

-REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

7/8/15

CASE NUMBER: A739/2014

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


SIGNATURE

07.08.2015
DATE

In the matter between:

GODFREY NGWENYA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MALULEKE AJ

[1] The appellant was convicted on charges of theft and robbery with aggravating circumstances. The appellant received a sentence of 12 (twelve) months in respect of the theft and the prescribed minimum sentence of 15 (fifteen) years imprisonment was imposed in respect of the robbery. The 2 sentences were ordered to run concurrently.

[2] In these proceedings the appellant appeals against both conviction and sentence, leave having been granted by the Court *a quo*.

[3] The appellant denies having committed the offences for which he was convicted and sentenced; and places identity in dispute.

[4] In arriving at the conviction, the Court *a quo* analysed and evaluated the evidence presented by the state on the question of identity as follows:

“What is in dispute is whether the accused has been correctly identified as being present at the scene of both offences. As far as the state witnesses are concerned the court finds that they testified satisfactorily in all aspects when they were subjected to cross examination they answered all questions spontaneously, they were able to motivate their answers. They remained firm and resolute throughout. Court cannot find any material contradictions in evidence of the state witnesses. Although there is no corroboration for the incident which occurred earlier on in the day when the R600-00 was removed there is indeed substantial corroboration for Mr Lizal’s version of the armed robbery which took place later on. It is clear to the court that the accused has correctly being identified by all of the witnesses. Not only that but that the registration number that was provided by Mr Lizal matches the

vehicle which is owned by the accused and which has very distinctive rims on it if one looks at the photographs that were handed in.

In so far as the theft count is concerned the complainant indicated that the only reason he made the decision to hand the money over to the accused is because he wanted his slip back. Clearly he felt the pressure was being exerted on him by the accused.

The court is satisfied in the light of that that the elements of theft had indeed been proven. On the evidence of Mr Lizal and Mr Nkuna a firearm was used, in fact caused injury to the complainant. The Court is thus satisfied that the state has proven that aggravating circumstances were present as envisaged by section 1 of Act 51 of 1977 and that the state indeed proven robbery with aggravating circumstances. The accused is accordingly found guilty on both counts."

[5] On behalf of the appellant, his counsel Mr Van der Merwe made a number of submissions to this court, among others, that the identifying witness was neither credible nor reliable and that the appellant's identification as the perpetrator was flawed. He argued that the presiding Magistrate had misdirected herself in finding that the appellant was correctly identified as the perpetrator who committed the offences in question. The learned Magistrates did not properly consider that the identification of the Appellant by Lizar was in the nature of a dock identification. He went on to say that the Presiding Magistrate erred by not properly considering that Lizar only identified the appellant on the basis of general appearance and did not base his identification on any specifically distinguishing mark or feature that would enable Lizar to reliably identify the appellant. He submitted that the trial court erred by rejecting the appellant's wife's evidence on the basis that she had a motive to tender evidence supporting the appellant and by also failing to consider that the appellant and his wife did not contradict one another on any material aspects regarding the

appellant's whereabouts on the day of the incident. It was submitted that the presiding Magistrate committed misdirection in convicting the appellant which misdirection entitles this court to interfere with the findings of that court by setting the convictions aside. Counsel for the appellant also referred this court to a number of authorities in support of his arguments and submissions which this court has considered and taken into account in arriving at its decision.

[6] I shall now turn to the Respondent. Mrs Van Vuuren appeared on behalf of the State the respondent in this matter. It was her submission that there is sufficient evidence linking the appellant to the commission of the crimes and that the identification by the witnesses was correctly admitted by the trial court. She submitted that the complainant saw the appellant on more than one occasion. She argued that the complainant had ample opportunity to observe the appellant, firstly when the search of the truck was conducted and secondly when he sat in the back seat of the police vehicle speaking to the appellant when the R600-00 was handed over. During the robbery in the afternoon, the appellant was in very close proximity to the complainant when he was at the window on the driver's side removing the keys of the vehicle and had a further opportunity to observe the appellant when the money was removed from his pocket during the robbery. The incidents occurred in broad day light. The various distances the appellant was from the complainant were relatively close in proximity (30 metres being the furthest). The two police officers who testified corroborated the complainant's version as he described it to the trial court. Counsel then submitted that the trial court's findings relating to the identification of the appellant is correct and supported by the respondent.

[7] At the hearing of this appeal Counsel for the appellant had difficulty persuading this court on the appellant's denial of the fact that he had been properly identified as the person who committed the offences in question. In fact he conceded both in his heads of argument and during the proceedings that there is enough evidence supporting the complainant's version and that the appellant was indeed properly identified. Having considered the submissions made by the two Counsels I am satisfied that the state did prove its case beyond reasonable doubt both in regard to the identity of the appellant and the subsequent conviction on the charge of robbery with aggravating circumstances.

[8] I am saddled with some difficulty with regard to the charge of theft of R600-00 and the conviction thereon. Given what transpired on the day of the incident. I am not convinced that the state correctly charged the appellant with theft and indeed proved its case in respect of this charge beyond reasonable doubt. What transpired on that day is that the appellant asked Lizar to enter into the police vehicle a Golf 5. Then the appellant asked Lizar for R600-00, Lizar gave the R600-00 in order to regain possession of the R11474-00 slip. The appellant had asked Lizar at what time he was going to fetch the money and Lizar told him at 16h00 that same afternoon. A person commits theft if:¹

He unlawfully and intentionally appropriates movable, corporeal property which:

- (a) Belongs to, and is in the possession of, another;*
- (b) Belongs to another but in the perpetrator's own possession; or*
- (c) belongs to the perpetrator but is in another's possession and such other person has the right to possess it which legally prevails against the*

¹ C R Snyder, Criminal Law 4th Edition, Butterworths page 469.

perpetrator's own right of possession, provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.

[9] I am not satisfied that there was "appropriation" in this case because the appellant asked for and was given the R600-00 by the complainant. I am of the view that some undue influence or pressure, be it express or implied, was exerted by the appellant on the complainant to get him to give the appellant the R600-00 in question. I say this for the reason that to the complainant the appellant is a police officer with a certain measure of authority and the fact that the complainant testified that it was clear to him that if he did not give the appellant the R600-00 he had asked, he will not regain the Slip which entitled him to the R11474-00 which he must collect from the scrap dealer later that afternoon. So the complainant obliged. This was never disputed in the hearing at the trial court. I therefore hold the view that the state did not correctly charge the appellant with the crime of theft in respect of the R600-00 and because of this doubt I am inclined to differ with the trial court on its conviction of the appellant in this regard.

[10] Having perused the record of proceedings of the Court *a quo* and submissions made by both Counsel, I agree with its findings that the appellant was properly and correctly identified; that the state proved its case against appellant beyond reasonable doubt and support the conviction in respect of robbery with aggravating circumstances. This robbery took place during the day I therefore reject the appellant's version before court. Accordingly, the appeal against conviction on Count 2 Robbery with aggravating circumstances falls to be dismissed.

[11] On the conviction in respect of Count 1 I am of the view that the trial court erred in charging and convicting the appellant of theft of R600-00 and find that some other charge in the realm of bribery, corruption or even extortion would have been more appropriate. Accordingly I find that the state failed to prove its case beyond reasonable doubt and that the appellant should have been acquitted on this charge. Therefore in my view the appeal in respect of this charge ought to succeed.

THE 15 YEARS IMPRISONMENT

[12] Mr Van der Merwe submitted that the court erred in finding that no substantial and compelling circumstances existed justifying a deviation from the prescribed minimum sentence of 15 years imprisonment. These he argues are:

- The appellant was gainfully employed and is the main breadwinner of his extended family;
- The effect of incarceration upon his minor children;
- No evidence that he was likely to reoffend in future was adduced; and
- The fact that he could be rehabilitated through the imposition of a shorter period of imprisonment;

He also argued that this constituted a misdirection by the trial court which entitles this court to interfere with the sentence imposed especially because the legislature did not define what constitute substantial and compelling circumstances and left it to the courts having regard to the circumstances of each case.

[13] On the other hand Mrs Van Vuuren for the state correctly argued that this court cannot interfere with the sentence imposed by the court below unless it is satisfied that the court below made a material misdirection and the sentence is disturbingly inappropriate. She told this court that the complainant was robbed whilst a firearm was pointed at him, being threatened of being killed. The appellant at the time of the commission of the crime was a member of the South African Police Service and in a position of trust which he abused. The public do not trust the police, as is evident from the evidence of the complainant and Constable Matsi. That the court a quo took the personal circumstances of the appellant into account when imposing the sentence and found that there were no substantial and compelling circumstances present justifying a deviation from the prescribed minimum sentence. She asked this court to confirm the sentence.

[14] As correctly submitted by both Counsel sentencing is pre-eminently a matter for the discretion of the trial court 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)**).

[15] It is trite law that the courts are not here to take revenge and that there can be no justice without a measure of mercy. In the same breath sentences can never be too lenient because the public and members of society or families of the many complainants who are affected by crime will take the law into their own hands and this will undermine the proper administration of justice.

[16] I recognise the seriousness and extent of the offence committed by the appellant. I equally took note of the appellant's personal circumstances. The society expects the courts to make sure that Police officers who take advantage of ordinary members of the public including foreign nationals by robbing them are removed from society. They must be taught a lesson in order to deter others from committing similar 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"

[17] The state proved one previous conviction which was admitted by the appellant that of negligent loss of a firearm, for which he paid an admission of guilt fine of R200-00.

[18] The accused is out on bail pending the hearing of this appeal. I have taken all the factors that a court is enjoined to consider during sentencing. However, I find no substantial and compelling circumstances in this case justifying a deviation from the prescribed minimum sentence.

[19] It is my view that a sentence of 15 years imprisonment is an appropriate sentence.

ORDER

1. The appeal against conviction in respect of Count 1, theft, succeeds.
2. The appeal against conviction in respect of Count 2, robbery with aggravating circumstances, is dismissed.
3. The appeal against the sentence of 15 years imprisonment is dismissed.
4. The sentence of 15 years imprisonment imposed by the trial court is hereby confirmed.

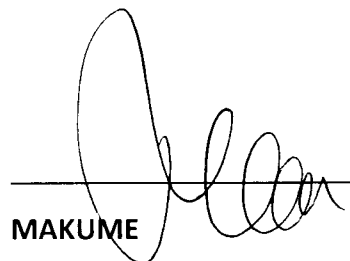

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MAKULEKE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree


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MAKUME

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

It is so ordered.

Date of hearing: 28 July 2015

Representation for Appellant:

Counsel : Adv. F J Van der Merwe

Instructed by : Johan Botha Attorneys

Representation for the Respondent:

Counsel : Adv. M J Van Vuuren

Instructed by : The State