



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

CASE NO: A311/2013

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

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SIGNATURE

In the matter between:

19/8/2013

HENRICK LILEK SONO

and

THE STATE

RESPONDENT

JUDGEMENT

DE VOS J

[1] In this matter the Appellant was convicted in the Regional Court, Soshanguve, on two charges of robbery with aggravating circumstances and sentenced to 15 (fifteen) years imprisonment on each count. Effectively a sentence of 30 (thirty) years imprisonment was imposed. The Appellant was granted leave to appeal against both the convictions and sentences imposed. The Appellant now approaches this Court on appeal against both the convictions and sentences.

[2] The conviction on Count 1

On the First Count, the State called a single witness, Mr Themba Skhosana, the Complainant. The Complainant testified that on the 18th September 2011 he consumed five to six dumpies of Black Label beer at Derrick's Tavern in Block G, Soshanguve between 22h00 and 01h00 in the morning when he left the tavern. He testified that he was not drunk and he managed to leave the tavern alone and proceeded to his house. It is also common cause that the Appellant was also present at Derrick's Tavern on that evening and was seen by the Complainant. On his way to his home he saw three people following him. They were walking in the same direction as he was going but on the opposite side of the street. They were about fifteen metres away from him. He then realised that the three persons were following him and they started running in his direction. When they were about six metres away from him the Complainant also started to run. He yelled for help but the three men apprehended him. Just before they apprehended him he realised that he could not run away from them and he turned around to face them. He then tried to ask them what they are doing but immediately thereafter he was struck on his mouth. He fell down. He testified that one of the assailants was the Appellant. He knows him very well. I will deal with this aspect at a later stage. While he was on the ground the Appellant throttled him for a period of three to four minutes. He was also struck by a hard object on his teeth. As a result he lost some of his teeth. He testified that the Appellant was the one who struck him on his mouth. During this period he wrestled with his assailants. One of them searched his pockets whilst he was trying to push the Appellant away from him. He then lost consciousness. Later that night he was woken up by two men who were wearing ZCC badges. His cellphone and R280,00 (Two Hundred and Eighty Rand) in cash were missing. He lost some teeth and sustained injuries on his head. He then went home to sleep and the next morning he reported the robbery to the Police.

[3] It is not in dispute that the Appellant is well-known to the Complainant. It is common cause that they grew up together in Block G, Soshanguve. They used to greet each other when they met. At some stage they were together in prison at Newlock, before the robbery took place. On the night of the robbery the Complainant saw the Appellant at Derrick's Tavern

[4] It is further common cause that on the Complainant's version the place where the robbery took place has sufficient lighting. Some of the houses in that area have outside lights and there is also an Apollo light in the area.

[5] The Complainant conceded during cross-examination and in chief that he was unable to identify the other two robbers. He recognised the Appellant when the group came running in his direction. When he laid the complaint at the Police he identified the Appellant to the Police as one of his assailants.

[6] The Appellant also testified. He denies that he and two other people robbed the Complainant. His version is that when the tavern closed, he and his girlfriend also left. Outside the tavern they saw four people fighting/ wrestling. The Appellant then decided to intervene. On approaching the men, three of them ran away. It is then that the Appellant realised that it was the Complainant who was lying on the ground. According to him the Complainant then raised his head and started accusing him that he, the Appellant, had robbed him. The Appellant and his girlfriend then left.

[7] The Appellant's girlfriend, Edna Ledwaba, also testified on behalf of the Appellant. She testified that she left the tavern in the presence of the Appellant. She testified that she was walking with the Appellant and when they turned at the corner they saw people

fighting. She said that the perpetrators were assaulting the Complainant, Themba Skhosana. She also said that she saw the attackers running away. No-one was lying on the ground and nobody fell on the ground at any stage. According to her, the Appellant and the Complainant were on their feet, busy arguing.

[8] There are serious discrepancies between the Appellant's and his girlfriend's respective versions. For example:

8.1 She saw the Complainant after the Appellant ran towards the group of people who were busy fighting. When she arrived at the point where the Complainant was robbed, the Complainant was accusing the Appellant that he robbed him and that he was going to lay a charge of robbery against him. If her version is to be accepted i.e. that she never lost sight of the Appellant from the moment he left her running towards the group of people until he met up with the Complainant, she must have seen the Complainant lying on the ground as the Appellant and the Complainant testified;

8.2 She said that she cannot say whether the group of people were fighting or not. In contrast, the Appellant testified that he ran in the direction of the group of people because they were fighting;

8.3 She denies the Appellant's version that she told the Appellant to go and see what was happening whilst the Complainant was being assaulted; whereas the Appellant testified that his girlfriend prompted him to go and see what was happening. If she was the one who prompted the Appellant to go and intervene, there was nothing preventing the defence witness from seeing the Complainant on the ground. Her own evidence was that there was nothing obscuring her view at the distance of four to five metres and that she arrived simultaneously with the Appellant at the scene of the crime;

8.4 She further testified that she never saw any injuries or blood on the Complainant, whereas the Appellant testified that the Complainant was bleeding and it was clearly visible.

[9] In my view the Appellant's witness was never at the scene of the crime. Her evidence about what she observed cannot be accepted. It is highly unlikely that she could not see what was happening at that short distance but conveniently heard the same thing as the Appellant when the Complainant blamed him for the robbery and threatened to report him to the Police. Against this the evidence of the Complainant must be weighed up. It is unlikely that the Complainant was assaulted severely and even lost consciousness if it was not true. These contradictions are indicative of the fact that the defence witness was not at the scene. It is further unlikely that the Complainant would accuse the Appellant under circumstances where he would have welcomed any help to assist him.

[10] The Court a quo properly evaluated the evidence given at the trial. The most important factor is that the Appellant places himself at the scene of the robbery. The Complainant identified the Appellant as being present and one of his attackers. The only question is whether there was a motive for the Complainant to falsely implicate the Appellant if he (the Appellant) he came to his assistance. The Court a quo correctly, in my view, found the Appellant's version to be improbable and that it does not make sense at all. The Appellant did not make a good impression on the Court a quo. The Appellant initially testified that the Complainant falsely implicated him because the community once caught the Complainant breaking into a car and assaulted him in the presence of the Appellant. The Appellant then changed his version and testified that the reason that the Complainant is falsely implicating him is that he once fought about a car which the

Complainant borrowed from him. When cross-examined about this, the Appellant conceded that the incident happened a long time in the past and was water under the bridge. Since that incident they even started greeting each other. The Court found that the Appellant kept on changing his version and tried to adjust his evidence to suit his version. In contrast therewith, the Court found the Complainant to be a reliable and honest witness. He did not try to hide the fact that he was drinking before the incident. He testified that he was still sober enough to make a proper identification of what happened during the robbery. He identified the Appellant as one of his robbers. The Appellant confirms on his own version that he was present at the scene of the robbery. The Appellant's girlfriend contradicts his version. Applying the provisions of Section 208 of the Criminal Procedure Act, Act 51 of 1977, the Court a quo correctly, in my view, found that the evidence of the Complainant, being a single witness, was credible and reliable and accordingly found the Appellant guilty as charged.

[11] The conviction on Count 2

The conviction on this charge is based on the evidence of a single witness, Ernest Monare. The Complainant testified that he knew the Appellant by sight, as he used to see him around Block G, Soshanguve, and also around the tavern in Block G. On the 8th October 2011, around 22h30, the Complainant was walking from Block F after consuming liquor at the tavern. When he crossed the road from Block F to Block G, he was approached by three people from the direction of Majembeni Tavern. The three males then asked him for a match. While the Complainant was still talking to them, two other people arrived and made the number five. One person then choked the Complainant from behind in a vice grip position. The Complainant alleged that he saw the Appellant and that they then started assaulting him with a hard object, like an iron rod, on his face until he became unconscious. He testified that the Appellant hit him with fists and one of his

accomplices hit him with the iron rod on the left eye. As a result of the injury to his eye the Complainant cannot see properly. After regaining consciousness around midnight, he found himself to be naked. His tracksuit and t-shirt were gone and he was only dressed in his underpants and socks. His Samsung cellphone, R44,00 (Forty Four Rand) in cash and his tracksuit were missing. The Complainant further testified that it was dark but not very dark, as he could still identify the Appellant. The Appellant also testified in his defence. He denied the allegations made by the Complainant.

[12] The identification of the Appellant on this Count is doubtful. According to the Complainant's version he only saw the Appellant for a second or more. It is trite law that the evidence of a single witness should be clear and satisfactory in all material aspects. Having regard to the fact that the robbery took place when it was fairly dark, it was at night, and that there were five assailants present of which only one is identified, a Court must be very careful before making a finding that an accused's identity has been proven beyond a reasonable doubt. It is common cause that the Complainant conceded that he consumed six bottles of 750 millilitres beer between 17h00 and 22h00 on that day. According to the Complainant, he was choked from behind. He only recognised the Appellant after he was choked.

[13] In view of the standard of proof, the Court does not have to be convinced that every detail of the accused's version is true. If the accused's version is reasonably possibly true in substance, the Court has to decide the matter on the acceptance of that version. The accused's version can only be rejected on the basis of inherent improbabilities, not because it was merely improbable but because it was so improbable that it could not reasonably possibly be true. See in this regard **S v Shackell, 2001(4) SA 1 (SCA)**. The Appellant's defence is based on the denial of his presence at the scene of

the crime. The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might be reasonably possibly true, he must be acquitted. See in this regard ***S v Hlongwane, 1995(3) SA 337 (A)***. The Appellant gave an explanation that he was at home with his girlfriend watching television. In my view, the Court had no reason to reject the Appellant's version. I am also not convinced that the Complainant properly identified the Appellant as one of his assailants. Because of the fallibility of the human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest; the reliability of his observation must also be tested. This depends on the various factors such as lighting, proximity of the witness, opportunity of observation, extent of prior knowledge of the accused, corroboration, etc. See ***S v Mthethwa, 1972(3) SA 766 (AD)***. I have serious doubts whether it can be said that seeing a man for a second or two constitutes a proper identification at all.

[14] In my view the conviction on the second Count cannot be confirmed and should be set aside.

[15] I now turn to the question of sentence. It is not necessary to deal with the sentence imposed on Count 2. I have already said that the conviction on Count 2 cannot be confirmed. It follows that the sentence imposed on Count 2 must be set aside. I will deal therefore with the sentence imposed on Count 1 only. When the appeal was noted, the thrust of the appeal against sentence was that the Court a quo erred in sentencing the Appellant to 30 (thirty) years imprisonment without taking the cumulative effect into consideration. That ground of appeal has now fallen away. In the alternative it is submitted that the Trial Court overemphasised the seriousness of the offence which the Appellant committed and the interest of society whilst the personal circumstances were

underemphasised. It is also contended that by imposing a lengthy period of 15 (fifteen) years imprisonment, the Court a quo erred as the sentence is shockingly harsh and induces a sense of shock. It is further contended that the Court a quo failed to properly investigate the Appellant's background in regard to his previous convictions, his level of education, and the fact that he grew up in an abusive relationship. It is also contended that the Learned Magistrate did not take into account the time period that the Appellant had spent in custody awaiting trial.

[16] It is trite law that a lesser sentence than the minimum sentence of 15 (fifteen) years imposed by the Magistrate can only be imposed if there were substantial and compelling circumstances, justifying a deviation from the prescribed minimum sentence.

[17] In my view, the Trial Court took all the relevant factors into consideration when imposing an appropriate sentence. The sentence imposed commensurate with the gravity of the offence and does not induce a sense of shock and is not shockingly harsh for the following reasons:

17.1 The Appellant has been convicted of a very serious offence as set out in the charge sheet. The Act on minimum sentences is applicable to this conviction;

17.2 The offence the Appellant was convicted of is prevalent in the Republic of South Africa;

17.3 The Appellant left his victim unconscious;

17.4 The Appellant did not show any remorse;

17.5 The Appellant has a previous conviction;

17.6 The offence was pre-planned, executed at night, and substantial force was used;

17.7 The Complainant sustained serious injuries i.e. he lost his teeth and he was throttled to such an extent that he became unconscious.

[18] Against these aggravating circumstances, the following mitigating factors were recorded:

- 18.1 The Appellant was 33 years old;
- 18.2 The Appellant is not married;
- 18.3 He has a minor child aged 13 years old;
- 18.4 He is presently unemployed;
- 18.5 He is staying with his mother;
- 18.6 His parents were divorced in 2000;
- 18.7 The Appellant grew up in an abusive relationship at home;
- 18.8 He is a member of the ZCC church;
- 18.9 He went to school up to grade 4; and
- 18.10 He was in custody awaiting trial for 15 months.

[19] In my view none of these personal circumstances recorded constitute substantial and compelling circumstances as required by the Act. No evidence was lead to show that the abusive relationship in his parental home was the cause of his criminal behaviour. It can also not be found on the facts that his low level of education contributed to his disregard for law and order. The Magistrate duly considered these factors and duly concluded that no compelling and substantial circumstances were proven, entitling him to impose a lesser sentence. I agree with the conclusion arrived at by the Magistrate.

[20] The only substance in the appeal against sentence is the question whether the Magistrate should have taken the time period that the Appellant has spent in custody awaiting trial, in consideration. See in this regard ***S v Vilakazi, 2009(1) SACR 552 (SCA)*** and ***S v Kruger, 2012(1) SACR 369 (SCA)***. In contrast thereto, the decision of ***Radebe v***

S, (726/12) (2013) ^S ZASCA 31 (27 March 2013) at p6, paragraph 13 – 14, must be considered. In that case it was held:

“There should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial... The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced”.

If I understand this decision correctly the extent to which the sentence should be reduced, having regard to the period in detention, is only but one of the factors that should be taken into account in determining whether the effective period of imprisonment imposed is justified. The test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed, in other words, whether the sentence in all the circumstances, including the period spent in detention prior to the conviction and sentencing, is a just one.

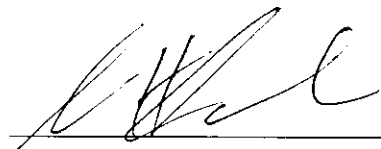
[19] In my view, a sentence of fifteen years imprisonment imposed as in the present case cannot be said to be unjust. It cannot be said that the Magistrate misdirected himself when he applied his discretion and decided to impose the minimum sentence. In my view, therefore, the appeal against sentence on Count 1 must be dismissed.

I THEREFORE MAKE THE FOLLOWING ORDER:

1. The appeal against the conviction on Count 1 is dismissed;
2. The appeal against the conviction on Count 2 is upheld and the conviction and sentence on Count 2 are set aside.

3. The appeal against sentence imposed on Count 1 is dismissed and the sentence of fifteen years imprisonment is confirmed.

I agree.



CAMBANIS AJ
ACTING JUDGE OF THE NORTH AND
SOUTH GAUTENG HIGH COURT

It is so ordered.



DE VOS J
JUDGE OF THE NORTH AND
SOUTH GAUTENG HIGH COURT