

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case no : A337/2012

IN THE MATTER BETWEEN:

7/3/2013

PROMINENT MOYO

Appellant

And

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	(NO)
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	(NO)
(3) REVISED.	✓
3/12/2012 DATE	<i>R. Oenker</i> SIGNATURE

Respondent

JUDGEMENT

- 1] In this matter the appellant and his co-accused were charged with robbery with aggravating circumstances and kidnapping in the Gauteng Regional Court. The trial commenced on 10 September 2009 and was finalised on 4 November 2009.
- 2] Both accused were represented in court and plead not guilty to all charges. No plea explanation was tendered by either of them.
- 3] They were found guilty and sentenced to:
 - 3.1 15 years on the count of robbery with aggravating circumstances; and
 - 3.2 5 years imprisonment on count 2 which was to run concurrently with

the sentence on count 1);

3.3 both accused were declared unfit to possess a fire-arm.

4] It is against both convictions and sentence that the appellant (accused no 1 in the court *a quo*) now appeals.

5] 3 witnesses testified on behalf of the State and the 2 accused testified in their own defence.

6] **THE COMPLAINANT**

He testified that:

6.1 on 26 September 2008 at approximately 15h30 he was returning from work and walking along the Old Pretoria Road when he was accosted by 2 men, one of whom pointed a fire-arm at him;

6.2 his assailants told him not to look at them, took everything out of his school bag and took his money, work-suit, phone, gloves, charger, bank card and R860 in cash;

6.3 they then tied him up with "*something like a plastic*" under a bridge and left him there;

6.4 he managed to free himself and headed in the direction that he saw them take, which led to Blue Valley, where he saw them walk into the nearby veld;

6.5 he then asked for help from the security officer at Blue Valley and with the latter's vehicle they drove to where the complainant had last seen the 2 accused. When they saw him they ran and the complainant and

the security officer gave chase and apprehended the appellant.

Accused no 2 escaped;

6.6 he testified that he was able to identify the appellant through the green t-shirt and blue track-suit pants that he was wearing when he accosted the complainant;

6.7 the appellant then mentioned accused no 2 and the police were contacted;

6.8 appellant agreed to take them to where accused no 2 lived where the latter was apprehended still wearing the white cap that he had worn when he had robbed the complainant earlier that afternoon. Besides the R260 found on accused no 2, nothing further was recovered from him;

6.9 both accused then agreed to take the complainant and the police to where they had left the items;

6.10 appellant pointed out where he had left his own tracksuit and a wallet and R400 were found. He then took them to where he had left the complainant's possessions when they ran away and there they found the complainant's school bag, phone cover, phone charger, and gloves.

8] The complainant, in cross-examination, conceded:

8.1 that he could not identify the fire-arm;

8.2 that he had actually lost sight of the 2 accused briefly.

- 9] Although the complainant never identified the appellant on any physical attribute, he did identify him on the clothes he wore and in the dock during the trial and the appellant never placed the clothes he was wearing at the time in dispute at all.

10] **MR MOLOKOMME**

He was the second State witness. He is the security officer at Blue Valley who came to the complainant's assistance. He testified that:

10.1 the complainant pointed out the 2 accused who fled when they were spotted;

10.2 they pursued and caught the appellant who was then identified by the complainant;

10.3 after the arrest:

"...they spoke to the complainant asking for forgiveness asking for forgiveness each blaming the other..."

10.4 the 2 accused threw down a plastic bag with a 2 litre Coke which the complainant had told him he had had when he was robbed;

10.5 he could not identify accused no 2 as his shift had ended at 18h00 and the police had arrived;

10.6 It is also important to note that, when he identified the person he apprehended, he said:

"...I think it was accused 1..."

- 11] Under cross examination he admitted that:

11.1 it was not the 2 accused who blamed each other, but rather the appellant

“...became scared and started saying it was no myself it was actually this other person that ran away...”;

11.2 he also admitted to the robbery;

11.3 the complainant told him that his assailants had a fire-arm.

CONST MAKGOBA

12] State witness no 3 was Const. Makgoba who testified that:

12.1 he received a report whilst he was on patrol and when he got to Blue Valley at approximately 20h30 they found the security guards, the complainant and the appellant there;

12.2 appellant admitted that he was with a friend who had gone to Olievenhoutbosch and he agreed to take them there;

12.3 they found accused no 2 at the address pointed out by the appellant and he was still wearing the white cap that he wore when he robbed the complainant and the complainant identified him;

12.4 the 2 accused then took them to where they said they had hidden the complainant's items and they found a charger, a bag, brush, ABSA bankcard, cash and some other items;

12.5 the 2 accused then took them to the place where they had disposed of the fire-arm but it was not found.

13] Cross-examination did not make great inroads into this evidence but it did

reveal that there was no mention of the actual pointing of the fire-arm, nor was there mention that the complainant had been tied up.

14] The State then closed its case.

THE APPELLANT

15] As stated, the appellant was accused no 1 and he testified as follows:

15.1 he was walking to Olievenhoutbosch when 3 people (2 security officers and the complainant) came towards him. One of the security officers (Molokomme) pointed a fire-arm at him;

15.2 he was searched and asked where the complainant's items and money were but he disavowed any knowledge thereof and they also found nothing on him after a search;

15.3 he was taken to the security office at Blue Valley where he was assaulted and the police contacted and he was asked where he stayed;

15.4 he told the police that he was on his way to his sister and they wanted him to take them there, which he agreed to do;

15.5 upon arrival, he was left handcuffed in the motor vehicle, they searched accused no 2, found R400 on him and then they asked him where he had been arrested by Molokomme so he took them there;

15.6 he denied that he took them to where the items were hidden – his version is that he took them to where he was originally arrested;

15.7 although they searched the area they found nothing;

15.8 he also testified that he knows the complainant – he was in a

relationship with the complainant's ex-girlfriend and this is why he was being accused of this crime. He also admitted that this was never put to the complainant by his legal representative;

15.9 furthermore, it was also never put to any of the other state witnesses besides the police officer, that no items were found.

ACCUSED NO 2

16] He stated that:

16.1 he was arrested at home and that the property is owned by appellant's sister;

16.2 that one Sathenga could confirm that Accused no 2 was at home all day;

16.3 after his arrest, R400 was taken from him which he said was his rent money, and he was taken straight to the police station and made no stops anywhere on the way there;

16.4 he denied that anyone pointed him out to the police and stated that when the police found him they "...*simply took me away...*"

17] This then concluded the case for both accused and Sathenga was never called to testify. No negative inference is inferred from this by this court.

AD CONVICTION : ROBBERY WITH AGGRAVATING CIRCUMSTANCES

18] It is trite law that an appeal court's powers to interfere with the factual findings of the court *a quo* are limited to circumstances where this court is of the view

that the findings are patently wrong.¹

- 19] In the matter at hand, it is important to carefully scrutinize the evidence and judgement of the court *a quo*. It is also important to heed the cautionary rule regarding single witnesses² which the complainant in this matter is as Molokomme could not positively identify the appellant in court when he testified.
- 20] However, in applying that rule, it is also incumbent upon the court to pay heed to all the facts placed before it, to evaluate those facts, to compare the facts tendered in evidence of the various witnesses and then to weigh that against the evidence of the accused. Once this has been done the question is where the State has proven its case beyond reasonable doubt.
- 21] In this matter the court *a quo* weighed up all the evidence placed before it and found the complainant to be a satisfactory witness and also found that his evidence was “*unequivocal and unchallenged*”. Insofar as the evidence of the two State witnesses was concerned, they were found to be honest and truthful and their version of events believable and probable.
- 22] Both accused’s evidence was rejected as being “*so improbable and beyond belief that it cannot reasonably be true*”.

¹ S v Francis 1991 (1) SACR 198 (A) ; S v Hadebe 1997 (2) SACR 641 (SCA)

² S v Mokoena 1956 (3) SA 81 (A)

- 23] Counsel for appellant submitted that the identification of the appellant by the complainant must be viewed with suspicion. He makes this submission based on the following:
- 23.1 the single witness cautionary rule;
 - 23.2 the fact that, during the chase, the complainant did indeed lose sight of the appellant, which he eventually admitted under cross-examination;
 - 23.3 the lack of forensic evidence linking appellant to the crime;
 - 23.4 the items recovered were not found in appellant's possession;
 - 23.5 the fire-arm was not recovered.
- 24] The complainant identified the appellant initially based on the clothing he wore when he robbed him and which the appellant was still wearing when he was apprehended by Molokomme. This was never disputed by the appellant. He was also identified by the complainant in court and the appellant's track suit pants were also found at the scene which was never disputed and this point therefore cannot succeed.
- 25] The facts in paragraph [24] *supra* equally apply to the issue of whether the complainant lost sight of the appellant and his identification is more than sufficient to properly identify the appellant.
- 26] Where there are sufficient facts that place the appellant at the scene of the crime and to identify him as having committed the crime for which he is charged, forensic evidence is not a *sine qua non* for a conviction.

- 27] Furthermore, whilst the items were not found in the possession of the appellant, he took the police and complainant to where he was arrested and this is where these items were found. This was conceded by counsel for appellant during argument. This point must also then fail.
- 28] Although it is so that the fire-arm was not found, this on its own is not sufficient, when viewed with the remainder of the evidence tendered on behalf of the State, to taint the State's case with sufficient doubt to acquit the appellant.
- 29] Whilst it is certainly so that the State witnesses do not corroborate each other in all respects, it is our view that there are sufficient proven facts which show that the appellant did indeed commit the crime for which he was charged and found guilty and, accordingly, the court *a quo* correctly convicted the appellant of robbery with aggravating circumstances.

AD CONVICTION : KIDNAPPING

- 30] The kidnapping charge is, however, quite a different story. Counsel for the State correctly conceded that were the complainant to have been tied up as he alleged, that this would have been done in the commission of the robbery and that, accordingly, the kidnapping charge was not competent in the circumstances. Accordingly, it is found that the court *a quo* materially misdirected itself insofar as its findings of fact and law on this charge and the conviction on the charge of kidnapping must be set aside and the appeal succeed on this charge.

SENTENCE

31] On count 1 the appellant was sentenced to 15 years imprisonment. The facts stated in mitigation of sentence were:

31.1 he is a single man with a 3 year old child. Both the child and her mother are supported by the appellant financially;

31.2 he also supports his 2 sisters who were 16 and 11 years old;

31.3 he hails from Zimbabwe and has been living in South Africa since 1999 and his asylum papers expired in approximately October 2009;

31.4 he worked for a rubble removal company and earned R500 per week;

31.5 he has a Standard 7 qualification;

31.6 he is a first offender;

31.7 he spent 14 months in prison awaiting trial.

32] When sentencing the court *a quo* took into account the facts of the robbery, the interests of society and the fact that the appellant had no remorse and found that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentence. The court *a quo* stated:

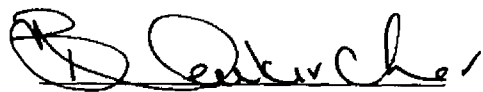
"...The court must by its decisions and the imposition of sentence promote respect for the law, protect society as well as maintain peace and safe living conditions. The court in imposing heavier sentences must also send out a message to other potential offenders so as to deter them from committing serious offences of this nature, thus ensuring safety and protection of society. No civilised community should have to tolerate barbaric conduct..."

- 33] Whilst this is all very true, the court must also be mindful of the circumstances of the accused himself and his prospects for rehabilitation.
- 34] Although robbery is a serious crime, the complainant was not physically injured or harmed and the 14 months that the appellant spent awaiting trial must be taken into account.
- 35] I am of the view that the sentence imposed by the court *a quo* is disproportionate to the crime and that it is extra-ordinarily harsh and inappropriate. It is our view that the appellant's circumstances warrant a deviation from the minimum prescribed sentence and accordingly, the appeal must succeed on this ground.

ORDER:

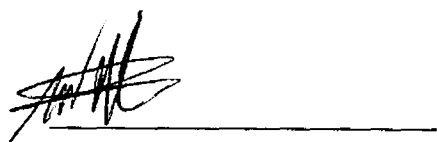
Accordingly, the following order is made:

1. The appeal against the conviction on Count 1 (robbery with aggravating circumstances) is dismissed.
2. The appeal against the sentence on Count 1 succeeds and the sentence handed down by the court *a quo* is set aside and replaced with the following:
"Imprisonment for a period of 10 years of which the period of 14 months spent awaiting trial is to be taken into account as having been served as part of the sentence."
3. The appeal against the conviction and sentence on Charge 2 (kidnapping) succeeds and the conviction and sentence on Charge 2 is set aside.
4. The appellant is declared unfit to possess a fire-arm.

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NEUKIRCHER (AJ)

I agree

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KHUMALO AJ

05 November 2012