

In the KwaZulu-Natal High Court, Pietermaritzburg
Republic of South Africa

Case No : AR 528/12

In the matter between :

Mfanafuthi Patrick Mabaso

Appellant

and

The State

Respondent

Judgment

Lopes J

[1] The appellant in this matter was convicted on the 3rd August 2011 on two counts – one of robbery with aggravating circumstances, and one of attempted murder.

[2] The charges arose out of a robbery committed on the 21st July 2009 of the Mphazima Store at Osizwini, during which the complainant in Count 2, Sikhumbuzo Joshua Sibiya was shot.

[3] The appellant was sentenced to undergo fifteen years imprisonment on Count 1, and eight years imprisonment on Count 5. Five years of the eight year sentence on Count 2 are to run concurrently with the sentence on Count 1.

[4] The matter comes before us by way of leave to appeal against both conviction and sentence, granted by the learned magistrate on the 9th December 2011.

[5] The central issue raised by the appellant is the question of identification. Ms *Takchund*, who appeared for the appellant, submitted that the identification of the appellant was a 'dock identification'. That was not the case.

[6] It was quite by chance that Mr Sibiya, whilst attending court in an unrelated matter, whilst accompanying a friend, saw the appellant in the courtroom. He then subsequently went with his friend to the Madadeni Police Station and reported what he had seen to Warrant Officer Mabaso, who was, coincidentally, in the company of the appellant. The learned magistrate found that Mr Sibiya was a very good witness who had had every opportunity to implicate the appellant's co-accused, but chose not to do so. This was even after the appellant had told Mr Sibiya that it was his co-accused who had shot him.

[7] Mr Sibiya testified that when he attended at the police station, in the presence of Warrant Officer Mabaso, the appellant had apologised to Mr Sibiya and said that he had not been the one who had shot Mr Sibiya but that he had been shot by another person, whom he named. Ms *Takchund* submitted that this statement by the appellant was tantamount to a confession and should have been held by the learned magistrate to be inadmissible. In my view the apology is capable of being interpreted in various ways, not all of which would amount to an unequivocal acknowledgement of the appellant's guilt. Whatever interpretation is put upon the statement by the appellant, the identity of the appellant was sufficiently established by Mr Sibiya on the remainder of his evidence. In any event, the confession, if it was one, was made to a member of the public and not to a police officer, even though he may have been present.

[8] The appellant was, as pointed out by the learned magistrate, a poor witness. He raised an alibi for the first time in his evidence and this had not been put to any of the witnesses. This also applied to the existence of a diary which he allegedly gave to the investigating officer Warrant Officer Mabaso. In addition, the accused's explanation as to the fact that he did not appear in C Court simply does not stand up to the scrutiny of the documents and the evidence of the witnesses. In my view he was rightly disbelieved by the learned magistrate.

[9] I raised with Ms *Takchund* the fact that both the witnesses Sibiya and Warrant Officer Mabaso were asked by the prosecution whether they would like to refresh their memories from the statements which they made. While there was nothing

extraordinary in the witnesses being allowed to refresh their memories from the statements which they had made, this was done after the witnesses had been giving evidence in chief for some time. I am satisfied that, notwithstanding the fact that procedurally this may have been undesirable, no irregularity arises which could assist the appellant. He was clearly identified by Mr Sibiya.

[10] In all the circumstances the learned magistrate correctly found that the appellant was guilty of robbery with aggravating circumstances and attempted murder.

[11] With regard to sentence, given the age of the appellant and his previous convictions the sentences imposed by the learned magistrate do not induce a sense of shock. In my view the learned magistrate correctly found that no substantial and compelling circumstances existed which would have entitled him not to impose the minimum sentence prescribed by the Criminal Law Amendment Act, 1997. The aggravating circumstances which accompanied the robbery were clear.

[12] The only aspect of the sentence which concerned me is that the appellant was incarcerated for a period of two years and seven months prior to his conviction and sentence. In terms of the dicta in *S v Vilakazi* 2009 (1) SACR 552 (SCA) Nugent JA stated at paragraph 60 :

‘While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if

the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is imposed.'

This was not dealt with in any way by the learned magistrate.

[13] In the circumstance I would make the following order :

- (a) The conviction is confirmed;
- (b) the appeal is upheld with regard to sentence and the sentence imposed on the appellant is set aside and the following sentence is substituted :
‘The accused is sentenced to fifteen years imprisonment on Count 1 and eight years imprisonment on Count 2;
- (c) Five years of the sentence on Count 2 are to run concurrently with the sentence on Count 1.
- (d) In calculating the date upon which the appellant’s sentence is to expire, two years and seven months are to be deducted.

Madondo J : I agree.

Date of hearing : 2nd April 2013

Date of judgment : 16th April 2013

Counsel for the Appellant : S Takchund (instructed by the Legal Aid Board)

Counsel for the Respondent : P G Shange (instructed by the Director of Public Prosecutions)