

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A63/2013

In the appeal between:-

LEBOHANG JUSTICE MOFOKENG

Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE, J and MOLEMELA, J

HEARD ON: 29 JULY 2013

DELIVERED ON: 01 AUGUST 2013

APPEAL

MOLEMELA, J

[1] This is an appeal against conviction and sentence. The appellant and another person were charged with robbery with aggravating circumstances by the regional court in Kroonstad. They were both convicted as charged. The appellant was sentenced to 10 (ten) years imprisonment, while his co-accused was sentenced to 12 (twelve) years' imprisonment. This appeal relates only to the appellant, with leave of this court.

[2] The facts that led to the appellant's prosecution as related by the state witnesses is that on the 19th May 2011 the complainant, an immigrant whose home language is Amaruk, was standing outside his shop in the township when he saw two men approaching him, one short (whom he identified as the appellant during the trial) and the other one tall (whom he identified as the appellant's co-accused during the trial). He assumed that they were customers and turned around to enter the shop so that he could attend to

them. As he was entering the shop, the appellant's co-accused grabbed him by his neck and started strangling him. He instinctively turned his head to the side, in the direction of the counter and saw the appellant standing behind the counter and removing money, cigarettes and cellular phone airtime-vouchers and stuffing them into a backpack made of camouflage material. He tried to free himself from the grip of the appellant's former co-accused, but the appellant quickly confronted him, brandishing a knife which he later pressed against his head. He lost consciousness. On regaining consciousness he phoned his brother. Before his brother's arrival a man (later identified to be Floyd Mosia, the second state witness) entered the shop. He informed Floyd Mosia that he had just been robbed by two men. Floyd Mosia informed him that he had just seen two men who were well-known to him, running out of the shop. His brother then phoned the police. Due to the fact that he (complainant) has difficulty expressing himself in English, it was difficult to communicate with the police officer who was taking his statement down and at some point his brother tried to assist him with the interpretation. The written statement was never read back to him until just before the trial when it was interpreted to him by an Amaruk interpreter. He immediately pointed out that he had never said he would not be able to identify his attackers but had merely mentioned that he did not know their names.

[3] The second state witness, viz Floyd Mosia testified that on the day in question he was sitting about nine metres from the shop when he saw the appellant and his former co-accused running out of the store. He knew both of them very well. He noticed that the appellant was carrying a camouflage backpack. He did not suspect that anything was amiss. About five minutes later he decided to go and buy cigarettes from the shop. On entering the shop he noticed that the complainant was bleeding. The complainant informed him that he had just been robbed by two men and that they had put the stolen goods in a camouflage backpack before fleeing. As there were no other persons that had entered the shop since the appellant and his former co-accused ran out of it, he (Floyd Mosia) concluded that they were the ones that had robbed the complainant. He informed the complainant that he knew the persons concerned and also provided him with their names.

[4] The investigating officer testified that after arresting the appellant and his co-accused, they both indicated that their defence was that of an alibi. The appellant informed him that he was in Vereeniging on the day of the incident. He went to Vereeniging to investigate the appellant's alibi and then concluded that it was a fabrication. He testified that during his consultation with the complainant there was no meaningful communication due to the fact that the complainant could not adequately express himself in English. Under cross-examination he stated that at the time when he effected the arrest, the complainant's statement was already in the docket. He was not the one that had taken down the statement in question and could not remember its contents. Under cross-examination, he was further asked to comment about a certain paragraph in the statement deposed to by the complainant. He stated that the impression he gained from that paragraph was that the complainant could not identify his attackers.

[5] The appellant denied any involvement in the robbery committed against the complainant. He also denied having informed the investigating officer that he was in Vereeniging on the day of the incident. His version is that he spent the day in question at his parental home in the company of his mother, his girlfriend and two children. On that day he only left the house when he was going to the shop. The complainant was unknown to him. He knew Floyd Mosia well. The latter was falsely incriminating him because there was bad blood between them, emanating from the fact that his current girlfriend had terminated her love affair with Floyd Mosia so as to have a relationship with him. He called his mother and his girlfriend as his witnesses. His co-accused's also denied any involvement in the complainant's attack. He testified that he had spent the afternoon of the day in question at his home, where he had kept himself busy with cleaning the yard and mowing the lawn. He did not leave his home at all during the afternoon and was in the company of his brother. He called his brother as his witness.

[6] The basis of the appeal against the appellant's conviction is that the court *a quo* erred in rejecting the appellant's version and also in disregarding

the fact that there was bad blood between Floyd Mosia and the appellant. It was argued that without Floyd Mosia's testimony the complainant would not have identified the appellant.

[7] The correct approach when analysing evidence is trite. Evidence is considered in its totality. In the case of **S v Chabalala**¹ the court aptly stated as follows:

"The correct approach is to weigh up all the elements which point towards 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 (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.

[8] It is clear from the court *a quo*'s judgment that its analysis of evidence was in accordance with the principle enunciated in the afore-mentioned case. Furthermore, the court *a quo* sufficiently demonstrated that it was alive to the principles applicable to evidence of identification as laid down in the seminal case of **S v Mthethwa**² and that it approached the evidence with caution, considering not only the honesty of the complainant and Floyd Mosia but also their reliability. The court *a quo* correctly took into account that the complainant's identification of the appellant on the day of the incident was made during the day and from a short distance of six metres; that he had correctly described his assailants' height and had also described their respective attire; that he had observed the two of them in a favourable state of mind when he first saw them outside the shop as he assumed they were customers; that he had seen them at close range outside the shop and then at very close range inside the shop which was lit by electric lights, where they

¹ 2003 (1) SACR 134 (SCA) at 139i – 140b

² 1972 (3) SA 766 (A)

were so close to him that they even made physical contact with him. The court *a quo* correctly concluded that the complainant had had sufficient opportunity to make a reliable identification.

[9] The court *a quo* correctly considered the complainant's denial of the part of the written statement where he was alleged to have stated that he would not be able to identify his assailants, as the contents of such statement were not proven in court despite the complainant's uncontroverted assertion that it was not read back to him after it was reduced to writing. The court *a quo* also correctly went on to acknowledge the language barrier that existed between the complainant and the statement-taker on the basis of the investigating officer's uncontroverted evidence that the complainant could not express himself meaningfully in English.

[10] The court *a quo* also correctly considered Floyd Mosia's evidence of identification as bolstering that of the complainant as the appellant and his co-accused were well-known to him and he was in fairly close proximity to them when he saw them running out of the shop.

[11] It is evident from the court *a quo*'s judgment that it properly considered the contradictions in the evidence of the appellant *vis-à-vis* the evidence of his witnesses pertaining to whether he left his house at any stage on the day in question, and also considered the inconsistency between the appellant's evidence and the evidence of his girlfriend regarding an alleged confrontation between the appellant and Floyd Mosia on the day of the incident, which, according to the appellant, allegedly served to confirm the existence of bad blood between the appellant and Floyd Mosia. There is thus no basis for interfering with the credibility findings made by the court *a quo*.

[12] In light of all the circumstances canvassed in the foregoing paragraphs, it is evident that the court *a quo* correctly found that the state proved its case beyond reasonable doubt. The concession, made during the hearing of the appeal by the appellant's counsel relating to the conviction was thus correctly made.

[13] With regards to the sentence it was submitted on behalf of the appellant that the court *a quo* misdirected itself by overemphasising the seriousness of the offence at the expense of the personal circumstances of the appellant.

[14] The mitigating factors placed on record and considered by the court *a quo* are as follows:

- (i) The appellant was a youthful offender who had no fixed employment.
- (ii) He was a first offender.
- (iii) That the appellant spent 13 months in custody while awaiting trial.

[15] The aggravating factors it took into account are the seriousness of the offence and the interests of the community. Having considered both mitigating and aggravating circumstances, the court *a quo* correctly found that there were substantial and compelling circumstances which justified deviation from imposition of the minimum sentence of 15 (fifteen) years imprisonment.

[16] It is not evident from the record that when the court *a quo* went about the task of considering what sentence would be appropriate for the appellant it considered what the impact of a lengthy term of imprisonment would be on such a youthful offender. This is borne out by the slight difference between the appellant's sentence (i.e. 10 (ten) years imprisonment) and his co-accused's sentence of 12 (twelve) years imprisonment despite the fact that his co-accused was a mature adult of 26 years with previous convictions. While the court *a quo* was under no obligation to ask for a pre-sentencing report to be compiled, I am of the view that such a step would have assisted it in determining a more appropriate sentence for the appellant. In the case of **S v Phulwane and Others**³, the court made the following remarks which I align myself with:

“When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officers entrusted with the task of sentencing such

³ 2003 (1) SACR 631 (T)

a youth to ensure that he or she receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best-suit the needs and interests of the particular youth. It is after all a salutary principle that sentence must be individualised.”

[17] I am satisfied that in overemphasising the seriousness of the offence and the interests of the community at the expense of the mitigating circumstances, the court *a quo* committed a material misdirection that warrants the setting aside of its sentence. In **S v Phulwane and Others**⁴ (**supra**) the court stated as follows:

“It is true that where a crime is serious and prevalent, particularly where it threatens the well-being of society, that courts should impose appropriate sentences. However, it remains a trite principle of sentencing that each case has to be decided on its own merits ... A sentencing officer must never allow the seriousness of the offence and the interests of the community to receive undue weight at the expense of the personal circumstances of the accused. This will inevitably lead to a sentence which is flawed.”

The remarks made in the afore-mentioned case fortify my view that the court *a quo* failed to exercise its sentencing discretion judiciously. This court is thus at liberty to consider sentence afresh. It follows therefore that the concession made by the state counsel in respect of sentence was properly made.

[18] A fresh consideration of the sentence warrants consideration of the well-known triad of sentence as well as the objectives of sentencing, *viz* rehabilitation, deterrence, retribution and prevention of the offender from committing further offences. The mitigating and aggravating factors applicable in this matter have already been canvassed. There is no doubt that the offence committed by the appellant is a serious one as it was accompanied by violence. This is a significant aggravating factor. This, however, is not the only consideration when determining an appropriate sentence. Although the appellant was already an adult at the time of commission of the offence, few will quarrel with the fact that, at the age of 18

⁴ *Supra*, at p634

years and 9 months, he still falls within the category of relatively youthful offenders. He was also a first offender. These two factors are compelling mitigating factors. In determining an appropriate sentence for him, care ought to be taken to ensure that he is not visited with a sentence that will deprive him of an opportunity of being rehabilitated. Imposing a lengthy term of imprisonment on a youthful offender has the danger of exposing him to hardened criminals, impacting negatively on any prospects of rehabilitation. Although the complainant suffered injuries at the hands of the appellant, the injuries he sustained were relatively minor. The value of the items stolen was relatively low. Another important consideration is that the appellant spent 13 (thirteen) months in custody while awaiting trial. The record does not show that the appellant had any hand in this state of affairs. This period thus ought to be taken into account when determining an appropriate sentence. See **S v Brophy**⁵.

[19] Given all the circumstances, I am of the view that a non-custodial sentence would not be appropriate as the following facts militate against it: that the offence committed by the appellant was serious and that it was clearly pre-planned; that some injuries were inflicted on the complainant; that the appellant showed no remorse and thus failed to take responsibility for his actions. This lack of remorse impacts negatively on prospects of a quick rehabilitation. An appropriate sentence for the appellant is one that will send a clear message to him and other young persons who involve themselves in serious offences that they will face the full might of the law despite their youthfulness. In my view, a sentence that will adequately serve the four objectives of punishment is the following sentence: 7 (seven) years' imprisonment.

[20] I would therefore make the following order:

1. The appeal against conviction fails.
2. The appeal against sentence succeeds.

⁵ 2007(2) SACR 56 (W)

3. The sentence imposed by the court *a quo* is set aside and replaced with the following: 7 (seven) years' imprisonment.
4. The sentence mentioned in par 3 of the order is antedated to 12 July 2012.

I concur.

M.B. MOLEMELA, J

B.C. MOCUMIE, J

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