

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A187/2012

In the appeal between:

SIPHO LAWRENCE TSHABALALA

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J *et* SNELLENBURG, AJ

JUDGMENT BY: LEKALE, J

HEARD ON: 10 JUNE 2013

DELIVERED ON: 20 JUNE 2013

[1] On 19 January 2011 the appellant, who was legally represented, appeared, as accused no.1, before the Regional Court at Bethlehem together with two other persons, who were eventually acquitted at the end of the trial, and was convicted of housebreaking with intention to commit robbery and aggravated robbery, as charge number 1, and unlawful possession of firearms as charge number 2. He was, thereupon, sentenced to 15 years and 3 years direct imprisonment on the respective charges which sentences were ordered to run concurrently.

- [2] He feels aggrieved by both the convictions and the sentences and now approaches this court on appeal against the same with leave granted by this court on petition.
- [3] On convicting the appellant the trial court, effectively, rejected the appellant's defence of alibi as not reasonably possibly true and attributed the date stamps on his passport suggesting that he was in Lesotho on the day of the crimes to possible fraud. The court below, further, accepted the identification evidence of the complainant as being clear. The trial court, furthermore, found no reason to reject the evidence of the fingerprint expert relating to the appellant's right ring finger prints lifted from an ammunition box found on the complainant's bed.
- [4] Upon imposing the impugned sentences the court below found no cause to depart from the 15 year minimum sentence prescribed by Act 105 of 1997 (the Minimum Sentences Act) for robbery with aggravating circumstances on, effectively, the basis that the mitigating factors were overshadowed by the gravity of the crimes and the interests of the society.
- [5] In the notice of appeal and the heads of argument as well as submissions before us the appellant assails the conviction on the grounds that the complainant was not certain about the identity of the appellant as one of his attackers. Mr Van Rensburg, appearing for the appellant, further, submits that the

fingerprint evidence is questionable in that the complainant neither referred to the ammunition box nor identified his signature on the box in question as an exhibit. It is, furthermore, contended for the appellant that no evidence was tendered by the state to prove that the appellant's passport was falsified.

- [6] The State supports both the convictions and the sentences, according to Mr Pienaar, who contends, both in heads of argument and oral submissions before us, that the complainant's evidence was clear that he had the opportunity and the visibility on his side to see and identify the appellant. It is, further, submitted for the state that it is not in dispute that the complainant identified the appellant at the identification parade. The fingerprint evidence is conclusive proof of the appellant's involvement in the crimes insofar as it links him to the same, Mr Pienaar argues. The court of appeal is entitled, in Mr Pienaar's view, to take judicial notice of the porous state of the borders between the Republic of South Africa (RSA) and Lesotho regard being had to the high number of illegal immigrants in our country from Lesotho.
- [7] The factual dispute between the parties, which fell to be determined by the trial court, was effectively whether or not the appellant was one of the robbers. The State's version, as presented by the complainant, was that the latter, who was 67 years of age at the time of the trial, was lying in his bed on the

farm around 3am when he became aware of some movements in the house. Before he could switch on the lights the appellant came directly to him from the corridor with a flashing torch and lit him in the face. The appellant switched on the light in his bedroom and, eventually, demanded money from him. The incident took about 1 hour and the appellant played a major role while his companions remained in the background. He, eventually, gave the appellant keys to the safe, whereupon, the latter opened the safe and took R7 000,00 in cash. The appellant, further, fetched three firearms from the safe as well as ammunition and placed them on the blanket near the bed. The appellant, further, ordered his companions to take all the ammunition out of the case and to put them in the bag. He later identified the appellant at the identification parade as well as accused number 3.

- [8] The appellant's version was simply that he was in Lesotho for a cleansing ceremony from 21 November 2009 to and including 27 November 2009 as his passport clearly indicates that he entered that country on 21 November 2009 and left it on 27 November 2009.
- [9] The evidence of the fingerprint expert was not disputed save for pointing out that the appellant was in Lesotho on 25 November 2009. The question was, thus, effectively whether or not it was possible for the appellant to be in Lesotho and in the RSA and within the jurisdiction of the court aquo at the same time.

- [10] Mr Van Rensburg contends that there was no evidence tendered to show that the ammunition box from which the appellant's fingerprints were lifted was, in fact, in the complainant's house on the morning of the crimes. It is, however, clear from the evidence of the complainant that the appellant fetched the firearms and the ammunition from the safe where they were kept and placed them near the bed where the complainant was lying. It was, further, the appellant's evidence that the appellant ordered members of his crew to take all the ammunition out of the case and to put it in a bag.
- [11] It is, further, truism that a person's finger prints cannot be found on the box which was, at all material times, in the complainant's house, where it held ammunition, unless such a person was in the complainant's house and handled such a box. It is, however, possible for a person's passport to be in Lesotho without him being physically there. It is, furthermore, possible, owing to the porous state of the borders, as Mr Pienaar correctly submits, for a person to enter Lesotho from RSA legally only to return to RSA illegally to commit crime and to re-enter Lesotho, without using his passport, only to return to the RSA legally at a later stage. It is, further, correct, as Mr van Rensburg correctly concedes, that there are constant media reports of allegations of fraud and/or irregularities at border posts between Lesotho and the RSA with it recently being reported that, at the Caledonspoort Border Post near

Fouriesburg, officials of Department of Home Affairs have been arrested for, inter alia, placing date stamps on passports without holders of such passports physically presenting themselves.

[12] The factual findings of the trial court are presumed to be correct unless and until they are shown, with reference to recorded evidence, to be wrong. The acceptance, by the trial court, of oral evidence of witnesses and its conclusions thereon are presumed to be correct absent misdirection on its part. The appellant must convince the court of appeal that such acceptance and conclusions are wrong, on adequate grounds and not merely by showing that there was a reasonable doubt that the trial court was correct. (See **S v Hadebe and Others** 1997 (2) SACR 641 (SCA) and **S v FRANCIS** 1991 (1) SACR 198 (A) at 204C – E.)

[13] There is nothing before us to show that the trial court misdirected himself in his factual findings and in his acceptance and evaluation of oral evidence as well as his conclusions thereon. In fact, we are satisfied that the State's case was proved beyond reasonable doubt and that the trial court correctly differentiated between the appellant and accused number 3, who was also identified by the complainant at the identification parade, insofar as there existed insufficient and reliable evidence against the said accused. The evidence against the appellant was overwhelming insofar as the

complainant had a clear and sufficient opportunity of identifying him and his evidence was, as such, satisfactory in all material respects. The evidence of the fingerprint expert, further, provided the necessary safety valve for the acceptance of such evidence to the extent that the complainant was a single witness. We may only mention that the complainant never contradicted the evidence of the fingerprint expert in any manner whatsoever. His evidence was, in fact, consistent with that of the fingerprint expert insofar as he testified that the appellant, inter alia, handled firearms which were in the safe together with the ammunition. The evidence of the fingerprint expert with regard to the ammunition box, from which the appellant's fingerprints were lifted, was not disputed at all. It was, further, not necessary for the trial court to make any finding with regard to fraud in order to reject the appellant's version as not reasonably possibly true. The question was simply whether or not there existed innocent explanation for the presence of the appellant's fingerprints in the complainant's house. The appellant's passport does not provide him with an alibi in respect of the date on which the crimes were committed insofar as it does not reflect that date, as the State effectively submits. No evidence, whatsoever, was presented to the court below to explain how the appellant's undisputed fingerprints got onto the relevant box, let alone in the complainant's house. The trial court, thus, correctly rejected the appellant's version as false to the extent that it was in conflict with the State's version.

[14] In his handwritten statement annexed to the affidavit filed in support of the application for condonation of the late petition for leave to appeal, the appellant contends that the conviction, on unlawful possession of firearms, is irregular in that it was not supported by evidence before the trial court insofar as no evidence was led to prove that he and/or any member of his alleged crew was in possession of any firearm. We are, however, convinced by the recorded evidence that the complainant's evidence sufficiently proves that the robbers removed the firearms mentioned in the charge sheet from his safe and made away therewith. The evidence, therefore, shows that the appellant and his co-miscreants took possession of such firearms without being in possession of appropriate licences. The complainant's evidence is also clear and sufficient with regard to the working condition of the firearms in question insofar as he testified, undisputedly, to the effect that those firearms were loaded and he was afraid and was waiting for death.

[15] To the extent that the appellant feels that there was unlawful splitting of charges or duplication of convictions insofar as the firearms involved form the subject matter of the robbery in charge number 1 and, at the same time, form the basis of charge number 2, we can only point out that unlawful possession of a firearm constitutes a distinct crime with its own elements which differ from the elements of the crime of

housebreaking with intent to commit robbery and aggravated robbery. Application of the “**same evidence test**” shows that evidence necessary to prove the first charge does not, at the same time, establish the elements of the second charge. The “**similar intent test**”, on its part, also shows that the mental element of the offence in charge number 1 does not extend to the charge of unlawful possession of a firearm, where the requisite intention is one to possess without a licence as opposed to intention to rob. It is clear from the complainant’s evidence that the initial intention was to rob him of cash and the firearms were taken only because they were found in the safe, where the appellant and his crew were pursuing cash. The requisite intention with regard to the firearms was, therefore, only formed distinctively after the fact of robbery of cash and in the process of searching for more money. There was, thus, no duplication of convictions in the instant matter. The convictions on the two charges, further, do not offend our sense of fairness and justice. (See **S v Whitehead and Others** 2008 (1) SACR 431 (SCA) paras [34] – [44].

- [15] Sentencing is pre-eminently the discretion of the trial court as the parties correctly submit. The sentences imposed can only be interfered with under very narrow circumstances where the sentences are grossly disproportionate or the sentencing court exercised its discretion unreasonably. See **S v Pieters** 1987 (3) SA 717 (A) at 727F – H.

- [16] The parties are correctly and effectively in agreement that the trial court was constrained to impose 15 years imprisonment as a sentencing floor in respect of the aggravated robbery charge viz. charge 1 unless substantial and compelling circumstances justifying a lesser sentence were found and are seen to exist. (**S v Malgas** 2001 (1) SACR 469 (SCA)).
- [17] The parties are, effectively, at variance on whether or not there existed the aforesaid legal cause for the trial court to deviate from the prescribed minimum sentence insofar as their submissions are confined to that sentence.
- [18] The test in determining whether or not there exists such a legal justification for a sentence lesser than the prescribed minimum sentence is, effectively, whether or not the cumulative impact of the mitigating factors on the nature and gravity of the crime committed and the interests of the community renders the prescribed minimum sentence unjust. (See **S v Malgas** *supra*.)
- [19] It is contended for the appellant that the sentence imposed is unjust because it is disproportionate to the crime, the appellant's needs and those of the community insofar as he was in custody, awaiting trial, from 17 December 2009 until he was sentenced on 19 January 2011, he was 24 years of age when the crimes were committed, he is married with one minor child, his wife is unemployed, he is economically active in that he owns a taxi which generates at least R2 500,00 per month,

his previous conviction for housebreaking dates back to 2005, the complainant did not sustain any serious injuries insofar as he was not treated at the hospital.

[20] Mr Pienaar, feels that the trial court has already shown mercy to the appellant insofar as the sentences were directed to run concurrently. He submits that there exists no cause to interfere with the sentence because the complainant was a soft target and old, violence was used to force the door open and the complainant was assaulted. The value of the goods taken in the robbery is high and they include firearms.

[21] The gravity of the offences involved is apparent *ex facie* the evidence of the elderly victim who testified that the appellant and his cohorts forced the kitchen door open by using an iron rod which the appellant, eventually, used to assault him by hitting him on the head. His hands were tied from behind with his belt. The appellant threatened to shoot and kill him throughout the ordeal. He knew that his firearms, which the appellant and his crew had taken possession of, were loaded. It was, as such, difficult to describe the effect of the crimes on his person because he was only waiting for his death. His bakkie was also taken and so was his newly acquired grinder.

[22] The crime of housebreaking with intention to commit robbery and aggravated robbery is, in fact, two crimes rolled up in one. In an appropriate case such a crime justifies at least 18 years

direct imprisonment in respect of a first offender, as the trial court correctly indicated. The appellant had a relevant previous conviction which was less than 10 years at the time of the crimes in the instant matter. Only the wielding of a dangerous weapon, as correctly pointed out by Mr Pienaar, during the robbery qualifies a first offender, in an aggravated robbery charge, for at least 15 years' imprisonment as prescribed by the law. In the instant matter an injury was, in fact, inflicted on the victim. The appellant played a leading role in the offences.

- [23] Looking at the mitigating factors collectively and weighing them up against the aggravating circumstances *in casu* as well as the interests of the community, which call for at least 15 years imprisonment, we are not persuaded that the 15 years imposed as a sentence is unjust. We are, in fact, convinced that the trial court could have, justifiably, imposed a sentence heavier than the one imposed. There is, however, no cross appeal before us requesting us to adjust the scales of justice upwards in order to strike a healthy and more appropriate balance between the crime herein, the personal circumstances of the appellant and the interests of the community. The fact that the appellant spent more than a year as awaiting trial inmate does not *per se* justify a lesser sentence. Its solitary effect is countered by the gravity of the offence which, in our view, is not strictly and adequately reflected in the sentence imposed. The trial court, therefore, showed mercy to the appellant as contended for the state. There exists, as such, no cause to interfere with the

sentences.

ORDER

[24] In the result the appeal fails on both fronts and the convictions and sentences are confirmed.

L. J. LEKALE, J

I concur.

N. SNELLENBURG, AJ

On behalf of appellant:

Adv. T B van Rensburg
Instructed by:
Jacques Groenewald
BLOEMFONTEIN

On behalf of respondent:

Adv. F. Pienaar
Instructed by:
The Director: Public Prosecutions
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