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

APPLICATION NUMBER: A82/15

In the matter between:

MOTLATSI PHAHLO

1st Appellant

GOITSEONE MOGOPODI

2nd Appellant

THATO NJIVA

3rd Appellant

And

THE STATE

Respondent

CORUM: EBRAHIM, J *et* BOKWA, AJ

HEARD ON: 9 NOVEMBER 2015

JUDGMENT BY: BOKWA, AJ

DELIVERED ON: 19 NOVEMBER 2015

A **INTRODUCTION**

- [1] The appellants were convicted in the regional court for Thaba Nchu, Free State Province, on charges of robbery with aggravating circumstances and attempted murder on 4 September 2013. They were each sentenced to an effective 18 years jail term on the 5 September 2013. The court *a quo* granted them application for leave to appeal against the conviction and sentence on 26 May 2014.

B FACTS
States Case

- [2] The State tendered the evidence of 3 witnesses. The first witness Thapelo Bernard Bopalamo, the complainant testified that on the 14 September 2012 at approximately 22h00 at night he was in his motor vehicle in Thaba Nchu. On the night in question he was driving a Polo hatchback with registration numbers [DNF.....] on his way to a tavern also known as Mototo Tavern in Thaba Nchu. Upon arrival, he parked his vehicle outside. He saw a person approaching him whilst he was still inside the vehicle. The person enquired if he knew what was going on inside the tavern. Before he could give any answer, a gunshot was fired outside his vehicle. The bullet hit the complainant on the left side of his face just under the cheek bone. After he was shot, he tried in vain to get out of his vehicle which was stationary using the front left passenger door.
- [3] One of his assailants entered the vehicle through the driver's door whilst the other entered the vehicle through the front left passenger

door. They pushed him to the back seat. The other 2 assailants entered the vehicle and sat at the back seat thus keeping him in the middle seat between them. In total, 4 assailants drove away from Mototo Tavern unto the N8 road towards Bloemfontein. Just outside Bloemfontein the vehicle stopped and he was dropped off. The vehicle immediately sped away towards Bloemfontein.

- [4] When he was dropped off outside Bloemfontein, his cell phone valued at R2 300.00, a purse with cash of approximately R1 200.00 and credit card in the ashtray of the vehicle were left inside the vehicle. He ran for approximately 45 minutes to a nearby farm where he encountered a man who assisted him by calling security and was taken to Kagisanong Police Station where he reported the matter. After reporting the matter he was taken to Pelonomi Hospital in Bloemfontein where he was admitted for an operation and further medical attention. He was operated on and discharged after 2 weeks.
- [5] Approximately 3 weeks after the incident he was able to identify his vehicle through the disc and registration numbers [DNF 4.....]. He also found his credit card in the ashtray of his vehicle. Furthermore he testified that at Mototo Tavern he was able to identify appellant number 3 as the person who pointed a gun and shot at him although it was dark. Under cross examination he testified that he positively identified the third appellant when he was shot because the third appellant entered at the back of the vehicle and handed the gun to

one of the other assailants. Whilst the vehicle was travelling on the N8 road towards Bloemfontein he could also see his robbers' faces using the lights of the oncoming traffic.

- [6] The second state witness was Mr. Mzondeke Boy, a police officer on duty that night who was in the company of warrant officer Ngobese. At approximately 04h00 in the early hours of the morning they both were patrolling in a marked police vehicle when he saw a Polo vehicle without registration numbers being driven by unknown people. He flickered lights signaling the vehicle to stop. It soon accelerated. Approximately 30 minutes earlier they had received a message that a vehicle matching the same description had been hijacked. They proceeded to follow the vehicle until it came to a standstill at a night spot in Bochabela Bloemfontein, a tavern known as Ekhayeni. They were approximately 3 to 4 meters from the suspected vehicle when 4 occupants got out of the Polo. The street lights as well as the lights from the tavern shown clearly making visibility good. He and his companion jumped out of the police vehicle and immediately ordered all the occupants of the Polo to lie down on the ground. One of the suspects stood up and fled over the devil's fork. The other 3 remained and were handcuffed.
- [7] The witness proceeded to check the disc of the vehicle and noticed the registration number DNF 466 FS. It matched those of the vehicle reported to have been hijacked earlier. The 3 robbers were detained at Mangaung and they were the same people before court.

Appellant number 1 was the driver of the vehicle. When he looked inside the vehicle he noticed blood stains as well as a jacket with blood stains on it. There were also blood stains on the trouser of the Second appellant. The vehicle was booked at the police offices at George Loerie Street in Bloemfontein. The blood stained jacket and the trousers of the Second appellant were also booked in at the SAP13.

[8] The third state witness Tebogo Moses Ngobese, testified that on 15 September 2012 they received a message to be on the outlook for a white Polo vehicle with 4 males inside. As they patrolled the area he saw a white Polo with 4 males inside and followed it. He noticed that the vehicle did not have registration numbers on. They tried to stop the motor vehicle but it accelerated. They kept chase until the vehicle came to a standstill at a night spot known as Ekhayeni Tavern in Bochabela, Bloemfontein. When the suspects got out, they ordered them to lie on the ground. Two of the men stood up and asked if they could urinate. One of the suspects jumped over the fence and fled.

[9] The three males were arrested and were the same people before the trial court. The first appellant was the driver of the vehicle as he came out of the drivers' seat after the car came to a standstill. He confirmed that inside the vehicle he found a jacket with bloodstains on it. The number plates with registration DNF 466 FS were found on the floor under the backseat. During cross examination he

testified that he searched the first appellant and found a car key in his pocket. The first appellant informed that the keys belonged to the person who fled. The first appellant was asked to start the vehicle which he proceeded to do on the scene with the key that was found on him and was arrested thereafter. The state called Paul Kenneth Motaung who testified about the extent of the investigation and further about the items which were sent out for analysis and the reason it took so long to finalize the investigations. At the time the results were not back from the laboratories. The State closed its case.

Defence Case

- [10] The first appellant testified in his own defence. On the night of the 14 and 15 September 2012 he was with the Second appellant at a night spot popularly known as Ekhayeni Tavern, in Bochabela, Bloemfontein. They were having a good time. At a certain time they decided to have a smoke break outside the tavern and they proceeded to walk outside where they stood and smoked. They were surrounded by many people who also stood outside. Suddenly a car guard came to them with the police and pointed them out to the police. A car guard informed the police that he was the one with a white t-shirt who drove the white vehicle. There was confusion. They were arrested. Under cross examination he confirmed that he was pointed out as the person who drove the vehicle, he could not confirm why the third appellant was arrested other than the fact that he also stood there. The police officers implicating him as the driver

were lying. He knew nothing of the incident and subsequently closed his case. The second and the third appellants did not call any witnesses and closed their cases without testifying. The state requested the trial court to find all 3 appellants guilty on both counts. Conversely the 3 appellants requested the trial court not to find them guilty on both counts and to discharge them.

C ANALYSIS

- [11] The trial court established the following objective facts, firstly, that the complainant, Mr. Thapelo Bernard Bopalamo was robbed in Thaba Nchu on the 14 September 2012 at approximately 22h00, of his vehicle with registration number [DNF 4.....] by 4 unknown men one of whom, shot the complainant in the face and where-after he was hijacked from Thaba Nchu with the vehicle travelling on the N8 and the suspects dropping him off outside Bloemfontein. Secondly, that the 2 police officers, Mr. Boy and Ngobese noticed a vehicle without registration plates with 4 men in occupation matching the description of a vehicle reported stolen earlier. The particular vehicle was travelling in Bloemfontein in early hours of the morning on 15 September 2012 at around 4h00, approximately 6 hours after the robbery took place in Thaba Nchu. Thirdly, despite attempting to stop the vehicle, it accelerated and came to a standstill at popular night spot called Ekhayeni in Bloemfontein. Fourthly, that the 2 police officers got out of the police vehicle and simultaneously noticed the 4 occupants of the Polo vehicle also getting out of the

said vehicle. Fifthly, that 1 of the men managed to flee by jumping over the devil's fork whilst the 3 men stayed behind. Sixthly, that the first appellant was the driver of the said vehicle because he got out of the drivers' side of the vehicle whilst the second and third appellants got out on other sides of the vehicle. Seventhly, that both police officers searched the vehicle and found a jacket with blood stains on it as well as the fact that the Second appellant also had blood stains on his trousers. Eighthly, that the disc on the said vehicle was the same as the registration number [DNF 4.....], which were found underneath the back seat of the vehicle. Ninthly, that the keys of the vehicle were found in possession of the first appellant when he was searched. Tenthly, that the complainant Mr. Thapelo Bernard Bopalamo identified his vehicle in Bloemfontein by way of the disc and a bank card that was still in the ashtray that was closed.

- [12] In its analysis the trial court considered all the facts as well as the doctrine of recent possession. It made a finding that the appellants and the fourth man were found in possession of the vehicle belonging to the complainant 6 hours after the robbery took place. When they were stopped they accelerated. The registration numbers of the vehicle matched those that were found underneath the back seat of the same vehicle. After careful analysis, the trial court made a finding that the 3 state witnesses' evidence was credible. It was not riddled with improbabilities. When evaluating the evidence of the complainant the trial court treated it with caution as he was a single witness testifying on identity. The trial court furthermore made a finding that the evidence of the 2 police officers

corroborated each other in all relevant material respects regarding the events at Ekhayeni Tavern, the bloodstained jacket in the vehicle as well as the bloodstains on the trousers of the Second appellant. They corroborated each other regarding the key of the stolen vehicle which was found in the possession of the first appellant.

[13] In evaluating the evidence it is the view of this court that the trial court took a correct approach in analyzing the evidence before it. The first appellant only offered a bare denial faced with the evidence of the two police officers who corroborated each other about his involvement in the robbery of the complainant. The trial court correctly found that his version was highly improbable. The trial court correctly rejected his evidence and made a finding that his guilt was proved beyond reasonable doubt in respect of the first count.

[14] In evaluating the evidence on count 2 regarding the person responsible for the shooting of the complainant the court took the view that all 4 (suspects were present during the robbery of the complainant. Whilst the court could not identify the actual person who shot the complainant, the court was of the view that all people present when the complainant was shot actively identified themselves with the execution of the common purpose of the group. See **S v Neurodien and others** 1998 [2] SACR 510 [NCA]. The trial court furthermore took the view that firstly, the people would have been all present on the scene of the robbery. Secondly, they would have been aware of the assault on the complainant. Thirdly,

they must have had the common intent with the shooter. Fourthly, they must have shown their participation with the shooter by way of association with the acts of the others and the shooter. In the circumstances they all must have had the necessary intention to kill the complainant either in the form of direct intention or indirect intention (*dolus eventualis*).

- [15] The trial court was satisfied that by shooting the complainant in his face the shooter had the necessary intention to kill the complainant in the form of *dolus eventualis*. The court was satisfied that there was a common purpose between the 4 robbers and that beyond any reasonable doubt the robbers made themselves guilty of attempted murder. Consequently all appellants were found guilty on count 1 for armed robbery with aggravating circumstances and on count 2 of attempted murder.
- [16] This court, in its assessment of the evidence, must look at the evidence in its totality to determine if the guilt of the appellants has been proven beyond reasonable doubt. Examining individual or component parts of the evidence can also be a useful exercise but such evidence must ultimately be considered as part of the whole body of evidence. The analogy used in **S v Shilakwe** 2012(1) SACR 16(SCA) is that of a mosaic. The components of evidence are the pieces of the mosaic, but the mosaic must be considered as a whole in order to arrive at a proper conclusion regarding the guilt of the accused. A dictum expressing a similar view is to be found in

S v Chabalala 2003(1) SACR 134 SCA, where Heher AJA (as he then was) said at paragraph [15] of that judgment:

“The correct approach is to weigh up all the elements which point toward 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...was decisive but that can only be an *ex post facto* determination and a trial court (and counsel should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence”

- [17] The second and third appellant did not testify in their defence and proceeded to close their cases. For the first and second appellant not to challenge the evidence of the complainant as well as the 2 police officials which incriminated the appellants, was in my view, a fatal mistake. Such incriminating evidence called for a decisive response from them to set the record straight. The first and second appellant did not rise up to meet the challenge. Failure to testify has adverse implications as it was held in the matter of **S v Chabalala** 2003 [1] SACR 134 [SCA] where the learned Judge dealt with the failure of an accused to testify or lead evidence. The accused in that case was faced with direct and apparently credible evidence and decided not to testify. The Judge said that:

“In such circumstances the *prima facie* case spoke for itself and that court was found to conclude that the totality of the evidence taken into conjunction with the silence of the accused, excluded any reasonable doubt about his guilt.”

[18] I am of the view that the appellants were correctly convicted by the court *a quo*. It evaluated the evidence properly and did not commit any material misdirection on the substantive merits which warrants an interference by this court. For these reasons the appeal regarding conviction is dismissed.

[19] I now turn to the sentence component of the appeal. The appellants were all sentenced to a prison terms of 18 years. The trial court found that there was no substantial and compelling circumstances to warrant deviation from the prescribed minimum sentence.

[20] The court hearing an appeal against a sentence is always guided by certain appellate principles. The first principle is that punishment of an offender it's primarily a matter for the discretion of the trial court. The second principle is that the appeal court should be careful not to erode the sentence in discretion of the trial court. Finally, the principle that the sentence should only be altered, on appeal, if the discretion has not been judiciously and properly exercised – **S v Rabie** 1975 (4) SA 855 (A) as per Holmes JA.

[21] In **S v Malgas** 2001 (1) SACR 469 (SCA) para 12 Marais JA stated as follows:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, and appellate Court is of course entitled to consider the question of the sentence afresh.”

- [22] When sentencing the appellants the trial court took into account the following factors:

First appellant

- 22.1 He was 24 years old when he committed the offence.
- 22.2 At the time that he was sentenced both his parents were deceased.
- 22.3 He was single and lived with his 11year old brother.
- 22.4 Since the incarceration of the first appellant his 11 year old brother was living with the neighbours.
- 22.5 Before the incarceration of the first appellant he did odd jobs to earn income in order to support himself and his younger brother.
- 22.6 The first appellant had previous convictions for theft and had already served direct imprisonment on the last previous

convictions. The first appellant had been released on parole on the 14th of May 2012.

22.7 4 Months after his release on parole he had committed the offence which the trial court convicted him on.

22.8 It was clear to the trial court that the short term of imprisonment the first appellant had already received in his previous conviction, had no rehabilitative effect on him.

[23] Second appellant

23.1 He was 28 years of age.

23.2 He was single.

23.3 The only dependent he had was his 5 year old child which stayed with its mother.

23.4 Before the incarceration he did odd jobs to earn income to look after the child.

23.5 Before his arrest in respect of the current charges he had 2 previous convictions, 1 for housebreaking and robbery and the other for robbery. He had already been previously sentenced to 9 years imprisonment.

23.6 He was released on parole on the 10th of September 2010 until the 9th of March 2015.

23.7 2 Years after his release on parole and while still on parole he committed the offence of which he was convicted of in the trial court.

[24] Third appellant

24.1 He was 31 years of age at the time he was sentenced.

24.2 He was single.

24.3 He had a 6 year old child who stayed with his grandmother.

24.4 He had permanent employment for 4 years before he was incarcerated.

24.5 He had 2 previous convictions, one for theft and one for housebreaking with the intent to steal and theft.

24.6 He was sentenced to a suspended sentence on the count of theft and 3 years imprisonment in terms of Section 276 (1)(i) of the Criminal Procedure Act.

24.7 He was placed under correctional supervision on the 21st of September 2011 which period lapsed on the 11th of August 2013.

24.8 He was thus still out on correctional supervision when he committed the offence which he faced at the trial court on the 14th of September 2012.

- [25] The mitigating factors vis-à-vis the aggravating factors, the court a quo came to the conclusion that no substantial and compelling circumstances existed to justify departure from the prescribed minimum sentence in respect of the 2 counts.
- [26] After a careful evaluation the trial court sentenced the appellants as follows:
- “Count 1, in terms of Section 51[2] [A], Act 105 of 1997, 15 years imprisonment. Count 2, in terms of Section 276[1] [B], Act 51 of 1977, 6 years imprisonment. After taking into account the cumulative effect of the two terms of imprisonment, court orders that three year of the six years imprisonment on count 2 run concurrently with the 15 years imprisonment on count 1, accused each thus to serve 18 years direct imprisonment. No order is made in terms of Section 103[1] Act 60 of 2000.”
- [27] The legislature has ordained the prescribed minimum sentences as the sentence that should ordinarily be imposed in the absence of any substantial and compelling circumstances. The court cannot depart from imposing such sentence for flimsy reasons. See Malgas supra.
- [28] In the circumstances there is no reason justifying interference with the decision of the trial court in respect of both the conviction and the sentence.

[29] Accordingly the appeal is dismissed both in respect of conviction and sentence.

I concur

I.R.O BOKWA, AJ

S. EBRAHIM, J

On behalf of the appellants: Mr. Nel
Instructed by:
Bloemfontein Justice Centre
Bloemfontein

On behalf of the respondent: Adv: De neyssen
Instructed by:
National Director of Public Prosecution
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/PC