



Reportable:	Yes/No
Circulate to Judges:	Yes/No
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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

*CASE NO.: CA&R 00/15
Matter heard: 31-10-2016
Delivered: 09-12-2016*

In the Appeal of:

China Leshope
Thabalakhe Grond

1st Appellant
2nd Appellant

And

THE STATE

Respondent

WILLIAMS J et ERASMUS AJ

J U D G M E N T

WILLIAMS J:

1. The appellants, Messrs China Leshope and Thabalakhe Grond, were convicted in the Regional court, Galeshewe on a charge of robbery with aggravating circumstances and were sentenced each to 15 years imprisonment. This appeal lies against both the conviction and sentences imposed.
2. The appeal against the convictions hinges on the issue of identity. The appellants maintained from the outset, in their

plea explanation and their evidence that they were walking peacefully, albeit inebriated, from a tavern when they were approached in the street by patrolling police officers who arrested them for no reason and placed them in the back of the police van where they were later identified by the complainant and his witness as the men who committed the robbery.

3. The state's case is briefly as follows:

3.1 The complainant Mr Isaac Mdoloza and his friend Mr Katlego Thipa testified that they were walking together along a footpath through the veld in club 2000 at around 22:00 on the night in question. Mr Thipa had fallen slightly behind since he had to attend to a call of nature, when four men approached them. Three of these men went for the complainant and one ran to Thipa.

3.2 According to the complainant the first appellant grabbed him by the pants, took out a knife and stabbed him once in the chest while the two other assailants who were also armed with knives stood to the side.

3.3 The second appellant returned from Thipa and started searching through the complainant's pockets. He took the complainant's cellphone, cash in the amount of R450, 00 and his Daniel Hechter cap before the four men ran away.

- 3.4 The complainant, who had collapsed to his knees, was joined by Thipa who almost immediately saw a police van approaching and which he stopped for assistance. The two were told to wait for an ambulance at a nearby house.
- 3.5 A short while later the police van returned with two people in the back of the van. The complainant recognized them as two of the robbers – the two appellants. The second appellant was wearing the complainant's Daniel Hechter cap, which was also the only property he received back.
- 3.6 Thipa who had managed to fight off the second appellant, who was also armed with a knife, testified that while he was looking for stones to throw at the second appellant he heard one of the men with the complainant shouting "*China kom ons hol weg*". When his assailant turned and ran off Thipa assumed that his name was China. As it turned out the first appellant's name is China.
- 3.7. Be that as it may, Thipa then went to the complainant whom he found had been robbed and stabbed. He managed to stop a police van and informed the police of the robbery. The police van left them waiting for an ambulance. When the van returned Thipa heard voices from the back of the van. He peered in, saw two men and realised that one of the men was the person who had attempted to rob him. He then informed the police officers present.

- 3.8 Two of the police officers involved in the arrest of the two appellants testified. Constable Moitseman was the driver of the police van, who with two colleagues constables Nhaleni and Lekweni, patrolled the streets of Club 2000. While driving around the area they saw four men running away after they had noticed the police van. Moitseman gave chase. At some point Nhaleni and Lekweni alighted the van and chased after the men on foot. While driving the van to a position where he could block off the road, Moitseman encountered Thipa, who stopped him and informed him of the robbery. Moitseman called an ambulance and drove back to his colleagues whom he found had arrested the appellants.
- 3.9 The appellants were loaded into the back of the van and Moitseman drove back to where he had left the bleeding complainant and Thipa. It was then that the two appellants were identified as the perpetrators. Moitseman also testified that a knife was found on one of the appellants. Moitseman stated that it was pure coincidence that they had arrested the perpetrators of the robbery since he did not even realise the link between them and the complainant.
- 3.10 Lekweni testified that when he and Nhaleni caught the two appellants, the second appellant threw a knife away. Lekweni fortunately managed to retrieve the knife. When Moitseman went back with the van to pick them up he

informed Lekweni and Nhlaleni about a man who had been stabbed and that they should go back there to attend to the man whilst waiting for the ambulance. It was there that the complainant saw the two appellants in the back of the van and identified them as having been involved in the robbery. The complainant also pointed out to Lekweni that one of the appellants was still in possession of his cap.

4. During argument Mr Van Tonder who appeared for the appellants contended that the circumstances of that evening were not ideal for a proper identification of the perpetrators in that: the perpetrators were unknown to the complainant and Thipa; the events unfolded quickly; the complainant suffered from dizziness after the attack; and neither of these witnesses could point out any specific identifying features of the perpetrators. For these reasons, the argument goes, the evidence regarding the identity of the appellants is not reliable and the convictions should be set aside.
5. It is so that evidence of the identity of a perpetrator should be treated with caution. In *S v Mthetwa* 1972(3) SA 766 (A) at 768 *Holmes JA* stated

"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; see cases such as R. v. Masemang, 1950 (2) S.A. 488 (A.D.); R. v. Dladla and Others, 1962 (1) S.A. 307 (A.D.) at p. 310C; S. v. Mehlahe, 1963 (2) S.A. 29 (A.D.).

6. In casu the factors which point to the reliability of the evidence are the following:
 - 6.1 Four men took part in the robbery, shortly thereafter and in the same vicinity four men ran away when they saw the police van;
 - 6.2 One of the two men who were arrested is called China, the same name Thipa heard one of the perpetrators using when calling an accomplice;
 - 6.3 The second appellant had a knife – knives were used in the robbery;
 - 6.4 The second appellant was found in possession of the complainant's cap; and
 - 6.5 Furthermore the identification of the appellants was spontaneous and made within minutes of the robbery.
7. In my view there can hardly be any doubt about the reliability of the evidence of the identity of the appellants – in fact it would

be far-fetched to conceive of all the above factors as being merely an unfortunate coincidence. It follows that the appeal against the conviction cannot succeed.

8. With regard to the sentences imposed it was contended that the trial court misdirected himself in finding that there were no compelling and substantial circumstances present which would justify a departure from the minimum prescribed sentence of 15 years imprisonment.
9. It is trite that sentencing is pre-eminently a matter for the discretion of the trial court and that a court of appeal will only interfere if the discretion has not been exercised properly or there is a misdirection or the sentence is disturbingly inappropriate. In casu, and despite the *dicta* laid down in *S v Malgas* 2001(1) SACR 469 SCA, the trial court still equated substantial and compelling circumstances with exceptional circumstances “*uitsonderlike omstandighede*” and found that there were none. This misdirection of the trial court leaves us at large to reconsider sentencing afresh.
10. The appellants were both 20 years old at date of sentencing. Both had been permanently employed before their arrest – the first appellant as a panel beater and the second appellant as a mechanic. Both the appellants are single and have no previous convictions. All in all they have very good personal circumstances and can no doubt be rehabilitated. On the other hand the crime they committed is a very serious one. The stab

wound inflicted on the complainant could so easily have cost him his life and it is just pure luck that the wound required only one suture and ointment after which the complainant was discharged from hospital.

11. The trial court correctly attached considerable weight to the interest of the community and the prevalence of this type of offence, however such considerations should not override justice.
12. In our view the youthfulness of the appellants, their clean records, the fact that they were under the influence of liquor, their good personal circumstances, the fact that the complainant suffered no serious harm and the fact that there is a reasonable prospect of rehabilitation, qualify cumulatively as substantial and compelling circumstances.
13. We are of the view, in all the circumstances of this case that a sentence of 10 years imprisonment is appropriate.

The following orders are made:

- a) The appellants appeals against their convictions are dismissed.**
- b) The appellants appeals against their sentences imposed are granted.**

c) The sentences imposed are set aside and replaced with the following:

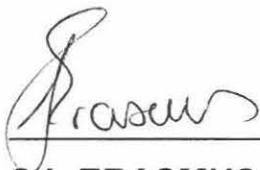
"The first and second accused are sentenced each to 10 years imprisonment."

d) The sentences are antedated to 30 March 2011.



C C WILLIAMS
JUDGE

I concur



S L ERASMUS
ACTING JUDGE

For Appellant: Mr A Van Tonder
Legal Aid Board

For Respondent: Adv N A Mxabo
Office of the Director of Public Prosecutions