

REPUBLIC OF SOUTH AFRICA

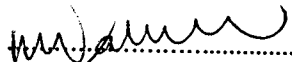


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

07/8/15

CASE NUMBER: A733/13

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


SIGNATURE

07.08.2015
DATE

In the matter between:

AFRICA MAVIMBELA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MALULEKE AJ

[1] The appellant was convicted on 2 (two) counts of robbery with aggravating circumstances and 1 (one) Count of possession of stolen property. With regards to the Count of possession of stolen property, the appellant received a sentence of 4 (four) years and in respect of the robberies, the prescribed minimum sentence of 15 (fifteen) years imprisonment was imposed in respect of each count of robbery. The court ordered that the sentence of 4 years and 15 years in respect of count 3 and 2 run concurrently with the sentence of 15 years in count 1. He was also declared unfit to possess a firearm.

[2] In these proceedings the appellant appeals both conviction and sentence with leave of the trial court.

[3] At the heart of this appeal is the issue of identity, in that the appellant denies having committed the offences for which he was convicted and sentenced.

[4] The facts of this matter are briefly set out below as follows:

4.1 On the 24th of December 2009, the complainants mentioned in the charge sheets in respect count 1 and count 2 where robbed of their property at their business premises in Schweizer-Reneke. These complainants (Mr Kathrada and his three sons) were accosted by certain male persons who robbed them of their properties and other items mentioned in the charge sheet. They took the key of a Toyota Yaris vehicle that belonged to the complainants during the robbery and drove off with it. That Toyota Yaris was later found abandoned it appears that they got away in another motor vehicle that was later found overturned in the

bushes along the Langlaagte Road. This getaway car is the car in count 3 of the charge sheet namely a Volkswagen Polo.

4.2 When the police arrived at the car which had overturned there were no occupants but certain items which were robbed from the complainants were found in this car. Accused number 1 who is not before us was arrested some 7km away from the scene by a certain Mr Andries Barnard, a security officer, patrolling in the farms within the area and handed him to the police.

4.3 On 30 December 2009 Police needed to confirm the residential address of accused 1 and for that purpose drove with him to Johannesburg. On their way to Johannesburg and shortly after leaving Schweizer-Reneke, accused 1 saw a Citi Golf approaching which he identified to the police officers as being his family who were coming to visit him. The police turned around and followed the car in question and somewhere along the gravel road near the bushes they found the appellant, standing among the trees near where a witness had earlier discovered the firearms as well as some cash, which were later handed to the police. When asked, the appellant explained his presences there by stating that he was looking for some herbs. As the police did not believe his story and were suspicious of him, they arrested him. His arrest was on the 30th of December 2009, some six days after the commission of the robberies.

4.4 The appellant was later subjected to an identification parade where he was positively identified by one of the complainants to the robberies in question. During trial he pleaded not guilty to all 5 counts the court rejected his evidence and convicted him on counts 1, 2 and 3. He was sentenced to an effective 15 years imprisonment. In convicting the appellant the trial court found that he was

linked to the robberies by the evidence of the complainants. The court was not satisfied with his explanation that he wanted to relieve himself in the bushes in Schweizer-Reneke. It is clear that the appellant and accused 3 were coming to visit accused 1, who had been arrested and was in custody as well as to check out the stashed cash and other stolen properties given the proximity of where the appellant was arrested to the place where these items were retrieved by the police. One of the sons of Mr Kathrada identified the appellant positively during the identification parade.

[5] The fact that the trial court rejected the appellant's testimony in regard to his explanation as to why he was in Schweizer -Reneke does not mean that he was responsible for the offences for which he was charged. The state still needed to prove his guilt beyond reasonable doubt in respect of all these counts.

[6] Based on the testimony of the state witnesses and other evidence in support thereof, the learned Magistrate was satisfied that the Identity parade was conducted properly. He further found that the complainants in question had ample opportunity to see the attackers and their subsequent identification at the parade confirmed their correct observation of their assailants. In doing so he excluded the evidence of Mr Kathrada Senior, which he referred to as a dock identification. The learned magistrate concluded that the state had proven its case beyond reasonable doubt both in regard to identity of the appellant as well as the commission of these crimes.

[7] As stated earlier the appellant denies that he is the person who committed the offenses and testified that he was at home with his wife and children on the 24th of December 2009. He denied being in Schweizer-Reneke on the day in question.

[8] Counsel for the appellant submitted in his Heads that the conviction of the appellant is based solely on the evidence of the Identification parade. He later seemed to abandon this argument. He argued that some questions on the identification parade form were not filled or answered and that the parade itself did not comply with the requirements or rules of identity parades and that the trial court erred in relying on that evidence to convict the appellant. He argued further that the state's evidence regarding identity cannot be relied upon. He said the complainants were attacked by more than two perpetrators, it was a moving and scary scene and firearms were brandished. He said that the complainants were not able to give descriptions of the suspects or any peculiar features and relying on **S v Mthethwa 1972 (3) SA 766 (AD)**, submitted that the trial court erred in ruling that the appellant was properly identified.

[9] He also argued correctly so that the guilt of the accused must be proven beyond reasonable doubt, weighing up all elements which point towards the guilt of the accused against all those that are indicative of the accused's innocence, taking proper account of inherent strengths, weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state so as to exclude any doubt as to the accused's guilt as it was held in **S v Chabalala 2003 SACR 134 (SCA)**. It is common cause that the appellant testified in his own defence and called no witnesses. Suffice it to say his defence was a bare denial of all allegations made against him

by the state. It is trite law that the appellant does not have to prove his innocence. His duty is to give the court a version that is reasonably possibly true and the court does not have to believe his version to be truthful. It was submitted for the appellant that his version can only be rejected on the basis of inherent improbabilities, not because it was merely improbable but because it was so improbable that it could not have been reasonably possibly true. On this score the appellant submitted that the trial court erred in ruling that his version is not reasonably possibly true. More over the appellant submitted that the state failed to prove its case against him beyond reasonable doubt and that his conviction ought to be set aside.

[10] On the other hand Counsel for the Respondent, argued that 3 witnesses who testified on behalf of the state said that they were able to recognise the appellant as one of the robbers. Firstly, Farid Kathrada testified that he was able to identify the appellant because the appellant was the person who confronted him and pointed a firearm at him. The appellant was apparently keeping guard of this witness as he was ordering him around and the complainant had sufficient time to look at him. The Complainant observed the appellant for between 3 to 5 minutes. Two other witnesses also testified that the appellant was indeed one of the robbers who pointed their father with a firearm. Harum Kathrada testified that he observed the appellant for 3 to 4 minutes and later positively identified him at the Identity parade.

[11] Counsel for the respondent further argued that there is evidence which confirms that the parade was conducted properly, in accordance with the procedure as recorded in Exhibit J and that it is not disputed that only the appellant was identified at the parade. The respondent requested this court to reject the appellant's version as false by all accounts and

submitted that the identity of the appellant was proven beyond reasonable doubt. The respondent also referred this court to a number of contradictions and inconsistencies in the appellant's version as regards his presence in Schweizer-Reneke on 30 December 2009, namely, whether he was there to relieve himself or to look for herbs. In the final analysis it was submitted for the respondent that the appellant was correctly convicted in respect of all 3 counts.

[12] Having received and considered the submissions of both Parties I can find nothing wrong with the learned Magistrate's findings. These robberies took place in broad day light and the complainants in my view did have ample opportunity to observe their robbers and subsequently positively identified the appellant at an Identification parade. I therefore reject the appellant's arguments and submissions that the trial court relied solely/mainly on the Identification parade in convicting him. Accordingly, the appeal against conviction on Count 1 and Count 2 falls to be dismissed.

[13] On the conviction in respect of Count 3, the Court *a quo* made the following finding:

13.1 Evidence before the court was that this car was stolen some days before the commission of the offences that the appellant and his co-accused faced. There was no evidence that these accused persons stole this motor vehicle. However the court was satisfied that the car was found in their possession. The learned Magistrate found that the state had proved its case that the persons who committed the robberies in respect of Count 1 and 2 are the persons who used this motor vehicle in count 3 which was later found overturned.

[14] Counsel for the appellant submitted that there is no evidence linking the appellant to count 3 that is possession of stolen property. There is no evidence to the effect that the appellant was in possession of the said motor vehicle, Volkswagen Polo. He submitted that the trial court erred in convicting the appellant of this offence and repeated the arguments that the respondent failed to discharge its duty in respect of its case on the guilt of the appellant and begged this court to equally set the appellant's conviction in respect of this count aside.

[15] Counsel for the respondent argued that the perpetrators of the robbery used the polo as a getaway car and were followed by the police. They abandoned the polo after it was involved in an accident. It is clear that they all had a common purpose to possess the car and use it during the robbery. He submitted that the appellant was correctly convicted in respect of all 3 counts.

[16] Having heard both Parties in respect of this count I also find nothing wrong with the findings of the learned Magistrate. In the circumstances, the appeal against conviction on possession of stolen property charge also falls to be dismissed.

SENTENCE

[17] Counsel for the appellant submitted that the trial court erred in sentencing the appellant to an effective 15 years imprisonment. He proceeded to say the court a quo erred further in over-emphasizing the seriousness of the offence which the appellant has committed and the interest of the society whilst the personal circumstances of the

appellant were under emphasised. It was also submitted that in imposing such a lengthy period of imprisonment the sentencing court erred as the sentence is shockingly harsh and induces a sense of shock. He also argued that the finding that the cumulative effect of the sentences does not constitute substantial and compelling circumstances was an error on the part of the court *a quo* namely the fact that:

- The appellant spent over two years in custody awaiting trial;
- The complainants were not injured during the robbery;
- Most of the complainants 'properties were recovered;
- The appellant has one minor child;
- The appellant was self-employed as vendor and was supporting his family;
- The appellant is HIV positive;
- The appellant suffering from piles; and
- The prospects of rehabilitation.

[18] In this regard it was submitted for the appellant that the 15 years imprisonment is strikingly disproportionate to the circumstances of the offence and ought to be set aside. He also argued that the shortened sentence be antedate to the 20th June 2012.

[19] Counsel for the respondent pointed us to the record and charge sheet, the robberies in Count 1 and Count 2 are read with section 51(2) of the Criminal Law Amendment Act 105 of 1997. He stated that robbery is a serious and violent offence which often result in injury and death. The appellant and his companions were so brazen to commit robbery in broad day light endangering the lives of the complainants and their customers. They also brazenly

hijacked people's cars in an endeavour to get away. There is an outcry from the community for perpetrators of these violent acts to be sentenced with deterrent sentences. He said the court a quo ordered the sentences in Counts 2 and 3 to run concurrently with the sentence in count 1. He argued further that there are many aggravating factors than there are mitigating ones and submitted that an effective sentence of 15 years imprisonment is not disturbingly disproportionate.

[20] As correctly submitted by Counsel for the appellant sentencing is pre-eminently a matter for the discretion of the trial court and the appeal court should be careful not to erode such discretion unless satisfied that the discretion has not been 'judicially and properly' exercised. The enquiry here is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate (see **S v Rabie 1975 (4) SA 855 (A)**).

[21] In **S v Groenemeyer 1974 (2) SACR 542** it was held at page 544 that:

"The courts are not here to take revenge and there can be no justice without mercy".

However if sentences are too lenient the public and members of society or families of the many complainants who are affected by crime may be inclined to take the law into their hands and this will certainly undermine the proper administration of justice.

[22] I recognise the seriousness and extent of the offence committed by the appellant. The society expects the court to make sure that persons such as the appellant must not roam free within the streets of our communities. They must be taught a lesson to deter

others from committing these crimes. Parliament also deems the crime of robbery, among others, as a very serious offence and in this regard promulgated Act 105 of 1997 prescribing minimum sentences in this regard of 15 years imprisonment. Having said this and in light of **S v Mako 2005 (2) SACR 223(E)** at page 233 where it was held:

“Furthermore the individualised nature of sentencing must not be lost sight of and it was irregular to sacrifice the accused on the altar of deterrence, even where the crime was very grievous in its effects or possible effects it was not proper to disregard the history and circumstances of the accused, a subjective aspect of the crime”.

[23] The fact that the trial court regarded the appellant as a first time offender and that he had spent over 2 years in custody awaiting trial, do in my view constitute substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. I therefore find that the learned Magistrate committed a misdirection which justify this court's decision to interfere with the sentence.

[24] Having regard to these factors and circumstances I make the following order:

IT IS ORDERED THAT

1. The appeal against conviction in respect of count 1, 2 and 3 is dismissed.
2. The appeal against sentence in respect of count 1 and 2 is upheld.
3. The sentence is set aside and substituted with the following:

(a) In respect of Count 1, the appellant is sentenced to 13 years imprisonment;

- (b) In respect of Count 2, the appellant is sentenced to 13 years imprisonment; and
- (c) Sentences in respect of count 1 and 2 will run concurrently antedated to 20 June 2012.


MALULEKE

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree

MAKUME

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

It is so ordered.

Date of hearing: 27 July 2015

Representation for Appellant:

Counsel : Mr. M B kgagara

Instructed by : Pretoria Justice Centre

Representation for the Respondent:

Counsel : Adv. M M Mashuga

Instructed by : The State