

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

Appeal Number: A105/2015

In the matter between:

MALESA MATABANE
ERNEST MOKHOSI

First Appellant
Second Appellant

And

THE STATE

Respondent

CORAM: JORDAAN, J *et* BOKWA, AJ

JUDGMENT BY: BOKWA, AJ

HEARD ON: 19 OCTOBER 2015

DELIVERED ON: 5 NOVEMBER 2015

- [1] The Appellants were charged in the regional court in Virginia with two counts of robbery with aggravating circumstances, one count of assault with the intend to do grievous bodily harm and one count of illegal possession of an automatic firearm. With the state having

withdrawn charges against Accused number one, at the trial they were Accused number two and three respectively. They were convicted as charged and sentenced to 20 years imprisonment. After their application for leave to appeal against conviction and sentence was dismissed by the trial court, the Appellants petitioned the Judge President and were granted leave to appeal against both the conviction and sentence. They are before us on an appeal against both the conviction and sentence. Mr. Van der Merwe appeared for the First Appellant, Mr. Van Rensburg appearing for the Second Appellant and Ms. Ferreira on behalf of the state.

- [2] The Appellants have raised a number of grounds against their conviction at the heart of which is the acceptance by the trial court of the evidence of Matladi Sylvia Maele, Nondwe Constance Mance and Danile Daniel Hlahla that the Appellants committed the offences.
- [3] On behalf of the First Appellant it was submitted that the trial court erred in accepting that the state proved the identity beyond reasonable doubt because none of the state witnesses could give a description of the First Appellant's - facial features or clothing during the incident. The First Appellants counsel submitted that no identity parade was held although Sylvia Maele was allowed to identify the First Appellant through a police vehicle. The fact that Sylvia Maele did not mention to the police that they had arrested the right suspects when she looked at the suspects in the police vehicle was submitted to be a material error. Furthermore counsel submitted

that the trial court failed to recognize the contradictions in the evidence of the two police officers who contradicted each other in material respects in that Daniel Hlahla testified that Nondwe Mance did hide herself under the police vehicle during the shooting whereas Nondwe Mance denied having done so. A further aspect highlighted as a material error on the part of the trial court was the testimony of both officers that they did not have the robbers within their sight until they were arrested. Of more importance is the fact that the police officers who actually arrested the suspects were not given the opportunity to testify at the trial by the state. It was submitted that all these contradictions supported the argument that the evidence of identification given at the court *a quo* is not reliable. It was further submitted that another important aspect which the court *a quo* failed to take into account was the fact that the First Appellant was justified to close his case without leading any evidence in his defense. Had it apparently done so, it ought to have made a finding that the First Appellant was entitled to close his case as there was no evidence that he was involved in the commission of the offences when the state closed its case.

- [4] Furthermore it was argued that the sentence imposed by the trial court failed to take into cognizance the triad principles elucidated in **S v Zinn** 1969 (2) SA 537 and consequently that the sentence of 20 years imprisonment was unreasonably excessive. Had the trial court taken the age of the First Appellant into account, it would have tempered its sentence with mercy and found substantial and compelling circumstances to be present in the First Appellants case.

- [5] Counsel for the Second Appellant argued that the trial court erred in convicting him on the unconvincing and unsatisfactory evidence of the identifying witnesses. In the premise the evidence of the identifying witnesses is impeached on the grounds that it is unreliable and contradictory.
- [6] A point was made that no fingerprints evidence was produced by the state both as far as the rifle and the vehicle hijacked is concerned so that the Second Appellant is linked to the crimes. Had the state led such evidence, it would have confirmed that the Second Appellant handled the R5 rifle especially because the firearm was not found in his possession. It was submitted that one would have expected to find evidence of gunfire residue on the hands of the Second Appellant since it was alleged that the rifle was fired.
- [7] The undisputed evidence before the trial court was that on the 24th December 2012 there was an armed robbery at Saaiplaas Cash & Carry. The disputed fact is the identity of the robbers.
- [8] In the matter of **S v Chabalala** 2003 (1) SACR 134 SCA, Heher AJA (**as he then was**) stated as follows at paragraph 15 [l] 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."

- [9] The state case relied on the testimony of three witnesses. The honesty of Sylvia Maele's testimony stands out. She was on duty on the day of the armed robbery at the till when she felt two people colliding with the till behind her. One person approached her from behind the till and another pointed a firearm at her. She saw the face of the Second Appellant for approximately one minute when he instructed her to open the till whilst pointing her with the firearm. She gave a description of Second Appellant's facial features to the police as being "dark in complexion", "big eyes" and that his nose was structured in a way that is "coming out". She saw the Appellants again after they were arrested in the police van. During cross examination Maele stated that she "will not easily forget the face of the First Appellant as this was a day she will never forget in her life." The First Appellant was in possession of a "small firearm",

black in color whereas the Second Appellant had a big firearm, “a long one”. Furthermore she described the Second Appellant as “black in complexion” with “long cheekbones” and “big eyes”. He was the one who approached her with a firearm and instructed her to open the till. Clearly she had ample opportunity to study the facial features of her assailants and for this reason the trial court found her testimony credible and corroborative.

- [10] It was the evidence of Nondwe Mance, a member of the South African Police Service with 8 years in the police that she received information that the Spar at Saaiplaas was being robbed. On arrival they found a person in possession of a firearm who also fired at them. It was an R5 rifle. Three people ran out of Spar. They followed them and found a Mr. Mandigeleni who reported that his vehicle had just been hijacked by three men. One of the men had a long rifle and the two others had small firearms. They found the car on the down street overturned on the side of the road. They received information from members of the public about the directions which the suspects took and went to Florien Street. When the suspects saw them, they started to fire shots at them. They called for backup and members of the police service arrived and arrested the suspects. Mance identified the Second Appellant who shot at the police using the R5 rifle. She remembers the Second Appellant because he was the “tallest” of the two suspects and that he had “big eyes” and a “dark complexion”.

- [11] Daniel Hlahla the third state witness is a police official with 11 years of service. On the day of the incident he was a driver of the police vehicle and was accompanied by Constable Mance. Upon arrival at the Saaiplaas spar, he saw three men exiting the shop who were all armed. One had a R5 rifle and two were in possession of 9mm firearms. The one with the R5 rifle tried to shoot at them but the firearm jammed since it was not cocked and this gave them the opportunity to hide behind the police vehicle. The one with the R5 rifle then fired shots. He realized that the rifle was set on automatic. He also fired one shot at the suspects as they ran away. They set on chase and lost sight of the suspects but members of the community pointed the direction in which the suspects went. They were also stopped by a man who reported that his Camry vehicle was hijacked by three men. As they drove four kilometers away they saw the Camry which was lying upside down.
- [12] Mr. Mandlakayisa Madingeleni stopped the police vehicle in front of Saaiplaas clinic on the day of the incident to report that he was hijacked. Him and his children were pulled from his vehicle, a Toyota Camry 2.2, white in color and bearing registration number [B..... FS].
- [13] The First Appellant elected not to testify in his own defense and closed his case.
- [14] The Second Appellant testified in his own defense and stated that on the day of the incident he was in Virginia busy at work doing

garden services. Whilst he was busy talking to a lady the police arrived and ordered him to lie down. They asked him whether he saw people jumping the fence into that yard. He was searched assaulted and placed at the back of the police vehicle. He was taken to the shop where he saw a number of people at the shop. He was later taken to the police station. It was the first time he saw his co-accused on that day.

[15] In evaluating the evidence it is a view of this court that the trial court took a correct approach in analysing the evidence before it. The identity of the robbers of the complainants was properly dealt with by the trial court. The court *a quo* followed the correct approach in the case where the version of the State stood in direct conflict with the version of the Appellants.

[16] Heher AJ in **S v Chabalala** 2003 (1) SACR 134 at p. 142 para 20(d) stated as follows:

“As was pointed out in **S v Mthetwa** 1972 (3) SA 766 (A) at 769D: Where ... there is direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, *whatever his reason may be* for such failure, in general *ipso facto* tends to strengthen the State case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; see **S v Nkombani and Another** 1963 (4) SA 877 (A) at 893G and **S v Snyman** 1968 (2) SA 582 (A) at 588G.”

- [17] The court went further in the same judgment at para 21G and stated that:

“The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralized by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge.”

- [18] In the circumstances, it was damning for the First Appellant to close his case in the face of evidence of the 3 state witnesses who implicated him in the robbery. He thereby left the *prima facie* case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt of his guilt.
- [19] With regard to the sentence, the trial court took into consideration all the relevant circumstances of the Appellants and concluded that there are no substantial and compelling circumstances justifying the departure from the prescribed minimum sentences. Consequently the imposition of a twenty years imprisonment sentence was a result of the exercise of the judicial discretion allowed to a trial court, after careful consideration of all the relevant factors. There was no misdirection on the part of the trial court regarding sentence.
- [20] The appeal against the convictions and the sentence imposed by the trial court is dismissed.

[21] In the circumstances, I would have made the following order.

The appeal against the conviction and sentence is dismissed.

I.R.O BOKWA, AJ

I concur

A.F. JORDAAN, J

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