

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no: CA&R 73/08
Date heard: 2009-02-09
Date delivered: 2009-02-13

In the appeal of:

SHANE JACOBS
MOSES VAN WYK

FIRST APPELLANT
SECOND APPELLANT

versus

THE STATE

RESPONDENT

Coram: MAJIEDT J et TLALETSI J

<i>JUDGMENT ON APPEAL</i>

MAJIEDT J:

1. The Appellants appeal with leave of the Trial Court against their convictions on robbery with aggravating circumstances as well as their sentences of 15 years imprisonment and 20 years imprisonment respectively.
2. During their trial the Appellants were both represented by an attorney. They elected not to disclose the basis of their defence and required the State to prove all the essential elements of the offence.

3. The State relied on the evidence of two witnesses, namely the complainant, Mr. Itumeleng Monnamorwe, and a policeman, constable Boitumelo Tlhako. Both Appellants testified in their defence.
4. The following facts were common cause or not seriously placed in issue during the trial:
 - 4.1 That the complainant was accosted by two men and robbed of an amount of money which he had in his possession.
 - 4.2 The complainant pursued one of these assailants and the police arrested the two Appellants shortly after the robbery in Roper street, which is not far from the scene of the robbery.
 - 4.3 The Appellants were searched and an amount of R255 was found on the second Appellant.
 - 4.4 The first Appellant has a hole in his nose and at the time of the incident he had a ruby inserted there.
 - 4.5 Neither of the Appellants were known to the complainant prior to the incident.
 - 4.6 The witness constable Tlhako, was one of the two policemen who had arrested the two Appellants at the insistence of the complainant who, as I have stated, was in hot pursuit of one of his attackers.
5. The primary issue in the trial was the question of identification. As

indicated above, neither of the two Appellants were previously known to the complainant. It was submitted on behalf of the Appellants by Mr. Cloete, that the opportunity for identification was very limited, that the robbery must have happened quickly and that the complainant must have been severely traumatised by the experience, having been stabbed by one of his assailants. The complainant's testimony was that it was the first Appellant who had stabbed him.

6. The matter is somewhat complicated by the fact that no identity parade was held subsequently to the arrest of the Appellants.
7. A further complicating factor is the several discrepancies which had arisen between the evidence of the complainant and constable Tlhako, primarily relating to the circumstances of the arrest of the Appellants.
8. I was somewhat taken aback by these discrepancies and, had it not been for the corroborative factors which I will allude to shortly, the State would have had serious problems in justifying a conviction of the Appellants herein. While it is not necessary to decide this particular aspect, I hold a strong *prima facie* view that constable Tlhako's evidence is much more unreliable than that of the complainant, where the two of them diverge on the details of the arrest and what had preceded it. It seems to me that the complainant, who struck me as an intelligent gentleman and who had remained fairly calm under the circumstances, was much more observant and reliable as a witness than constable Tlhako. In addition, constable Tlhako's written statement seriously

contradicted his oral testimony on material aspects.

9. It is well established that, in assessing identification evidence, a trier of fact should be satisfied beyond reasonable doubt not only as to the honesty of an identification witness, but also as to the reliability thereof.

See generally: **S v Mthethwa 1972(3) SA 776 (A)** at 768 A-C;

S v Zitha 1993(1) SACR 718 (A) at 721 c-e.

At 721 e of the **Zitha** matter, Howie AJA (as he then was), emphasized again the importance of a description of the physical appearance of a suspect being given by an identification witness. In **S v Carolus 2008(2) SACR 207 (SCA)** the Court, per Mhlantla AJA (as she then was) also laid much emphasis on the correctness of a description of a perpetrator given by an identification witness. At 213 g (par [25]), the learned Judge stated that:

“... it would be a remarkable coincidence if (the identification witness) were mistaken about the identity of the appellant.”

These remarks are particularly apposite to the circumstances in this case as I shall in due course show.

10. In the present matter, the complainant testified that he was accosted by two men armed with knives. He was told to close his eyes and he did so, but he peeped through his half-closed eyes and had observed that the one assailant had a ruby in his nose

and that the other one was taller than the first. He was stabbed, on the instructions of the taller one, by the assailant with the ruby in his nose. The taller of the two assailants was the one who took R250,00 in cash from him, which consisted of R200 in notes which he had just previously withdrawn from an automatic teller machine at a bank, namely two R100 notes and a R50 note. He also had R5 in coins which was the change which he had received from the taxi which he had taken to town that morning.

11. The police, as I have stated, arrested the two Appellants shortly thereafter. It was common cause at the trial that the first Appellant had a hole in his nose where he previously had a ruby inserted and that the second Appellant is somewhat taller than the first Appellant. Upon searching the second Appellant, the exact same amount of R255 in cash was found on him by the police. This amount was made up exactly as the complainant had testified, namely two R100 notes, a R50 note and R5 in coins. This money was later handed in and recorded in the SAP 13 register which was produced at the trial. The second Appellant, in his evidence, claimed that the money was his own that it in fact consisted of two R100 notes and R55 in coins. This evidence was directly contradicted not only by the complainant, but also by the objective facts, consisting of the SAP 13 register which indicated that the serial numbers of the notes had been recorded including the serial number of a R50 note. For this reason, the Court *a quo* was correct in rejecting the second Appellant's version and accepting that of the complainant on this particular aspect.

12. In my view Mr Kgatwe for the State, is correct in his contention

that it was too great a coincidence that a tall person with R255 in his possession and another shorter person with a hole in his nose would be apprehended by the police shortly after the robbery on the complainant by two persons with a similar description. Moreover and importantly, the complainant's evidence was that he had followed the one attacker, namely the one who had stabbed him and who had a ruby in his nose (i.e. the first Appellant) and that, while in hot pursuit, he never lost sight of this particular assailant until the police arrived on the scene.

13. It is plain therefore that the Magistrate was correct in convicting the Appellants on the evidence before him. In my view the complainant was not only an honest identification witness, but also extremely reliable as is borne out by the objective facts, namely that the description of the two assailants match those of the two Appellants arrested by the police. The fact that the exact amount of R255,00 was found on the one appellant is also conclusive proof of that reliability. The Magistrate was further correct in rejecting the versions of the Appellants, particularly that of the second Appellant that the money found on his person belongs to him, for the reasons enunciated above. There is therefore no merit in the appeal against conviction. I might add that another aspect which had completely been overlooked by the Magistrate and by Counsel, is that a cautionary rule also applied to the evidence of the complainant as a single witness on the robbery. For the reasons set out above, I am of the view that the complainant's evidence was satisfactory in all material respects and that he therefore passed muster as a single witness.

14. The sentence imposed is in my view excessive and induces a sense of shock. In my view the Magistrate erred in coming to a hasty decision that, since there were no substantial and compelling circumstances as prescribed in s51 read with s52 of Act 105 of 1997, the imposition of the minimum sentence of 15 years is justified in the case of the first Appellant and, in the case of the second Appellant given his previous convictions, a sentence of 20 years imprisonment was justified.
15. The Appellants' personal circumstances were as follows:
 - 15.1 The first Appellant was 23 years old, unmarried with no dependants and he had left school in grade 11. He was unemployed at the time of the commission of the offence and had been in custody from the time of his arrest until he was sentenced, i.e. approximately 5 months.
 - 15.2 The second Appellant was 36 years old, unmarried with a 3-year old child whom he had maintained. He had several previous convictions, *inter alia* for housebreaking with the intent to steal and theft and robbery. In respect of the last robbery conviction he had been sentenced to 8 years imprisonment during 2003. He was employed at the time as a "*jump boy*" (a taxi-assistant).
16. In **S v Malgas 2001(1) SACR 469 (SCA)** at par. [12], Marais JA set forth the circumstances in which a court of appeal may interfere with the sentence imposed by a trial court, particularly where a minimum sentence is applicable. The learned Judge of

Appeal held that:

” A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. “

Furthermore in that same judgment it was held that where, on consideration of the circumstances of a particular case, a sentencing court is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, it may impose a lesser sentence.

See: **S v Malgas**, *supra* at 482 e-f.

I am of the view that the present matter falls in that category and that the Trial Court should have reached that conclusion on the facts and circumstances before it. This finding renders it unnecessary to consider whether there were, in any event, compelling and substantial circumstances proved. Suffice to state that, on a conspectus of all the mitigating and aggravating factors,

in my view such circumstances do in fact exist.

17. In **S v Blignaut 2008(1) SACR 78 (SCA)**, a 34-year old accused had been convicted of robbery with aggravating circumstances. He was sentenced to 15 years imprisonment by the Regional Court, with application of the minimum sentence prescribed in Act 105 of 1997. On appeal, the Supreme Court of Appeal set aside the sentence and replaced it with a term of 5 years imprisonment. While the facts and circumstances of that matter admittedly differ considerably from the present one, I cite the judgment in support of my view that the sentences imposed on both Appellants, particularly on the first Appellant, is grossly disproportionate to their crime, the Appellants' circumstances and the legitimate interests of the society. **S v Blignaut** reiterates the obligations on a sentencing court to strike a balance between these three elements.

See also in this regard: **S v Mahomotsa 2002(2) SACR 435 (SCA)** at par. [20].

18. We are therefore at liberty to consider afresh a suitable sentence. There can be little doubt that a custodial sentence is justified in the circumstances of this case. The two Appellants brazenly accosted a much older gentleman in broad daylight and in the vicinity of the railway station where there must have been a few other persons present. They threatened him with knives and the first Appellant cold-bloodedly on the instructions of the second Appellant stabbed the complainant after they had already divested the complainant of his cash. Society expects the courts to act with the necessary seriousness in imposing deterrent sentences for such crimes. But

a suitable sentence must always be cognisant also of the need for the rehabilitation of offenders. A careful balancing exercise is therefore required. Upon consideration of all the facts and circumstances, I am of the view that a sentence of 7 years imprisonment for the first Appellant and 10 years imprisonment for the second Appellant would be appropriate.

19. The following order is issued:

19.1 The appeal against conviction is dismissed.

19.2 The appeal against sentence is upheld. The order of the Court *a quo* in respect of sentence is set aside and substituted with the following:

“FIRST APPELLANT IS SENTENCED TO 7 (SEVEN) YEARS IMPRISONMENT. SECOND APPELLANT IS SENTENCED TO 10 (TEN) YEARS IMPRISONMENT.”

19.3 Both the aforementioned sentences are antedated to 5 April 2007.

**SA MAJIEDT
JUDGE**

I agree:

**PL TLALETSI
JUDGE**

FOR THE APPELLANTS : ADV PJ CLOETE INSTRUCTED BY THE KIMBERLEY JUSTICE CENTRE
FOR THE RESPONDENT : ADV KM KGATWE INSTRUCTED BY THE DPP