between each delivery. He said the first deliveries were done in the morning in the Bo-Kaap area and the rest thereafter, with his workday ending at 3 pm by which time he was free. Sometimes his workday ended at 12 noon. When confronted with the evidence that his palm print was found on the Isuzu bakkie he said:

'When the motor vehicles are in the parking lot and you go and park there then there is a possibility that you can touch someone's vehicle when you get out of your car.'

and

'When you pass in between the motor vehicles you could touch.'

and

'It might be now that when I come back from the shop and I'm pushing my trolley and then it might be that I accidentally then touch a motor vehicle.'

and

'It might be just on that day that I touched there – it might (be) the way it was parked.'

[14] Counsel for the appellant argued that the inference of guilt was not the only possible inference to be drawn from the circumstantial evidence presented in the case (*R v Blom* 1939 AD 202). The enquiry before us then is whether the court a quo, on the evidence before it, could reasonably have come to the conclusion that it was indeed the appellant who perpetrated the robberies in question. This involves a determination of whether the two cardinal rules of logic in *Blom* had been invoked: first, the inference that the appellant committed the robberies must be consistent with all the proved facts. If it is not, that inference cannot be drawn. Second, the proved facts should be such that they exclude every

reasonable inference from them save that it was the appellant who was the perpetrator.

[15] The first leg of the enquiry is clearly met: the inference that the appellant was one of the robbers is consistent with the fingerprint evidence. The answer to the second depends upon the probative value to be accorded to the appellant's thumb and palm prints found on the Venture van and the Isuzu bakkie. Can it be said, ultimately, that his explanation as to how his palm print came to be on the Isuzu bakkie and his lack of knowledge as to how his thumb print came to be on the Venture van is reasonably possibly true, such that the conclusion that the appellant was guilty on both counts is wrong?

[16] The thrust of counsel's argument was three-fold. First, eight years had passed between the date of the first robbery and the date of the appellant's testimony. The lack of explanation for the presence of his thumb print on the Venture van was equally consonant with an innocent explanation as with a guilty one, as was his explanation of his palm print on the Isuzu bakkie. Second, because the state had not led any evidence during the trial as to the apparent age of the appellant's thumb print and palm print and the probable life span of these prints in the particular positions they were found on the vehicles, the probative value of the finger print evidence had been diminished. Third, the high court had erred in using the evidence led on the one count in order to prove the other count as this was an impermissible form of reasoning in determining the guilt of the appellant. Counsel submitted that the court a quo ought to have harboured a doubt as to the appellant's guilt and acquitted him on both charges.

[17] It is settled law that whilst similar fact evidence is admissible to prove the identity of an accused person as the perpetrator of an offence, it cannot be used to prove the commission of the crime itself. This legal principle operates, in addition, to exclude such similar fact evidence from being confirmatory material on another count.

[18] However, the application of the rule is not to be confused with the situation where the rule is invoked to establish the cogency of the evidence of a systematic course of wrongful conduct in order to render it more probable that the offender committed each of the offences charged in respect of such conduct (*S v Gokool* 1965 (3) 465 NPD at 475A-D). The appellant's argument, if it were to be accepted, would be tantamount to excluding evidence of the modus operandi of the appellant merely because he had been charged with more than one count of robbery. In *Gokool* Harcourt J said (at 475D-F):

'It is clear that each count brought against an accused person must be considered separately and that the admissibility of evidence on each count must be tested as if that count had been the only count against such accused ─ *R v Buthelezi* 1944 TPD 254. But this does not prevent material, which could be admissible under the rules relating to similar fact evidence, from being received merely because a plurality of counts is involved in a case.'

The ultimate test is, and must always be, the relevance of such similar fact evidence as the foundation for its admissibility against the accused person: the evidence will be admissible if it is relevant to an issue in the case. This court (per Schreiner JA) stated the rule succinctly in *R v Matthews* 1960 (1) SA 752 (A) at 758B-C:

'Relevancy is based upon a blend of logic and experience lying outside the law. The law starts with this practical or common sense relevancy and then adds material to it or, more commonly, excludes material from it, the result being what is legally relevant and therefore admissible. . . . *Katz's* case is authority for asking oneself

whether the questioned evidence is only, in common sense, relevant to the propensity of the appellants to commit crimes of violence, with the impermissible deduction that they for that reason were more likely to have committed the crime charged, or whether there is any other reason which, fairly considered, supports the relevancy of the evidence.'

[19] *R v Katz* 1946 AD 71 very clearly demonstrates how the rule is to be applied. The accused there was charged with having sold meat above the controlled price on five separate occasions within a period of 11 days. Evidence was admitted of a customer's complaint some weeks before then of the high price charged, and of the accused's response that he was not prepared to sell at the controlled price, on account of its relevance to show that the accused sold in the ordinary course of business at a higher price. This evidence of his practice made it more probable that he sold on the five separate occasions at the higher price. Thus evidence of a modus operandi can be used to prove the commission of an offence provided the relevance of that evidence has been established. In my view the evidence relating to the modus operandi on the two counts, supported by the fingerprint evidence, is relevant and admissible. Each offence has been established independently, but the cumulative effect of evidence of similar conduct on both counts must weigh heavily against the appellant.

[20] Counsel referred us to the judgment of Griesel J (Van Staden AJ concurring) in the Western Cape High Court in the matter of *Jonginamba v The State* (Case No A389/10). The appellant in that matter was convicted of the robbery of the second complainant in this case, Abrahams, in respect of the same incident. The court on appeal set aside Jonginamba's conviction on the basis that the evidence of his palm print on the Isuzu bakkie was insufficient to conclude that the only reasonable

inference to be drawn was that he was one of the robbers. I express no view on the correctness of the decision. The evidence in this matter is different because of the additional charge of robbery, and because the appellant's explanation of how his fingerprints may have been placed on the two vehicles is not credible.

[21] It is highly unlikely that two robberies, committed in the same fashion (the robbery by armed men of a complainant, who has just drawn cash from a bank, as he returns to his business premises), where the fingerprints of one are found on the different vehicles, would be entirely unconnected. Even though so far apart in time, the coincidence, especially when regard is had to the fact that the fingerprints of the appellant were lifted in each case from a vehicle proven to have been involved in each robbery, is explicable only on the basis that the appellant participated in each robbery.

[22] The only inference to be drawn from the proved facts is that the appellant is guilty on both counts, and was correctly convicted.

[23] The appeal is dismissed.

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S Ebrahim
Acting Judge of Appeal

APPEARANCES

APPELLANT:	RM Liddell Instructed by Liddell Weeber & Van der Merwe c/o Von Lires, Cooper, Barlow, Cape Town Ben van der Merwe Attorneys, Bloemfontein
RESPONDENT:	(Ms) M Marshall Instructed by The Director of Public Prosecutions, Cape Town The Director of Public Prosecutions, Bloemfontein