

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal Number: A156/2015

In the matter between:

MALEFETSANE RADEBE

Appellant

And

THE STATE

Respondent

CORAM: NAIDOO, J *et* BOKWA, AJ

JUDGMENT BY: BOKWA, AJ

HEARD ON: 12 OCTOBER 2015

DELIVERED ON: 29 OCTOBER 2015

- [1] The Appellant was convicted on the 29th of April 2015 in the Regional Court at Welkom on a charge of robbery and sentenced to 7 years' imprisonment. The Appellant lodged an appeal against both the conviction and sentence. The matter is before us with the leave of the trial court, with Mr. Kambi appearing for the Appellant and Mr. Hoffman for the state.

- [2] The main focus of the appeal is the acceptance by the trial court of the complainant's evidence as well as that of the second state witness namely Mxolise Kulumani both of whom identified the Appellant as one of the assailants who robbed the complainant on the morning of 22nd May 2014 at or near Thabong in the district of Welkom. It is the contention of the Appellant that the court *aquo* erred by making a finding that there was proof beyond a reasonable doubt that the Appellant was the person who robbed the complainant. In support of this contention the Appellant submitted that the trial court misdirected itself by not accepting that the complainant was not in a good position to identify the robbers because he was scared and would not have had sufficient time to observe them. The fact that the complainant failed to give a clear description of his assailants at the police station is itself indicative of his uncertainty about the identity of the robbers and which the trial court ought not to have accepted as evidence beyond reasonable doubt. It is contended by the Appellant that the trial court ought to have approached the evidence of the complainant with caution.
- [3] The Appellant contends furthermore that the trial court erred by concluding that the conduct of the culprits constituted robbery. The trial court came to a finding that the cellphone of the complainant fell whilst he was retreating. It was submitted that there was no evidence suggesting that the culprits demanded anything from the complainant before his cellphone fell on the ground. Consequently that there was no evidence suggesting that force or intimidation was directly related to the taking of the cellphone of the complainant and

that the trial court therefore erred by concluding that the offence of robbery was committed by the Appellant.

[4] It was submitted by the Appellant that the sentence of 7 years imprisonment is shockingly inappropriate and harsh. The trial court ought to have taken the value of the cellphone into account which according to the complainant amounted to R650.00. By not taking into account the personal circumstances of the accused as well as his stay in custody for 11 (ELEVEN) months before the finalization of the trial, it was submitted that the trial court misdirected itself. Conversely, the state agrees with the conviction and sentence imposed by the trial court.

[5] In analyzing the evidence in this matter, I am guided by the dictum of Ponnar JA in **S v Shilakwe 2012 (1) SACR 16 SCA at p. 20 para 11(d)**.

“Whilst in the ultimate analysis the evidence must be looked at holistically in order to determine whether the guilt of the appellant was proved beyond reasonable doubt, the breaking down of the evidence into its component parts is obviously a useful aid to a proper evaluation and understanding of it.”

[6] The evidence adduced by the State linking the Appellant to the offences consisted of the eye witness testimony of the complainant, Lucas Monokoane, and Mxolisi Kuluman the second state witness. The complainant testified that he was on his way to work on the morning of the 22nd of May 2014 and was travelling on foot at

around 06h35. He travelled the road that he usually used which passed the location called Tellerine, the hall and hostels. He entered a passage that normally allows him to pass to the area of his work place. He met 2 male persons. The one person took out half of a pair of sheep shears while the other one took out a “Rambo knife”. The assailants approached him from the front. When he saw their weapons, he retreated backwards. As he retreated his hands were in his jacket pockets. Inside the jacket pocket was a cellphone. As he took his hands out of his jacket pockets, his phone fell on the ground. The Appellant’s companion immediately took the phone from the ground. At the same time the Appellant quickly advanced towards the complainant providing his co assailant a good advantage to take the phone that fell on the ground. When the complainant demanded his cellphone, both the Appellant and his companion searched his pockets asking for his bank card. They did not find anything in his pockets. The complainant was scared for his life and felt “emotionally drained”. The phone which was robbed is a Nokia X21 which he bought at Foschini for R650.00 and at the time of the incident it was not insured. He never recovered it. He subsequently went to the police station to report the incident and where he first asked permission if he could go to his work to inform them about his whereabouts after which he went back to the police station to give a statement. He knew the Appellant by sight and not by his name. He usually passes the Appellant’s parental home where he often sees him.

- [7] The second state witness, Mr. Mxolisi Kuluman, corroborated the complainant's evidence in the material respect of the identity of the robbers. He resides at hostel nr. 34D in Thabong which is not far from the house of the Appellant who resides at 28D hostel also in Thabong. He had known the Appellant throughout his life. On the morning of 22nd of May 2014 he was on his way to work using the same path travelled by the complainant which passes the back of his parental house. It was just before seven o'clock in the morning when he noticed two people grabbing the complainant in front of him. He positively identified the Appellant as one of the assailants. The Appellant had a knife in his possession and while he noticed that his co-assailant also had an item that looked like a knife. The part of the robbery he saw was when the assailants searched the complainant in his pockets. When the assailants noticed him they told the complainant to run away as they also ran away. The complainant immediately asked him if they could chase his assailants but instead he advised the complainant to rather report the matter at the police station. The complainant also told him that he had just been robbed of his cellphone by the two assailants. He had no ulterior motive to falsely implicate the Appellant.
- [8] The Appellant denied robbing the complainant and submitted that at the time of the alleged robbery he was at his parental home doing gardening. Whilst he did not deny the complainant was robbed on the day in question he only placed identity in dispute.

- [9] The undisputed evidence before the trial court was that the complainant was robbed by two assailants whilst on his way to work. The identity of these assailants was in dispute. The State relied on the evidence of the only two state witnesses, whose evidence the trial court accepted as credible and impressive. Even more, the trial court accepted the evidence as corroborative in all material respects especially on the issue of identity of the Appellant. In evaluating the evidence the trial court accepted that the incident of the falling of the cellphone from the complainant and it being picked up immediately, were so intertwined that it was almost impossible to separate the incident into two separate incidents of assault and theft but rather as the complete offence of robbery. The court *a quo* accepted that the state had proven the guilt of the Appellant on the evidence beyond a reasonable doubt.
- [10] Similarly in the matter of **S v Chabalala** 2003 (1) SACR 134 SCA, Heher AJA (**as he then was**) stated as follows at paragraph 15 [1] of the judgment:

“The trial court’s approach to the case was, however, holistic and in this it was undoubtedly right: S v Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt. The result may prove

that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.”

- [11] In evaluating the evidence it is the view of this court that the trial court took a correct approach in analysing the evidence before it. The identity of the attacker of the complainant was properly dealt with by the trial court. The Appellant takes a view that the trial court erred by concluding that the conduct of the culprits constituted robbery. It was contended that because the cellphone fell whilst the complainant was retreating from his attackers, the trial court erred and ought to have made a finding that there was no evidence suggesting that the culprits demanded anything from the complainant. It was submitted therefore that the conviction is not supported by the evidence and furthermore that there was no connection between the taking of the cellphone and the violence or intimidation. Van Heerden JA in S v Yolelo 1981 (1) A at 1004 para [H] stated as follows:

“Robbery can also be committed if violence follows on the completion of the theft in a juridical sense. In each case an investigation will have to be made into whether, in the light of all the circumstances, and especially the time and place of the (accused’s) acts, there is such a close link between the theft and

the commission of violence that they can be regarded as connecting components of substantially one action. This is also applicable to a threat of violence in so far as it can be an element of robbery.”

[12] In the present matter, the appellant and his companion advanced towards the complainant armed with dangerous weapons. The threat of violence was real and imminent causing him to retreat and in so doing to cause the cellular telephone to fall. In our view there was sufficient threat of violence to satisfy that element of robbery. The trial court dealt sufficiently with the contradictions between the complainant’s statement and his testimony in court and came to the conclusion that there was no basis or conspiracy by both witnesses of the state to falsely implicate the Appellant and thus correctly rejected the version of the Appellant as improbable. The trial court found that the state had proven its case beyond reasonable doubt and rejected the version of the Appellant. At the hearing of the Appeal Mr Kambi conceded before us that the conviction was properly dealt with by the trial court.

[13] The Appellants record of previous convictions was analysed by the trial court which also took the view that they were a relevant consideration in this case. The trial court took guidance from the dictum in **State v Swapo** 1984 (1) PHH 56 SWA, where it was stated that previous convictions are not per se aggravating unless it is a bad record. It was the trial court’s finding that weight should be attached to previous convictions of the same or similar type of offence.

The trial court had to consider the time lapse between the previous convictions of the Appellant and the present offence. In its analysis the trial court made a finding that the Appellant had not spent more than a year outside incarceration since 2004. The Appellant had committed offences every 2 years, in 2004, 2006 and 2008 where he was sentenced to six years imprisonment. The court further made a finding that the Appellant had committed an offence even before the expiration of six years.

Accordingly the trial court concluded that the previous attempts to reform the Appellant where he had received correctional supervision had failed. In this case the Appellant had been found guilty of robbery with the use of a knife whilst his accomplice had half a scissors.

- [14] The trial court balanced the triad of factors for the purposes of sentence including the Appellant's personal circumstances, correctly. In our view the court came to the correct conclusion due to the Appellant's record of previous convictions, which were similar in pattern during the commission of the current offence. The trial court arrived at a correct conclusion that the overriding consideration was to protect the community against people like the Appellant by sentencing him to direct imprisonment. In the circumstances a conclusion that the seriousness of the crime and the interest of the community far outweighed the personal circumstances of the Appellant was a correct finding by the trial court.

[15] Regarding the sentence of 7 years imprisonment, it is trite that this court will not interfere with the sentence imposed by the court below unless, it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. No misdirection has been alluded to, nor can we find any. It also cannot be said that the sentence induces a sense of shock.

[16] It follows that the appeal against the conviction and the sentence imposed by the trial court must fail.

[17] In the circumstances, I propose that the following order be made:

The appeal against the conviction and sentence is dismissed.

I.R.O BOKWA, AJ

I concur

S NAIDOO, J

On behalf of the appellant:

Mr. S.D. Kambi
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. Hoffman
Instructed by:
Office of the Director:
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