

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NO.: A32/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	03 June 2022
.....	
SIGNATURE	DATE

In the matter between:

CLINT MZWANDILE TUMANE

1st Appellant

TSHAKANE LAWRENCE NTLEMO

2nd Appellant

NKULULEKO MOSES MKHWANAZI

3rd Appellant

versus

THE STATE

Respondent

JUDGMENT

MPHAHLELE J

[1] The appellants were charged with *'robbery with aggravating circumstances read with the provisions of section 51 of Act 105 of 1997 minimum sentence of 15 years imprisonment upon conviction in that upon or about the 27th of June 2012 and at or near Valencia, Nelspruit in the regional division of Mpumalanga the accused did unlawfully and intentionally assaulted Riza Ali Mayet and did then and with force take from him R27 500-00 a bag valued at R200-00 his property or property in his lawful possession aggravating circumstances being the use of firearms'*.

[2] The appellants pleaded not guilty but were eventually convicted as charged and each sentenced to 15 years' imprisonment.

[3] This is an appeal by leave of the trial court against both the conviction and sentence.

[4] The main contention of the appeal is that the trial court erred in accepting the evidence of the complainant as a single witness to be true and finding that the state proved its case beyond reasonable doubt on the charge. Further that the trial court erred by failing to allow the recalling of the complainant and in fact failed to make any ruling in this regard.

[5] Let me first deal with the application for the recall of Mr Riza Ali Mayet ("the complainant"), to the witness stand. This application was brought immediately after the testimony of the first two appellants, who were accused 1 and 2 respectively during the trial proceedings. The main objective of the application was to place a statement made by the complainant to the police before court and also clarify some aspects of the statement by canvassing the issues with him (the complainant). At page 113 line 17, the legal representative submitted as follows: *"However your worship in the interest of justice and for the court to reach a just decision it is necessary that Mr Rizza be recalled so that he can clarify some of these things in his statement that were not put to him."*

[6] The State then indicated that it had no objection to the complainant's statement made to the police being handed into the record. On this basis, the appellants' representative indicated that there was no need to recall the complainant. He practically abandoned the application and proceeded to call the third appellant (accused 3) to the

witness stand.

[7] The trial court, correctly so, stated in its judgment that the application for the recalling of the complainant was abandoned and as a result thereof did not deal with the application.

[8] Let me now deal with the issue of whether or not the State managed to prove its case beyond reasonable doubt.

[9] Mr R A Mayet, the complainant was the only witness for the state connecting the appellants to the crime.

[10] It is trite that an accused may be convicted of an offence on the single evidence of a competent witness but the court must apply the cautionary rule and that particular evidence be treated with due caution. In this respect the court in *S v Mthethwa* 1972 (3) SA 766 (A) at 768 A – C, 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 the identification parade, 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....."*

[11] Therefore, particular care should be taken if the only evidence connecting the accused with the crime is that of a single identifying witness; then the cautionary rule relating to single witnesses should also be taken into account.

[12] In *S v Sauls & Others* 1981 (3) SA 172 (AD) at page 180 E – G, the court stated the following: *"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or*

contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by DE VILLIERS JP may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded.' It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[13] The complainant testified that on 27 June 2012 at about 16h15, the first appellant entered his store to ask for a quotation. The first appellant was not very clear what he wanted, he could see that he did not know what he wanted but nevertheless proceeded to give him a quotation. It is in the normal course of his business that he would find customers who are confused and then he will advise and then give a proper quotation. After receiving the quotation, the first appellant left the store followed by the complainant who went to his yard to give instructions to his workers. The complainant then noticed the first appellant getting into a white Golf driven by the second appellant. The Golf was parked at the gate of his store. The car was parked right in his driveway at the entrance to the gate and he was walking towards the gate to his staff who was on the left hand side and that is when he saw the first appellant getting into this car. The car was driven by the second appellant. There were other occupants in the car but could only notice the third appellant who was wearing a red shirt. The appellant was sitting in the front seat. It was at the time the store was about to close and there were not many people around, it was quiet.

[15] The complainant collected daily takings of R6 500-00 from the store and placed it in his pocket. He then left for his home. When approaching his home, he noticed three or four people standing on the staircase of the overhead pedestrian bridge adjacent to his home. He regularly observes the bridge to ascertain if there were any people standing there because he was previously robbed. He noticed 3 to 4 people standing on the staircase. He immediately recognised the first appellant who was walking towards his house. He found the scenario to be a bit suspicious and did not immediately turn into his driveway, he drove past his house and went around the block and then eventually turned into his house. He then pulled into his driveway and before he could exit the vehicle, he was accosted by three men. The first and third appellants and another person ordered him out of the vehicle. As he got out of the vehicle, he was punched by the third appellant. He could not identify the persons who assaulted him whilst he was lying on the floor. He had a scarf around his neck which was used to strangle him as they demanded cash. The amount of R6 500-00 in cash, two cell phones and other belongings were removed from him. He directed them to a bag containing the rest of the money at the back of his car. The bag had an amount of R14 500-00 in cash. After removing the bag,

one of the men instructed the other one to shoot the complainant. At the time the complainant's neighbour appeared and shouted, enquiring as to what was happening. The appellants then left. The complainant's daughter who witnessed the attack went inside the house and pressed the panic button. Hi Tech security personnel who were patrolling in the vicinity responded immediately. About an hour later, the security personnel informed the complainant that 3 suspects have been arrested. He later went to the police station to make a formal statement and the appellants were brought in at the same time. He immediately notified the police officer in charge that the appellants were the very same people who attacked him.

[16] He recognised the first appellant as the man who came to his store earlier on for a quotation. He still remembered his face and the same clothes he was wearing earlier on at the store. He "*unmistakably*" identified the second appellant by his dread hairstyle and face and recognised him as the driver of the vehicle. He recognised the third appellant as one of the occupants in the car. The third appellant was wearing a red shirt and he punched him during the incident.

[17] The complainant recognised the appellants because it was just a short period of time from the time that they came to his shop to the time that they attacked him at his home. He thereafter saw them about an hour later after the attack at the police station. He saw them thrice on that day. The three men who instructed him to get out of his car were all armed.

[18] HiTech recovered the bag and gave it to the complainant at the police station and he found his belongings intact in the bag, namely his watch, a personal file as well as some business documents.

[19] Under the circumstances of this case, the trial court exercised caution in regard to the evidence of the complainant and found the evidence of the complainant to be reliable and credible.

[20] As to his reliability, the court found that the complainant had ample opportunity for observation of the appellants.

[21] The circumstances of this case justify the guilty finding of robbery with aggravating circumstances as found by the trial court.

[22] It follows that the appeal against conviction cannot succeed.

[23] I now turn to the appeal against the sentence imposed by the trial court. As already stated, the appellants were each sentenced to 15 years' imprisonment for robbery with aggravating circumstances read with section 51 of Act 105 of 1997. The appellants were further declared unfit to possess firearms.

[24] The appellants did not lead any evidence in mitigation and their personal circumstances were presented as follows:

[25] The first appellant is a 33 years old male and a father of two children. He is living with his wife and younger brother and sister. He is employed as a security officer and has one older brother who is also employed. His family is dependent on him for financial support. He is a first offender.

[26] The second appellant is a 34 years old male and has 3 children aged 2, 8 and 12 years old respectively. He is still staying with this mother. His wife, mother and children are financially dependent on him. He is self-employed and offer some employment opportunities for the youth. He passed matric and thereafter obtained a diploma in bookkeeping. He is also a first offender.

[27] The third appellant is a 34 years old male and has three children aged 3, 6 and 14 years old respectively. Only two of these children are staying with him. His family, including his mother, are dependent on him for financial support.

[28] Further it was submitted that the court should also take into consideration that the appellants were relatively young at the time of the commission of the offence, that the complainant did not suffer serious injuries and that all the stolen items were recovered. Further the offences were committed in June 2012 and the matter was only finalised in February 2019 even though the appellants were on bail, as a result they were not in custody during the whole trial proceedings. During this period of approximately 7 years, there were several postponements of the trial hearings and the appellants attended each of the court proceedings without fail. Further in that period, the

appellants were never found to have fallen foul of the law. The appellants appear to be good candidates for rehabilitation.

[29] It is no doubt that the appellants were convicted of a serious offence. Society expects the courts to deal appropriately with the perpetrators of such heinous deeds. Without doubt, society needs to be protected from such criminals.

[30] After having considered all the evidence in this matter, I am of the considered view that there are substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence of 15 years' imprisonment in respect of each appellant. I am further of the considered view that the appropriate sentence would be 10 years' imprisonment in respect of each appellant.

[31] In the result, it is hereby ordered as follows:

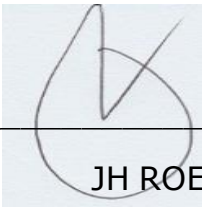
1. The appeal against conviction is hereby dismissed.
2. The appeal against the sentence is hereby upheld and replaced with the following sentence:
 - 2.1 The appellants are each sentenced to 10 years' imprisonment, antedated to 22 February 2019;
 - 2.2 The appellants are further declared unfit to possess firearms in terms of section 103 of the Firearms Control Act 60 of 2000.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a small flourish.

S S MPHAHLELE

DEPUTY JUDGE PRESIDENT
MPUMALANGA HIGH COURT

I agree.



JH ROELOFSE

ACTING JUDGE

MPUMALANGA HIGH COURT

FOR THE APPELLANTS: Attorney C G Jordaan

INSTRUCTED BY: Coert Jordaan Inc Attorneys

FOR THE STATE: Adv T S J Bekwa

INSTRUCTED BY: THE NDPP

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 03rd day of June 2022.