

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>3/05/2018</u> DATE	
 SIGNATURE	

Case number: **A339/2017**

In the matter between:-

RAMOKONE: TLOTLO JOHANNES

Appellant 1

PHUMANE: SOLLY MALEFETSANE

Appellant 2

BALOYI: ANTON

Appellant 3

and

THE STATE

Respondent

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

[1] The appellants were arraigned in the Kempton Park Regional Court on 2 counts of robbery with aggravating circumstances. They were legally represented and pleaded not guilty to all the charges. They were convicted and each sentenced

to 10 years imprisonment, both counts having been taken together for sentencing purposes. All the appellants were declared unfit to possess fire-arms in terms of section 103 of Act 60 of 2000.

[2] The court *a quo* granted the appellants leave to appeal against both their convictions and sentences.

ISSUES IN DISPUTE

[3] Identity is the key issue in dispute in relation to their conviction.

BRIEF OVERVIEW OF THE FACTS AND EVIDENCE

[4] Count 1 relates to an incident, which had occurred on a plot in Pomona, Kempton Park. Ms Caroline Masanganje (*'Ms Masanganje'*) who runs a tuck shop from her room on the plot, was sitting outside this room on 16 October 2016, when 2 robbers approached her, one wielding a gun and the other a knife. Altogether there were approximately 8 assailants. After some attempts by her and her sister-in-law, Ms Letta Musibudi (*'Ms Musibudi'*), to prevent their entry into the room by obstructing the entrance with a fridge, the robbers (or some) gained entry. They took R 2000 in cash, 2 litres of cold drink, a cellular phone, about 200 cigarettes and airtime vouchers. Count 2 relates to events which had occurred at about the same time. Mr Cassim Mohale (also referred to as Cassim Harry *'Mr Cassim Harry'*) was assaulted and a Golf motor vehicle (*'the Golf'*), the property of Mr David Dube (*'Mr Dube'*) was taken. The Golf was used as a get away car by 5 of the robbers in respect of Count 1.

[5] The state's case rested on the evidence of Ms Masanganje, Ms Musibudi, Mr Cassim Harry, Mr Dube and Sergeant Nikodimus Delamo (*'Sgt Delamo'*) whose evidence dealt with an identification parade (*'ID parade'*).

[6] The substantive and procedural fairness of the ID parade were not disputed. The results are thus common cause. All three appellants participated in the ID parade where Ms Masanganje and Ms Musibudi identified all three appellants, Mr Cassim Harry identified appellant 2 and Mr Dube, appellant 3.

[7] In court and during evidence: Ms Masanganje identified appellants 2 and 3 only (it is important to note that there were only 3 accused who stood trial in the court *a quo* being the 3 appellants); Ms Musibudi identified appellants 1 and 3 only and Messrs Cassim Harry and Dube, appellants 2 and 3.

[8] All 3 appellants testified, denied participation in the offences and that they were present at the scene of the crimes.

ASSESSMENT OF EVIDENCE

[9] In *S v Hadebe*, 1997 (2) SACR 641 the court re-emphasised the following principles at 645e:

‘Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, **its findings of fact are presumed to be correct** and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.’
(emphasis provided)

[10] It is common cause that all the identifying state witnesses had seen appellant 2 selling ice cream on the plot prior to the incident. Similarly, appellants 1 and 3 were known by sight as they attended soccer matches on Sundays, appellant

3 used to sell dollars and he was known for this. One of the factors which are of great importance in the case of identification is the witness' previous knowledge of the person sought to be identified.

[11] Although it can hardly be said that the identifying witnesses knew the appellants, the fact that they had seen the appellants in the context described and that these activities, ie the selling of ice cream, dollars and the attendance at soccer matches, was not disputed during cross-examination of the relevant witnesses, is of considerable significance.

[12] In my view, one looks in vain for a misdirection on the part of the court *a quo* on the findings of reliability in respect of the identification evidence. The court *a quo* very carefully analysed the opportunities and circumstances pertaining to the identification. His conclusion that they had sufficient time to observe the robbers whose faces were not covered, cannot be faulted. His conclusion that the area was sufficiently lit can similarly not be faulted.

[13] The one contradiction emphasized during argument before the learned magistrate was that Ms Masanganje testified that only 1 robber had entered her room whereas Ms Musibudi had testified that 4 robbers had entered the room. The learned magistrate, quite rightly in my view, had regard to the fact that the evidence demonstrated that the room had been partitioned so that Ms Masanganje's view of the door would have been obstructed. One should also bear in mind that the situation was fluid ie the robbers were walking around in addition to the fact that the two witnesses had different vantage points in the room. In my view, the contradiction (insofar as it might be construed to be one which I do not find), is not material. In this regard, the learned magistrate relied, quite aptly, on the dicta in *S v Bruiners and*

Another, 1998 (2) SACR 432 (EC) at 435 a - b and *S v Mafaladiso and others*, 2003 (1) SACR 583 (SCA) at 584 i – j and 585 a – d where the well recognised principle was restated that the consequence of the existence of a contradiction is not necessarily the rejection of the state's version. The evidence must be viewed as a whole.

[14] The contradictions between the identification at the ID parade and the identifications in court are of no consequence. The incident occurred on 16 October 2016. Appellants 1 and 2 were arrested on 22 October 2016 and appellant 3 on 23 October 2016. The ID parade was held on 1 March 2017. The trial was started on 17 May 2017. All the appellants were pointed out to the police by Ms Masanganje shortly after the incident. It was by virtue of this identification that they were arrested.

[15] It would have been very easy for Ms Masanganje to make a dock identification of appellant 1. She did not and this should count in her favour. Ms Musibidi met appellant 1 outside and he had struck her with a firearm on her left ear. She had ample opportunity to see him and because of his specific interaction with her, left a significant impression on her.

[16] Ms Masanganje further testified that appellant 3 slapped her and that during these assaults she witnessed the tattoos on his hand. The existence of the tattoos on the hand of appellant 3 was never disputed.

[17] The finding that the identifying witnesses were both honest and reliable is, in my view, unassailable. The reliability of identification depends on various factors, such as lighting, visibility, eyesight, the proximity of the witness, the opportunity for observation, both as to time and situation, the extent of the witness's prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's

face, voice, build, gait and dress, see *S v Jochems* 1991 (1) SACR 208 (A) at 212 a – e.

[18] In my view, the learned magistrate evaluated the evidence correctly. He was clearly conscious of the principles formulated in *S v Hadebe and others*, 1998 (1) SACR 422 (SCA) at 426 F to H in which the importance to adopt a holistic approach to the evaluation of the evidence was emphasized. Due regard was also had to the principles formulated in *S v Shackell*, 2001 (4) SA 1 (A) at para 30 in which the correct approach to the role of probabilities in criminal matters was formulated and the importance to have regard to each piece of evidence as emphasized by Nugent JA in *S v Van der Meyden*, 1999 (2) SA 79 (W) at 82 D – E and *S v Chabalala*, 2003 (1) SACR 134 (SCA) at 15, was stressed.

[19] Although the learned magistrate did not say so expressly, he was, in my view, correct to find that the versions of the appellants were, having regard to the conspectus of evidence, not reasonably possibly true and that such versions were, beyond reasonable doubt, false.

SENTENCE

[20] Both counts attracted minimum sentences of 15 years imprisonment in terms of section 51 and schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended. Without identifying the substantial and compelling circumstances in respect of each appellant, the learned magistrate sentenced each appellant to 10 years imprisonment in respect of each count and ordered the sentences to run concurrently thus sentencing each appellant to an effective term of 10 years imprisonment as opposed to 30 years imprisonment each. It appears as though the

learned magistrate was acutely aware of the cumulative effect of the sentences and concluded that the sentence imposed was appropriate.

[21] The principles underpinning the power of a court on appeal to interfere with the sentence imposed by the trial court are well established in our law. In *S v Romer* 2011 (2) SACR 153 (SCA), at paras [22] and [23] they were discussed as follows:

[22] It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal have been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is '(a) disturbingly inappropriate; (b) so totally out of proportion to the magnitude of the offence; (c) sufficiently disparate; (d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and (e) is otherwise such that no reasonable court would have imposed it.' See *S v Giannoulis*; *S v Kibido*; *S v Salzwedel & others*.

[23] In *S v Matlala*—it was held that, in an appeal against sentence, the fact that the sentence imposed by the trial court is wrong, is not the test. The test is whether the trial court, in imposing it, exercised its discretion properly or not. Consequently, the circumstances in which an appellate court will interfere with the exercise of such discretion are circumscribed. In *S v Sadler* Marais JA, writing for a unanimous court, had occasion to re-state them when he said the following:

'The approach to be adopted in an appeal such as this is reflected in the following passage in the judgment of Nicholas AJA in *S v Shapiro* **1994 (1) SACR 112** (A) at 119j-120c:

"It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in *S v Rabie* **1975 (4) SA 855** (A) at 857D-F:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal —
(a) should be guided by the principle that punishment is 'pre-

eminently a matter for the discretion of the trial Court',
and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

2 . The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".
(footnotes omitted)

[22] The state did not cross-appeal against the sentences imposed. Had it done so the outcome of this appeal might have been different. I mention this simply because in my view, the sentences imposed were too lenient. Such a finding in and of itself would however, not, on its own, have justified interference by this court. It was argued that the sentences imposed were shockingly inappropriate and unjustifiably harsh. As already intimated, such a conclusion is totally unwarranted. To the contrary, the opposite conclusion might even be warranted. Be that as it may, there certainly exists no reason to interfere with the discretion exercised by the learned magistrate.

CONCLUSION AND ORDER

[23] I cannot fault the learned magistrate's reasoning nor his finding and accordingly make the following order:

23.1 The appeal is dismissed.


Ingrid Opperman
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree

A handwritten signature in black ink, appearing to read 'MB Mahalelo', written over a horizontal line.

MB Mahalelo
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 23 April 2018

Judgment delivered: 3 May 2018

Appearances:

For Appellant: Ms Y.J. Britz

Instructed by: Legal Aid South Africa

For Respondent: Mr MT Ntlakaza

Instructed by: Office of the DPP