

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

REPORTABLE

CASE NO: A 197/09

In the matter between

JOHANNES CHOWE

APPELLANT

And

THE STATE

RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
2009-09-18 DATE	 SIGNATURE

JUDGMENT

MAVUNDLA J.,

- [1] The appellant was convicted by the Regional Court in Soshanguve on 10 July 2007 on count one: robbery with aggravating circumstances and on count two: unlawful possession of a firearm. The appellant in respect of count one was sentenced to fifteen years imprisonment and in respect of count two three (3) years imprisonment. It was ordered that both sentences are to run concurrently. It was further ordered in terms of section 103 of Act 60 of 2000 that he is not fit to possess a firearm. The appellant was granted leave to appeal against both conviction and sentence.

- [2] The appellant was dully represented during the trial. The charges against the appellant were that on 18 October 2006 and at Block K Soshanguve he unlawfully robbed the complainant Mr. David Mahila of his Nokia 6310i cell phone, with aggravating circumstances being present in that a firearm was used, and was unlawfully in possession of a firearm without being a holder of licence for such a firearm. He pleaded not guilty to both counts. The appellant pleaded not guilty to both charges and exercised his right of silence.
- [3] The State called the complainant Mr David Mahila as its first witness. The evidence of Mahila is that 18 October 2006 at around 19:00 he was at a church in the company of a friend. He closed the church gates and accompanied his friend. As they were walking they saw two persons ahead of them. As they came nearer to these two unknown persons, these then turned around and produced firearms and pointed them therewith. He further testified that the appellant searched him and took his Nokia 6310i cell phone. He further said the appellant inquired from him where he stays. He informed the appellant that he stays at Block K. The appellant and his *socio in crime* instructed him to take a different route. The complainant informed his friend that he would no longer accompany him and walked alone. Along the way the appellant then noticed the appellant and his *socio in crime* walking ahead of him. At that point the appellant saw a police van which he flagged down and

informed the police of his ordeal. The police summoned other police who arrived in a police van. He then pointed the direction the appellant and his friend were heading to.

[4] The appellant together with the police went in search of the appellant and his friend and found them in the vicinity of the police station. The appellant was apprehended whilst his friend upon seeing the police van run away. The police searched the appellant and found on his body a firearm.

[5] On further questions by the prosecutor, the appellant explained that when the appellant was searching him, he looked at the appellant in the face. The appellant at that stage then instructed him to look down. He says that his friend was searched but he does not know what was taken from him.

[6] Mahila said that the area was illuminated by street lights, an Apollo light and he was able to see the appellant in the face and could also see his clothes. He says further that the appellant was wearing a blue lumber jacket which had a cream white colour and a white Nike's cap, a trousers and the blue part of the of lumber jacket was in the front and the back part thereof is cream white. He further says that he is certain that the person arrested by the police is the same person who robbed him earlier and is the appellant. He further said that the value of the cell phone is R600.

[7] Mahila was cross examined. He was cross examined on the features upon which he identified the appellant. The version of the appellant was also put to him. The version of the appellant put to Mahila was that the appellant and the complainant had earlier been together at a place where they together with others were gambling with dice. At some stage, so was it put to Mahila, at about 20: 00 Mahila was involved in a fight with Tshepo, with whom the appellant arrived at the dice gambling. After this fight, the appellant left together with Tshepo and walked in the direction of Red Onion Hotel where they proceeded from west to east direction. They were subsequently stopped by police and Tshepo ran away whilst the appellant stopped. One of the police chased after Tshepo and a shot was fired. The appellant was assaulted by the police. Mahila disputed the version of the appellant as put to him, save that the appellant was arrested and instructed to lie down.

[8] It is trite that the State must prove the guilt of the appellant beyond reasonable doubt. Where the version of the appellant is reasonably possibly true, the appellant is entitled to his acquittal.¹

¹ S v V 2000 (1) SACR 453 at 455a-c Zulman JA held that:

“It is trite that there is no onus upon an accused person, where the State bears the onus, ‘to convince the court’. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false.”

[9] In casu, the complainant is a single witness, in so far as the robbery is concerned. He is also testifying on identity of the appellant being the person who robbed him. Where the identity of the accused person depends on the evidence of a single witness, it is trite that the evidence of that single witness must be approached with caution.² Generally the evidence of a single witness is accepted if such evidence is satisfactory in all material respect or there is corroboration,³ and the witness is truthful.⁴ It is important to look at, inter alia, the opportunity the identifying witness has had to see the identified person, whether the identified person is known to the identifying person, the illumination and the prevailing circumstances. One must also look at whether there is real risk of an error by the identifying witness.⁵ The evidence of the appellant requires an objective assessment.

[10] According to the complainant, he was robbed at about 19:00⁶. He observed the clothes of the person who robbed him. He gave a description of the clothes of the person who robbed

² R v Mokoena 1956 (3) SA 81 (A) AT 85—6; S v Lesedi 1963 (2) SA 471 (A) at 473F; S v Sauls and Others 1981 (3) SA 172 at 180E—G; Leburu v S [2003] 2 ALL SA 531 (NC) at 535d-g

³ S v Artman and Another 1968 (3) SA 339 (A) at 341A-B.

⁴ S v Sithole and Others 1999 (1) SACR 585 (W) at p591

⁵ S v Sithole (supra) at 591e-f the Court said that: "Where a conviction depends on that evidence alone, a court must quite obviously be satisfied that the witness is truthful. What is perhaps more important, though, is that there must be no reasonable doubt that the witness is not mistaken. In our view that will generally require something more than the mere assertion by the witness that he has correctly identified the culprit, if the inherent risk of error is to be guarded against. It may be that the person concerned is well known to the witness. Or it may be that the person has some distinctive feature. But once one accepts that there is an inherent potential for mistaken identification, which a court is bound to do, it would seem to us that without something more, the mere assertion by a witness that he recognizes the offender will seldom suffice."

⁶ Paginated page 31 line 16-4 at paginated page 32.

him⁷. The complainant gave a description of the people who accosted him⁸. He further stated that the area was illuminated⁹. The appellant pointed to the police the direction in which the person who accosted him and his friend headed towards.

[12] Kruger says that the complainant gave them the description and the clothes of the persons who robbed him¹⁰. According to Mariba, they received the complaint about 19:30,¹¹ and they took about ten minutes looking for the culprits. The evidence of the appellant in so far as the description of the clothes of the persons who accosted him is being corroborated by the

⁷ Paginated page 38 lines 9-17: "What clothes was he wearing?—He had a blue lumber jacket, it is nice lumber jacket which is blue and it has, it is blue at the back, it has a cream white colour, he was wearing a cap and Nike's.

COURT: Just a minute before you proceed, I do not get the description quite well. It is blue, it is cream white, I do not know blue where white? I do not get the description.—It is a nice lumber jacket, on the front part it is blue, the back part it is cream white, he was also wearing a cream white pair of trousers and the cap, a white cap, it is a Nike white cap."

⁸ Paginated page 37 line 4-10: Sir, these two persons, the accused and the other person, is there anything about the two of them that sets them apart? The description of both of them is there anything different from both of them?—Yes

What?—One is tall, one is short.

Who is tall?—It is the one that ran away

The one that ran that ran away he is tall?—The one that ran away is short.

Is the accused tall? ---Yes, he is tall."

⁹ Paginated page 37 line 11-16: "Sir, how was visibility around that area?—Yes, there are lights at the tarred road which also one is also able to can see around the area using the lights.

What lights is that?—It is an Apollo light

So you say that the area is lit?—Yes, I was able to see the person clearly.

¹⁰ Paginated page 81 line 1-5: Now when you got this complainant what did he tell you; did he tell you "I was robbed by two people, I will show you" or what was the situation?—Yes, he informed us what the person who robbed him, the clothes that he was wearing and that he was willing to drive us to see if we can catch the suspect.

At line 21 of the same page: You said the complainant gave the discretion when he came to your vehicle, what was the description he gave of the two people?—There was two, a short one and a tall one and he gave the discretion of the tall one, was the clothes, with a white cap and the cream, white and blue top Nike and white pants."

¹¹ Paginated page 67 line 4-7 "Sir, if the accused testifies he will testify that indeed he was walking with another person near the Red Onion Hotel but it was more near to the 20:00 the evening—Yes, the accused is right, it could be around 20:00 be cause we received the complaint at 19:30; then we could have taken sort of ten minutes to arrive there."

evidence of Kruger¹² and Mariba.¹³ But besides, the appellant on his own version, he was with the appellant earlier, although he says at a gambling with dice. The question of identity is therefore not really so much in dispute, it is the circumstances at which he would have seen the appellant earlier.

[13] According to the appellant, he was with the appellant at the game of dice between 16:00 and 19:00¹⁴. The appellant testified that “at about past-seven there erupted a fight and the game was stopped and I left the hostel. I moved along the road that leads to the station. “He then left the game of dice after the fight together with the person who was involved in the fight whose name is unknown to him.¹⁵ This version that he does not know the name of the person involved in the fight does not

¹² Paginated page 75 Kruger testified at line 4 “That specific evening round about that time, 19:30 at night, inspector Makubela contacted us over the radio and informed us that he was at BP Filling Station opposite hostel blockade with complainant of armed robbery..... (at line 9-19) “.. and he got into the police bakkie with us. As we got into the vehicle with us we drove in the direction of Soshanguve train station. As we drove, the complainant pointed out two men walking next to the road as the two, as the people that robbed him. I stopped next to them; as we got myself and Constable Mariba got out of the bakkie, he managed to arrest the one suspect.

Who did he manage to arrest, sir?—Out of the two suspects there was a shorter one and a taller one; the taller one as the complainant described to us, was the one wearing the light pants with the cream, white and blue Nike top and white cap, that is the person that he arrested.”

¹³ At paginated page 56 line 16-24 Mariba testified as follows:

Prosecutor: Tell me sir; did the complainant give you discretion of these two person who robbed him?

COURT: Just a minute Mr. Mariba, please do not rush, do not talk whilst other people are talking,--Okay. Please do that—Yes, your worship. The description of the suspect was the other one was tall, the other one was short. And the short one was swearing a black short as well as a black T-shirt. Then the tall one was wearing white trousers, a sweater which was blue on the front part and grey on the back part as well as a white cap.”

¹⁴ Paginated page 99 line 3-6 : “Can you tell the court from when you went to the dice what happened, the incident where you were involved in, what happened on that day?—It was after 16: 00 in the afternoon when we went to this game of dice. I spent some time there up to about past the evening.

Paginated page 102 line 8: “Now you said you started at around about 16:00in the afternoon and left roundabout 19: 00 when the fight broke out, correct?—Yes.

¹⁵ Paginated page 99 line 13-17 “When you said you left, did you leave alone?- No
Who was with you?—I was together with one who was fighting at the game
This one who was fighting, does he have a name?—No. I do not know his name.”

accord with the version put by his legal representative to the complainant that it was Theo with whom the complainant was involved in the fight.¹⁶ I can only assume that the appellant is lying when he says he does not know the person's name, otherwise the name Tshepo would not have been put to the complainant by his legal representative, Mr. Botha.

- [14] The complainant and his friend were accosted by two persons who pointed them with firearms. When the police stopped next to the appellant and his friend, his friend ran away. According to the State witnesses, a firearm was found on the appellant. The appellant says that the police chased after his friend and returned with the firearm and then alleged that it was found on him. The magistrate rejected this version of the appellant on the basis that Kruger had testified that it was dark where the other person, with whom the appellant was, ran into and as the result a search could not be conducted.

¹⁶ Paginated page 50 line 6:

“BOTHA: Your worship, it is actually 2006. And he will also testify that about 16:00 the afternoon he went with two other male persons, one called Mike and one Tshaepo to a place where the people gamble, they play dice... Yes, he approached me around 19:00, seven PM.

The accused will testify that at this place where the people play dice, you were also there—No, I was at church.”

He will testify that while playing it was about 20:00, you started an argument with the person called Tshepo-No, I do not know Tshepo.

The accused will also testify that your argument turned into a physical fight and himself and the other people at the dice stopped you—No, you see around Block L I do not have a friend there, I do not know Block ...

The accused will then testify that after the fight was stopped you played again and then after about ten minutes you left.—No

The accused will also testify that ten minutes after that, himself and Tshepo also left the dice...

At paginated page 51 line 7: He will also testify that he himself when the police stopped just kept on walking but Tshepo the person with him ran away-Yes he ran away and then I told the police officers that this one has a firearm as well. The police searched him and from his possession a firearm was found.”

[15] It needs mention that in rejecting the evidence of the appellant; the magistrate also had regard to the fact that the appellant had testified that he was assaulted by the police and sprayed with a pepper. The appellant also under cross examination stated that although blinded with the pepper spray he could still see which police assaulted him with a brick. The magistrate found it improbable that the appellant could have seen in that blinded state who assaulted him and that he was assaulted with a brick. Further the magistrate also took into consideration that what was put to some of the witnesses as to be what would be the appellant's version differs as to what was eventually testified to by the appellant.

[16] In my view, the magistrate has not misdirected himself in eventually rejecting the evidence of the appellant as false. I am further of the view that the magistrate has not misdirected himself in rejecting the version of the appellant and accepting the evidence of the State witnesses. Consequently, I am of the view that the appeal on conviction must fail.

[17] The appellant was sentenced to fifteen years in respect of the conviction of robbery with aggravating circumstances. He was sentenced to three years imprisonment in respect of count 2 of unlawful possession of a firearm possession. The sentence of three years imprisonment was ordered to run concurrently with the sentence of 15 years imprisonment. The appellant was also

declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

[18] The magistrate reminded himself of the fact that the conviction on the count of robbery fell within the ambit of s51 (2) (a) of Act 105 of 1997. The magistrate considered the appellant's personal circumstances, namely that he is 26 years old, single but has a child who is 7 years old and he was employed at SASKO where he was earning an amount of R3000. 00. The magistrate had regard to the fact that the appellant had a previous conviction of housebreaking and theft, but accepted that this previous conviction does not relate to any robbery so as to warrant that he must be treated as second offender for purposes of imposition of the minimum prescribed sentence, but treated him as a first offender.

[20] The magistrate had regard to the decision of *State v Malgas*¹⁷ wherein it is stated *inter alia* that firstly, the court has a duty to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders. Secondly, for circumstances to qualify as substantial and compelling, they do not have to be exceptional in the sense of seldom encountered or rare.

[21] The magistrate also had regard to the fact that the value of the item robbed, namely a Nokia cell phone, was only an amount of

¹⁷ 2001 (1) SACR 469 (SCA).

R600. The magistrate found that there were no substantial and compelling Circumstances warranting that he must depart from imposing the cirminimum sentence of 15 years.

[22] In casu. I have been unable to find anywhere indicating that at the commencement of the trial, the accused was warned that the Minimum Sentence Act would be applicable in the event of being found guilty as charged. In my view, the right to a fair trial entails, *inter alia*, that the accused person must be fully advised of the offence levelled against him and that the Minimum Sentence Act is applicable.

[23] During the sentencing, the magistrate said the following:
“Mr. Chowe during the address on sentence, the public prosecutor as well as Mr. Botha appearing on your behalf, properly argued before me that due to the nature of the offence that I have convicted you of as well as the first count concerned, that offence falls under the part 2 of schedule 2; in that the offence you are convicted of as far as the first court is concerned, it is robbery with aggravating circumstances. That being the case the court has to consider the penal provision contained in section 51(2) (a) of Act 105 of 1977 in coming to an appropriate sentence in this matter.”

[24] From the above mentioned magistrate’s statement it is clear that the appellant had not been warned at the beginning of the case that the Minimum Sentence is applicable. The fact that the

accused was legally represented, in my view does not take away the need to inform the accused that such Minimum Sentencing Act dispensation would be relied upon for sentencing. S35 (3) (a)¹⁸ of the Constitution requires that the accused must be informed of the charge with sufficient detail to answer to it. This entails, in my view, *inter alia*, the applicability of the Minimum Sentence Act.¹⁹

[25] I am of the view that a perfunctory approach by the lower courts with regard to the Minimum Sentence regime is not to be countenanced. The record must speak for itself, that right at the pleading stage, irrespective whether such an accused person is legally represented or not, he has been informed of the applicability of the Minimum Sentence Act. By so insisting we shall be ensuring that the right to a fair trial is ingrained in our criminal jurisprudence, ensuring that at all times the accused persons make an informed decision in the preparation and the conducting of their defences.

[26] Further in casu, the magistrate quite correctly stated that he must look at the traditional factors in considering what an appropriate sentence would be. The magistrate was referred to *S v Rabie*. In this *Rabie* case the Appeal Court re-emphasis, *inter alia*, that punishment must fit the criminal, taking into

¹⁸ Constitution of South Africa, Act No 108 of 1996

¹⁹ *S v Ndlovu* 2003 (1) SACR 331 (SCA) at 337e-f.

account the interest of society, as well as the need to blend the sentence with a measure of mercy²⁰.

[27] When considering the presence or otherwise of substantial and compelling circumstances, it requires, in my mind, that the judicial officer must also look at the prospect of rehabilitation, the value of the goods involved in the robbery, the manner in which the offence was committed and whether there was resultant physical harm during the commission of the offence. This must be so having regard to the fact that there is a discretion in deciding whether to or not to impose the Minimum Sentence Act.

[28] In casu, the accused is 26 years old, which makes him a good prospect for rehabilitation. The value of the cell phone robbed is R600. 00. The complainant was not harmed, save to have been pointed with the firearm. All these factors taken together, in my view, require departure from the imposition of the Minimum Sentence. Put differently, the combination of these factors amount to the presence of substantial and compelling circumstances. The imposition of minimum sentence, which is by its very nature, a very long imprisonment, must be reserved for those callous and heinousness offences.

[29] In my view, the magistrate in finding that there are no substantial and compelling circumstances *in casu* failed to

²⁰ S v Rabie 1975 (4) SA 855 (AD) at 861A-862F.

judicially exercise his mind and has therefore misdirected himself, thus warranting the interference by this court. Having regard to the circumstances of this case and the personal circumstance of the accused, including the fact that he is, strictly speaking, not a first offender because he has a previous conviction of housebreaking and theft, and he has been in custody since 28 October 2006 and was sentenced on 4 March 2008²¹ after his bail was withdrawn, I am of the view that the following sentence would be appropriate in this case.

[30] In the result, I recommend that the following order should be made:

1. That the appeal on conviction on both counts one and count two is dismissed.
2. That the appeal on sentence in respect of count two is dismissed and the sentence of 3 (three) years is confirmed.
3. That the appeal on sentence in respect of count one is upheld and substituted with the sentence set out herein below and the magistrate's order is varied to read as follows:

- “1. That the accused is convicted on count one and two as charged;
2. That the accused in respect of count one of robbery is sentenced to 10 (ten) years imprisonment;

²¹ He has been in custody for 8 months and a week, which is may be seen as being equivalent to 8 months and two weeks.

3. That the accused in respect of count two (unlawful possession of a firearm) is sentenced to 3 (three) years imprisonment.
4. That in term of s280 (2) of Act 51 of 1977 it is hereby ordered that the two sentences run concurrently,
- 5 That in terms of s103 of Act 60 of 2000 the accused is declared unfit to possess a firearm.

HEARD: 27 JULY 2009

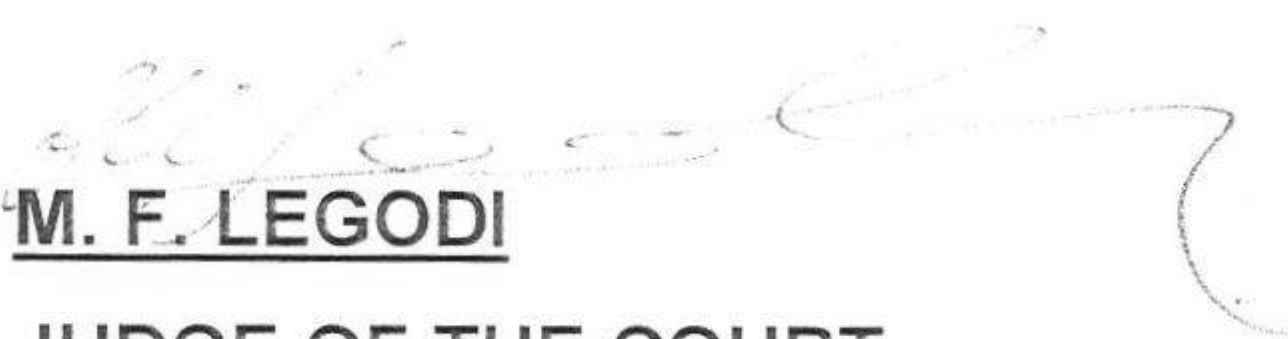
DELIVERED 18 September 2009



N. M. MAVUNDLA

JUDGE OF THE COURT

I AGREE AND IT IS SO ORDERED



M. F. LEGODI

JUDGE OF THE COURT