



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

2017-04-25
DATE


SIGNATURE

CASE NUMBER: A566/16

DATE: 25 April 2017

JOHN MOGODI TSHEBESEBE

Appellant

V

THE STATE

Respondent

JUDGMENT

MABUSE J:

- [1] This is an appeal against both the conviction and sentence, leave so to appeal having been granted on petition by Jansen J and Lebala AJ.

[2] The appellant appeared before a regional court magistrate in Cullinan where he was charged with robbery with aggravating circumstances as contemplated in s 1 of Act 51 of 1977 (“the CPA”) read with the provisions of s 51 (2) of the Criminal Law Amendment Act 105 of 1997 (“the Minimum Sentence Act”). He was accused of having committed the offence on 16 October 2013 at Refilwe when he unlawfully and intentionally assaulted one AA Mename and there and then with force, when he took certain items, to wit R1500.00 cash, airtime to the value of R800.00 and cigarettes to the value of R750.00, the property at the time in the lawful possession of the said AA Mename by use of a firearm or a dangerous weapon. It is also contended by the State that during the said robbery serious injuries were inflicted on the said AA Mename.

[3] The appellant, who pleaded not guilty to the charge enjoyed legal representation during the entire trial. Despite his plea of not guilty to the charge he was convicted accordingly and upon conviction, sentenced to 15 years imprisonment.

[4] The offence against the appellant arose from the following circumstances. On 16 October 2013 the said Adisa Adam Adade Mename (the complainant) was in the shop selling and waiting for customers at Refilwe. He was being assisted by his brother, Adamaje Tamras Gabore (“Gabore”) who at the specific stage had gone to the toilet. It would appear that the

toilet was outside the shop building. While he was still waiting for his customers, one walked in. It was a black man. He produced a R20.00 note, told him that he wanted a Vodacom R12.00 airtime and gave him R20.00. He took the R20.00 note and bent down to fetch the airtime.

- [5] Immediately when he rose from where he had fetched the airtime and when he was preparing to give such airtime to the first black man two other men walked into the shop. One of these men was armed with a firearm. The man who had a firearm pointed it at him, told him to come out behind the counter and to lie down on the floor. He obliged and lay face down on the floor. After lying down the first black man firstly stood on his back and thereafter sat on it. The other two then went behind the counter and took airtime and money and cigarettes. The first black man who was the accused in the court *a quo* and now the appellant in this appeal stabbed him with a knife once on his left shoulder and asked him where the other money was. He screamed and as he did so they all ran out, the appellant ran into the direction of his brother and the other two into a different direction. The brother caught the appellant. Members of the community came. The police were called. The knife was found in his possession. That is the knife that the appellant had while he was fleeing. The community members took the knife from the appellant and gave it to the police.

- [6] The robbers took cash, airtime and cigarettes from the shop to the value of R1550.00.

[7] As a consequence of being stabbed with a knife on the shoulder he sustained an injury and bled. He was detained for two months, first at a hospital in Bronkhorstspuit and later at Steve Biko Academic Hospital here in Pretoria for medical treatment.

[8] During cross-examination he testified that the people who came to rob him spoke to the appellant. The appellant's version was put to him that the appellant gave him a R50.00 note, which he denied and gave him a wrong change and when he queried the change he threatened to stab him with the knife, which he also denied. Again during cross-examination the J88 was handed in. In addition and after further scrutiny of the said document, he testified that he also had sustained a small cut on his hand caused by the knife that the appellant had. It was furthermore put to him that it was not the appellant who stabbed him with the knife. He was adamant that it was indeed the appellant who stabbed him with the knife.

[9] The appellant testified in his defence. He admitted that on the date in question he was at the complainant's shop, having gone there to buy airtime. He got the airtime plus R8.00 change. He had a fall out with the complainant over the change that the complainant had given him. He claimed that when he bought airtime he gave the complainant R50.00 but instead of the complainant gave him a change of R38.00, he gave him only R8.00.

[10] He denied that he pulled out a knife and stabbed the complainant with it. He testified that the complainant approached him with clenched fists as he went out of the shop. As he did so some members of the public walked into the shop. The public walked into the shop when he and the complainant started to fight. The next thing that he saw was members of the public grabbing him and tying his hands with ropes behind his back. On a question by the court he said that the complainant grabbed him by his clothes and hit him with fists. He hit back.

[11] The court led the evidence of one July Kleinbooi Maseko ("Maseko"). His evidence related to events that took place after the robbery. It will therefore not be helpful to this Court.

[12] The court *a quo* was satisfied that the State had proved its case beyond reasonable doubt. Accordingly it convicted the appellant. The court remarked during its judgment that it was not denied that the knife was recovered from the complainant. It was further not denied that the appellant was assaulted by the members of the community until he was saved by Maseko. Furthermore it was never denied that the complainant had an injury at the back of his shoulder. It was also not in dispute that the complainant was robbed and it was common cause that the appellant was assaulted by the community and suffered some injuries.

[13] The court remarked that the evidence of the complainant on the alleged robbery was that of a single witness and of course the court was alert against the dangers inherent in the evidence

of a single witness. The court accordingly approached the evidence with caution. The impression that the complainant created to the court was that it was alarm individual who gave his evidence in a collective manner. The only contradiction that was inherent was that he said he forgot about the secondary injury. It was a slight injury on his right hand top of the finger. The fact that he told the court that he was two months in hospital is not a contradiction because the State prosecutor's remark in re-examination was that he was an outpatient at Steve Biko Hospital.

- [14] The court remarked that it could not make a justifiable inference that the complainant was unreliable because of a single omission to make reference of a slight injury on his hand. According to it there were no other inherent contradictions by the complainant or external contradictions by any other witness before the court. The court could not find any more default in any of the state witnesses or the court witnesses to falsely implicate the accused. No one knew the accused before the incident.

- [15] The court made no adverse inference about the complainant as a witness nor about his brother. The court was satisfied that the State witness testified satisfactorily in all respects. The court stated that upon a consideration of the totality of the evidence it was satisfied that the version by the appellant could not be reasonably possibly true and that it must be rejected. On that basis it rejected the appellant's evidence.

[16] Upon conviction the court *a quo* sentenced the appellant to 15 years imprisonment in terms of the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997. The court *a quo* did not find any substantial and compelling circumstances to justify the imposition of a sentence lesser than the prescribed one. Mr. Moeng argued that the sentence imposed on the appellant by the court *a quo* should be interfered with and reduced because the appellant was severely assaulted by the members of the community. Such an assault was unlawful. Taking it into account it would validate the conduct of the community which was unlawful. It will make bad precedents that a suspect can always be assaulted with the hope or possibility that his sentence before a court of law may be reduced.

[17] In imposing sentence we are satisfied that the court *a quo* took into account all the relevant factors, including the personal circumstances of the appellant and the fact that he had a clean record. The court *a quo* supported its findings by reference to decided cases. In our view the court *a quo* did not misdirect itself in any manner in imposition of an appropriate sentence.

[18] The following order was made by the court *a quo*:

"In terms of section 51(2)(a), you are sentenced to 15 years' imprisonment and I state it that 51(2)(a) means in terms of Section 105 of the 1997, you must continue four fifths of your sentence of 15 years, it is 12 years before you have the right to go on parole."

We are of the view that by imposing such a sentence the court *a quo* attempted to dictate to the Department of Correctional Services as to how it should conduct its affairs. It was unnecessary and not appropriate. This Court is at large to vary the sentence imposed by the court *a quo* by jettisoning the unnecessary appendages. No one Department of the State is entitled to dictate to another Department of the State how the latter must conduct its own affairs.

[19] Accordingly we make the following order:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The sentence imposed on the appellant by the court *a quo* is hereby set aside and in its place is substituted the following:

"3.1 The accused is sentenced to 15 years imprisonment."



P.M. MABUSE

JUDGE OF THE HIGH COURT

I agree



S.C. MIA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant:

Mr. S Moeng

Instructed by:

Pretoria Justice Centre

Counsel for the respondent:

Adv. M Molatudi

Instructed by:

Director of Public Prosecutions

Date Heard:

25 April 2017

Reasons furnished on:

25 April 2017