

REPUBLIC OF SOUTH AFRICA



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

14/6/2013

CASE NO: A761/12

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

14/06/2013

In the matter between:

JOSEPH GENU

FIRST APPELLANT

GOLDEN MATYALA

SECOND APPELLANT

LUCKY MFUNDISI

THIRD APPELLANT

and

THE STATE

Respondent

JUDGMENT

BALOYI AJ:

1. The appellants Joseph Genu, Golden Matyala and Lucky Mfundisi were each charged with two counts of robbery with aggravating circumstances in the Regional Court, Oberholzer on the 24 October 2011. They were each convicted and sentenced on both counts of robbery with aggravating circumstances on 26 April 2012.
2. They now appeal to this court, against conviction and sentence having been granted leave to do so by the magistrate.
3. A summary of the evidence in the court a quo is that the two complainants Mr Albert Nyengiwe("Nyengiwe") for count one Mr Raphael Manyaka("Manyaka") for count two were at the Total Garage Oberholzer on the night of the incident, at approximately 21h00 when they were attacked by a group of more than 10 men. According to Nyengiwe these men split into two groups, the one group focused on him and the other group concentrated on his friend, the second complainant Manyaka.
4. The three appellants were part of the group that was standing in front of Nyengiwe. They started fighting them. Nyengiwe fought back. Appellant number two produced a knife. The rest of the group shouted to the second appellant "stab him, hit him". Nyengiwe surrendered. They searched him and the third appellant took his wallet containing an Absa card, R300 cash and a V360 cellular phone.

5. At the time of the robbery, the third appellant was wearing a top which was cream in colour and it had a hood resembling Little Red Riding Hood. During the robbery Monyaka was assaulted and lay on the ground. The robbers fled with their possessions. Monyaka's evidence is that he was with Nyengiwe at Total Garage talking on his cellphone and felt a blow on his head which rendered him unconscious. When he regained consciousness his cap and cellular phone were missing. Immediately thereafter whilst still at the scene with Nyengiwe they saw the third appellant who came running in their direction and they apprehended him. Police arrived at the Total Garage and the third appellant was arrested.
6. Monyaka related the robbery to the police he also gave them his cellphone number. The police dialled the number and his cell phone rang in the pocket of the third appellant who told the police that he will not be arrested alone and will point out the other co-perpetrators. When the third appellant was arrested he had taken off the top he was wearing and held it in his hand.
7. Police took the two complainants to the police station. Other police officers went away with the third appellant to point out other co-perpetrators. The first and second appellant together with a third person were arrested. This third person was also charged. Initially four people were charged for robbing the two complainants. However, there was no evidence linking the third person pointed out by the third appellant. The third person was acquitted on both counts.
8. Whilst at the police station police took items from the possession of the people that were arrested after the pointing out by the third appellant. Nyengiwe was

able to identify and recover his ABSA bank card, driver's license and his cell phone. The Third appellant is the person that took the wallet containing bank card, driver's license, R300 – 00 cash and a Motorola cell phone. His cell phone was recovered from the first appellant. However he did not recover the R300 – 00 cash.

9. Both complainants identified their cell phones. It is not in dispute that the cellular phone found in possession of the third appellant belongs to Manyaka. It is also not in dispute that the cellular phone found in possession of the first appellant belongs to Nyengiwe. All three appellants were convicted of two counts of robbery with aggravating circumstances.

10. Counsel for the three appellants argued that there is no evidence linking the three appellants to the second count of robbery with aggravating circumstances in that the complainant Manyaka was hit on the head and became unconscious. He did not see the people who robbed him. Counsel argued further stating that the appellants were not warned at the commencement of the trial that the state will rely on the doctrine of common purpose regarding count two.

11. In the absence of proof of a prior agreement to commit the offences, as in this case, the appellants can be convicted on the basis of the doctrine of common purpose, if

- (a) They were present where the robberies were being committed.
- (b) They were aware of the assault on the second complainant.
- (c) They intended to make common cause with the perpetrators of the assault.

(d) They manifested their sharing of a common purpose with the perpetrators of the assault by themselves performing some act of association with the conduct of the perpetrators; and

(e) They had the requisite *mensrea* concerning the unlawful outcome at the time the offence was committed, that is, intended the criminal result or foresaw the possibility of the criminal result and nevertheless actively associated themselves regardless as to whether the result was to ensue. (See **S v Sefatsa 1988(1) SA 868 A; S v Mgedezi 1989(1) sa 687 (A) at 703 B-I; S v Thebus 2003 (Z) SACR 319 cc para 49**)

12. According to the evidence of Nyengiwe it is clear that the group approached the two complainants with the sole aim of robbing them. They split into two groups, one group focused on first complainant and the other on the second complainant. They had one intention namely to rob the two complainants.

13. Nyengiwe's evidence is that the third appellant was part of the group that focused on him and the third appellant is the one who searched him and took his items. What is interesting regarding the third appellant is that when he was arrested he was found in possession of the cellphone belonging to Manyaka.

14. The first appellant was found in possession of cell phone belonging to Nyengiwe. It was removed from Nyengiwe's possession by the third appellant. This fact indicates that after the robbery there was an exchange of items robbed from the two complainants amongst the appellants. Furthermore when the third appellant was arrested by the police, he later pointed out the first and second

appellants who were also identified by Nyengiwe as part of the group that robbed them. Nyengiwe was adamant that first, second and third appellant were standing in front of him. Second appellant wanted to stab him with a knife and the rest of their attackers were shouting at second appellant that he must stab or hit him because he was resisting.

15. Furthermore there is no requirement that the appellants should have been warned that the state will rely on the doctrine of common purpose for a conviction to stand on count two. I therefore come to the conclusion that the conviction of all three appellants on both counts was indeed justified and there was no misdirection on the part of the magistrate.

16. With regard to sentence counsel for the appellants submitted that the magistrate misdirected himself by imposing sentences which induce a sense of shock and failed to take their personal circumstances into account.

17. In **S v Malgas 2001 (1) SACR 469 (SCA)** the circumstances entitling an appeal court to interfere with the sentence was stated to be as follows:

"A court exercising 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 a material discretion by the trial court vitiates its exercise of discretion an appellate court is of course entitled to consider the question of sentence afresh. In doing so it assesses sentence as if it were a court of the first instance and the

sentence imposed by the trial court has no relevance. As it is said an appellate court is at large. However, even in the absence of material misdirection an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so where the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed, had it been the trial court, is so marked that it can properly be described as shocking, startling or disturbingly inappropriate”.

18. With regard to sentences imposed on second and third appellant, in my view they are not shocking or disturbingly inappropriate. If one takes into account that second complainant sustained serious injuries during the robbery. He was hit on his head and the blow rendered him unconscious, his right eye was completely swollen and he could not see. His jaws were affected and he could not move them.
19. Nyengiwe did not recover the R300 cash stolen from his wallet. The Court a quo also took into account that the two robberies occurred simultaneously and both counts were taken as one for the purposes of sentence.
20. Under the circumstances the sentence imposed on second and third appellant is upheld.
21. However, regarding the sentence imposed on the first appellant, it does not appear to me that the magistrate took proper account of the fact that the previous conviction of robbery was more than 10 years old at the time of the commission of the current offences. Furthermore the previous conviction is robbery and not robbery with aggravating circumstances. The previous

conviction for Robbery would therefore not have required section 51(2)(a)(ii) of the Criminal Law Amendment Act 105 of 1997 to be applied. In this regard the respondent submitted that the sentence of 12 years imprisonment ought to be confirmed by this court.

22. In the result, the following order is made:

1. The second and third appellants appeal against conviction and sentence on both counts is dismissed.
2. The first appellant's appeal against the convictions on both counts is dismissed.
3. The first appellant's appeal against sentence is upheld
 - 3.1 The sentence imposed by the court below is set aside and replaced with 12 years imprisonment. Count one and two taken as one for the purposes of sentence.
 - 3.2 The Sentence of 12 years imprisonment is antedated to 26 April 2012.


J S BALOYI

Acting judge of the High Court

Pretoria

I agree and it is so ordered.



S P MOTHLE

Judge of the High Court

Pretoria