



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

DATE

SIGNATURE

CASE NO: ~~A110/2009~~

27/05/2010
A1034/2009

In the matter between:

SIFISO MPUNGOSE

Appellant

And

THE STATE

Respondent

JUDGMENT

LEDWABA, J

[1] The appellant was convicted on 4 counts of robbery with aggravating circumstances (counts 1, 2, 4 and 5), one count of contravening **section 3 of Act 60 of 2000** (unlawful possession of a firearm) (count 3) and attempted robbery with aggravating circumstances (count 6). Counts 1, 2, 4 and 5 were taken together for sentence and he was sentenced to fifteen years imprisonment. On count 3 he was sentenced to five years imprisonment. On Count 6 he was sentenced to

five years imprisonment which was to run concurrently with the sentence of fifteen years imprisonment on counts 1, 2, 4 and 5. Appellant was then effectively sentenced to twenty years imprisonment and was further declared unfit to possess a fire arm.

- [2] According to the charge-sheet all the offences were committed on 18th October 2008 at Wattville in the Region of the Gauteng District. Appellant was legally represented during the trial in the court *a quo*.
- [3] Leave to appeal against conviction and sentence was granted by the High Court after the court *a quo* refused to grant the application for leave to appeal.
- [4] For convenience sake, I will refer to the incidents where counts 1 and 2 were allegedly committed as 'the first incident' and the incidents where counts 4, 5 and 6 were allegedly committed as 'the second incident'. Count 3 is an element in the first and second incidents. How count 3 was committed, will be apparent when I discuss the facts relating to the first and second incidents.
- [5] Thokozani Mbala (Thokozani) and Vuyiswa Mthunzi (Vuyiswa) testified about counts 1 and 2 and said on the 18 October 2008 at about 21h00 they were walking together with one Goodman when they were approached by a group of men. When one of the men from the group, whom they said is the appellant, cocked a fire arm, Thokozane tried to

run away but they caught him and three shots were fired during the event. Thokozane was hit with a fire arm on his forehead. He sustained an open wound and bled profusely. The attackers searched him after he fell on the ground and took his cell phone, a Nokia 6600.

- [6] Vuyiswa was separated from Thokozane by some of the attackers. She was hit with a open hand on her face and her cell phone and a belt were taken.
- [7] When the attackers left, Thokozani went to a nearby shebeen to seek assistance.
- [8] The summary of the evidence of Ishmael Zwane (Ishmael), Mpumelelo Zwane (Mpumelelo), and Dikeledi Molehisi (Dikeledi) complainants in count 4, 5 and 6, respectively, regarding the second incident is that on 18 October 2008 at about 1h00 whilst on their way to buy some alcohol beverages they were attacked by a group of people. One of the attackers cocked a firearm and demanded money and cell phones from them.
- [9] Ishmael was hit with the firearm on his left eyebrow. When a shot was fired he took out R50 and dropped it on the ground. The attackers took his pair of trousers and there was R100 in one of the pockets. The attackers took Mpumeleo's wallet which contained R800 and some bank cards. His pair of takkies was also taken. Dikeledi said when she was

searched, the attackers indecently touched her breast and private parts. Nothing was taken from her.

- [10] The complainants said they were instructed by the attackers to lie down and were not supposed to look at their attackers.
- [11] Dikeledi and Mpumeleo said the offenders left and the person who had a fire arm, whom they also said is the appellant, remained behind and one of the offenders from the group that left, called him by the name 'Sifiso'. They further said after the second incident occurred a vehicle passed next to them.
- [12] Regarding the first incident, Bongani Magagula (Bongani), seventh state witness, confirmed that Thokozani did come to the shebeen. He (Bongani), invited his co-worker and they all left in a vehicle to look for the attackers.
- [13] They noticed a group of people in the process of a robbing some people. Thokozani and himself alighted to check what was happening. When the vehicle approached the said group the attackers ran away. They pursued one of the attackers who cocked the fire arm in his possession to threaten them but they managed to catch him when he tried to jump over a fence. They said the person they arrested is the appellant.
- [14] Thokozani testified that his cell phone and Vuyiswa's cell phone were found in possession of the appellant. However,

Bongani said only one cell phone was found in the appellant's possession.

- [15] Appellant in his evidence denied that he robbed the complainant and that he was in possession of a fire arm. His version, briefly, was that he was from his place of employment in Johannesburg on 17 October 2008. He arrived at Kwikot in Wattville just after 23h00. A BMW motor vehicle bumped him. Thereafter the occupants beat him and put him in the boot. They then took him to the police station. He further said he was falsely accused to have been in possession of a fire arm.
- [16] He said he was taken to Thembisa hospital for treatment. When he returned from the hospital he saw the complainant at the police station.
- [17] Mr. Novella, the eighth state witness, testified that Bongani came to the police station with a group of people. He received a Luger 9mm fire arm, a cell phone and something (the record of the proceedings reflects [inaudible] regarding what he further received), see page 63 lines 2-3 of the record.
- [18] Aaron Monkoe testified that on 12 November 2008 he booked out a 9mm CZ75 fire arm which was sealed and had a serial number FSC 577457 from the SAP 13 459/2000 and took it to the Forensic Department.

- [19] In paragraph 3 of exhibit 'B', affidavit in terms of **section 212 of the Act** by Tebogo Alfred Shametha the fire arm is described as a 9mm Parabellum Calibre CZ model 75B semi-automatic pistol, serial number V8505 with a magazine. I think Mr. M. Novella and Mr. Monkoe refer to the same fire arm because both refer to the same SAP 13.

EVALUATION OF THE EVIDENCE

- [20] The complainants in the first incident said the attacker was the appellant and he was wearing dark clothes and they recognised his height or body built. However, they could not give a description of his face. They further said they were seeing the appellant for the first time. They said it was dark but there were street lights.
- [21] It would not be proper to convict the appellant solely on the basis of the identification of the complainants especially because Thokozani admitted that he consumed some beers and he further said he felt dizzy because of the bleeding.
- [22] Complainants in the second incident also said the appellant was one of the attackers and he was wearing dark clothes. They also said there were some street lights some 5-10 metres away from where they were robbed.
- [23] Dikeledi said she also recognised the appellant's voice.

- [24] Regarding the cell phone Thokozani said two phones were found on the appellant after he was arrested. However, Bongani said one cell phone was found in his possession.
- [25] Vuyiswa's uncontested evidence is that her cell phone was also taken and she received it back after about one hour from Thokozani. I think Bongani could not have seen the second cell phone taken from the appellant when he was arrested.
- [26] I also need to take into account that Dikeledi and Mpumelelo said one of the person's who attacked them was called by his name 'Sifiso'.
- [27] Coincidentally the appellant's name is also 'Sifiso' and he does not dispute that he was bumped by a vehicle and arrested by the people who were in the said vehicle.
- [28] According to the appellant he was arrested on the 17 October 2008 just after 23h00. He did not challenge and dispute the complainants version that the arrest took place at about 1H00 on 18 October 2008.
- [29] I need to point out that the magistrate erred in the judgment when he said in addition to the cell phone an amount of R1000 was taken from Thokozani. Thokozani testified that only a cell phone was taken from him.

- [30] I think the magistrate correctly accepted the version of the state witnesses and found that the accused's version, where it contradicts with the version of the state is not reasonably possibly true. The conviction is in order.

SENTENCE

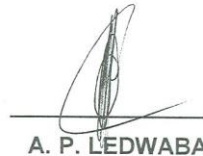
- [31] The only reason mentioned in the appellant's heads of argument regarding sentence is that the magistrate misdirected himself by imposing an effective imprisonment term of twenty years and overemphasised certain aspects.

- [32] It is trite that the court, the appeal court, should not lightly interfere with the sentence imposed by another court when the said court exercised its discretion reasonably and there are no material misdirections. See **S v Kgosimore 1992 (2) SACR 238 SCA**, and **S v Nchechè 2005 (2) SACR 386 (W)**.

- [33] I cannot find any justification to interfering with the sentence of the court *a quo*.

- [34] I therefore, make the following order:

The appeal against conviction and sentence is dismissed.



A. P. LEDWABA
JUDGE OF THE HIGH COURT

I agree,


N. P. MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT