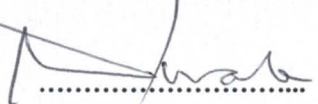


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE: A0197/2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
<u>26/02/18</u> Date  ML TWALA	

In the matter between:

MPOFU, BOTHWELL

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

TWALA J

- [1] The central issue in this appeal is whether the appellant was positively identified as one of the culprits who perpetrated the offence of robbery on the complainant. The appellant was charged and convicted of the offence of robbery with aggravating circumstances with his then co-accused in the Johannesburg Magistrate Court and was sentenced to 8 years imprisonment.

- [2] Leave to appeal against both conviction and sentence was granted by the Court a quo.

- [3] It is common cause that on the 5th of April 2016 three assailants accosted and robbed the complainant, Mr Kalanko at knife point, of two cellphones next to the taxi rank in Johannesburg. When he was attacked by the robbers he screamed and his screams alerted the police officers who were nearby. He pointed out his assailants to these police officers and they were about 25m away at the time. The police officers gave chase and he followed them. He met the police officers at the entrance to Park Station where they asked him of the description of his cellphones which he said was a Samsung and a Nokia C1. Only two of the three assailants were arrested and one kept on blaming the other for the incident whilst the other was apologising to the complainant.

- [4] Captain Thamagane (Thamagane) and constable Sefeka (Sefeka) corroborated the evidence of the complainant in that they heard a man screaming and when they approached him, he pointed his assailants who were about 25m away from them at the time. Thamagane drove behind these two culprits until at the entrance of Park Station where constable Sefeka accosted the appellant and his co-accused. Thamagane searched the appellant and found the Nokia cellphone

on him. He searched the accomplice on whom he found a knife and the Samsung cellphone. The complainant switched on these cellphones and called his father informing him of the incident. It is the testimony of Thamagane and Sefeka that they never lost sight of the culprits until they arrested them.

- [5] The version of the appellant is that he does not know his accomplice. He was walking alone to the Spar in Park Station. He was surprised when the police officers arrested him. They picked up the cellphones from the ground and he knows nothing about a robbery committed on the complainant. He was searched but nothing was found on him.
- [6] Counsel for the appellant contended that there is no record that the appellant was informed by the Court a quo of the implications of the minimum sentence legislation and therefore the appellant deserved to be acquitted on the charge arraigned against him.
- [7] I am unable to agree with counsel. It is on record that the presiding Magistrate confirmed with the appellant's attorney at the time that the appellant has been informed of the implications of the provisions of the minimum sentence legislation. I am therefore satisfied that the appeal should fall on this ground.
- [8] It is trite law that the burden is on the State to prove the guilt of the accused beyond reasonable doubt. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version and acquit the accused.

- [9] In the case of **S v Jackson 1998 (1) SACR 470 (SCA)** at 476 the court stated as follows:

“Burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”

- [10] In the case of **S v Ntsele 1998 (2) SACR 178 (SCA)** Eksteen AJA (as then he was) stated the following:

“Prove guilt beyond reasonable doubt – not beyond a shadow of doubt – if only remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt.”

- [11] In the case of **Shackell v S 2001 (4) ALL SA 279 (SCA)** Brand AJA (as then he was) stated the following:

“A Court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

[12] As indicated above, the issue to be determined by this Court is whether the accused has been positively identified as the perpetrator of the robbery on the complainant on the day in question. It is trite law that the evidence of identification should be approached with caution.

[13] Counsel for the appellant contended that the version of the appellant is that he was not the perpetrator of the robbery on the complainant and that he did not know his former co-accused. His evidence is that of an *alibi*, so it is contended by counsel, for he was never near the place where it is alleged the robbery took place.

[14] It is a well-established principle of our law that where an *alibi* is raised by an accused, there is no onus on him to prove his *alibi*. His is merely an onus of rebuttal which he discharges by denying guilt under oath and exposing himself to cross examination.

[15] In the case of **R v Hlongwane 1959 (3) SA 337 (A)** the Court stated the following:

"The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. R v Biya 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation....

The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In the Biya's case supra, Greenberg JA, said at page 521.... 'if on all the evidence there is a reasonable possibility that his alibi evidence is true it means that there is the same possibility that he has not committed the crime'".

- [16] It was again emphasised by the Appeal Court in the case of **S v Shabalala 1986 (4) SA 734 (A)** where the Court stated the following:

“It is trite law that where an alibi is raised there is no burden on the accused to prove his alibi. The onus rests on the State to prove his alibi is false..... The effect of the falseness of an alibi on an accused’s case is to place him in a position as if he had never testified at all”.

- [17] In the case of **S v Liebenberg 2005 (2) SACR 355 (SCA)** which case was quoted as authority in the case of **Steven Malcom Musiker (272) [2012] ZSCA 198 (30 November 2012)** the Supreme Court of Appeal stated the following:

“Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant of the offences. The acceptance of the prosecution’s evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false.”

- [18] I find myself in disagreement with counsel in this regard. The police officers did not know the appellant. He was pointed out by the complainant as one of the people who robbed him. When the appellant was arrested, the police officers found him in possession of the Nokia C1 cellphone which was identified by the complainant as his. He switched it on and put his password or pin code and was able to call his father and inform him of the incident. That piece of evidence in my view uncontroverted and places the appellant at the scene of the robbery. It identifies the appellant as one of the culprits who perpetrated the robbery against the complainant.

[19] I am of the view therefore that the evidence in this case places the appellant at the scene of the robbery. There was no duty on the appellant to prove his *alibi* but where there is evidence placing him at the scene of the crime, he is at least expected to tender evidence corroborating his *alibi* and the appellant failed to lead such evidence. I am of the view therefore that the Court a quo correctly rejected his alibi as false.

[20] In the case of **S v Mthetwa 1972 (3) SA 766 (AD)** the Appellate Division (as it then was) stated the following:

“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;”

[21] It is my respectful view therefore that there is corroborative evidence in this case identifying the appellant as one of the culprits who committed the robbery against the complainant. The Nokia cellphone belonging to the complainant was found on the appellant. Thamagane and Sefekabefore testified that they never lost sight of the culprits as they were chasing them. I am therefore satisfied that

the Court a quo correctly found that the state has proved its case against the appellant beyond reasonable doubt.

[22] It is trite that sentencing is pre-eminently the domain of the trial Court. The court of appeal may only interfere with the sentence imposed by the trial court if it is of the view that the trial Court did not exercise its discretion judiciously and correctly. Alternatively, if the appeal Court is of the view that the sentence imposed is disturbingly inappropriate

[23] In the case of **S v MALGAS 2001 (1) SACR 496 (SCA)** the Supreme Court of Appeal stated the following:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial Court.”

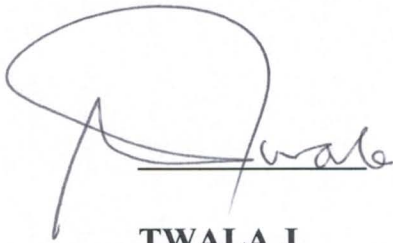
[24] The appellant was convicted of a serious crime for which the legislature found it necessary to promulgate a minimum sentence of 15 years imprisonment, unless the Court finds that there exist substantial and compelling circumstances which oblige the Court to deviate from imposing such a sentence.

[25] The Court found that substantial and compelling circumstances are present in this case in that the appellant was a first offender who has been in custody for 4 months. The complainant was not injured in the incident and his goods were recovered. In the result the Court a quo sentenced the appellant to 8 years imprisonment. I hold the view therefore that there is no misdirection on the part of the Court a quo with regard to sentence. I am therefore satisfied that the

appellant was correctly sentenced to 8 years imprisonment and the appeal falls to be dismissed on this ground.

[26] In the circumstances, I make the following order:

I. The appeal against both the conviction and sentence is hereby dismissed.

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TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree,

A handwritten signature in dark ink, appearing to read 'Sardiwalla', written over a horizontal line.

SARDIWALLA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

Date of hearing: 26 October 2017

Date of Judgment: 26 February 2018

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