

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A167/2005

In the appeal between:

JOUBERT MOKHATLA

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI, J *et* C.J. MUSI, J

JUDGEMENT:

RAMPAI, J

HEARD ON:

26 JUNE 2006

DELIVERED ON:

29 JUNE 2006

[1] The appellant was tried as accused number 2 in the Bethlehem Regional Court on three charges. On the 24th April 2002 he and his co-accused, Sentu Isaac Mosia, in other words accused number 1, were convicted. The next day on the 25th April 2002 an effective sentence of 15 years imprisonment was imposed on each of them. Now the appellant comes on appeal against the conviction and

the sentence.

[2] The appellant stood accused of the following charges: The first charge was robbery with aggravating circumstances. The second charge was unlicensed possession of a firearm, a .38 special revolver. The third charge was unlawful possession of 5 rounds of ammunition. It was alleged that the accused committed all these offences at Boiketlo Village in Qwa-Qwa on the 1st February 2001.

[3] The trial started on the 15th October 2001. The appellant pleaded not guilty to all the charges. Notwithstanding his plea, he was convicted on the 24th April 2002. The next day a 15 year jail term was imposed on him in respect of the first charge and a 3 year jail term in respect of the second and the third charges. The two were taken together as one for the purpose of sentence. The court below directed that the three year sentence should run concurrently with the 15 year jail sentence. Therefore the appellant is currently serving an effective sentence of 15

years imprisonment.

- [4] The version of the prosecution was narrated by seven witnesses, namely: Anna Falatsi, Pulani Litali, Ben Bite Mofokeng, Liza Mosia, Sergeant L. D. Mokone, Inspector T. N. Lerotha and Inspector T. M. Mokoena.
- [5] Briefly stated the following were the facts. In the morning of the 1st February 2001, Falatsi was on duty at the Vodacom street telephone stall. She was an employee. At or about 10h00 Litali was inside the same Vodacom street telephone stall to make a call. She was a customer. The two ladies were alone in the stall when three men attacked the stall. One of the attackers was armed with a gun. They robbed Falatsi of her Siemens cellular phone and Litali of her Bosch cellular phone. In addition they robbed Falatsi of R1 100 cash and Litali of her white t-shirt. One of the robbers who stood guard at the door was wearing a white t-shirt with the word Vodacom printed on it.

[6] Mofokeng was in the same stall shortly before the armed robbery. He was still in the vicinity when he heard a woman screaming. He then saw two men running away out of the stall. He chased the two fugitives up to the playground where he noticed that one of them had a firearm in his hand. Mofokeng never lost sight of the two fugitives at any stage during the chase.

[7] The police arrived at the stall, picked Litali up and pursued the two fugitives just like Mofokeng. Litali directed them in the direction in which the fugitives fled. Both fugitives were arrested in accordance with Litali's pointing out. Mofokeng witnessed the arrest. Inspector Lerotha confirmed that there was a boy who was chasing the suspects and that he found the boy with the suspects on the playfield. One of the fugitive suspects was wearing a white t-shirt with the word Vodacom printed on it. Such fugitive was identified as the appellant. Inspector Mokone apprehended the appellant's fellow fugitive. He searched him and found a firearm, ammunition and two plastic money bags containing R426,25. Later the two plastic money bags were identified as those that were stolen at the stall. The appellant was arrested by Inspector Lerotha.

[8] The cellular phones of the victims were recovered by the

police and handed back to the victims. Litali received hers within six days of the armed robbery and Falatsi received hers within 6 months thereof. The one cellular phone was recovered from a certain suspect, Mowane and the other from Liza Mosia, accused number 1's mother.

[9] Inspector Mokoena established that the firearm belonged to a certain Yolanda van Zyl. The firearm was loaded with five live rounds of ammunition. There was no explanation from the suspects as to how the firearm came into the possession of the appellant's co-accused.

[10] The version of the defence was narrated by the two accused, Mosia and Mokhatla. They put up a common defence of an alibi. I deem it unnecessary to set out the finer details of the appellant's defence in the light of the concession made before us by his attorney, Mr. Reyneke. The lawyer carefully weighed up the evidence of the seven state witnesses. In view of such evidence he conceded that the alibi defence as raised by the appellant could not be reasonably and possibly true. He concluded that on the

merits, he could not make any sensible submission as to why the court *a quo* can be said to have misdirected itself in convicting the appellant as charged.

- [11] The court below followed the correct approach in dealing with the conflicting versions. In the case of **S v MATTIODA**, 1973 (1) PH H24 (N) at 27 Leon J articulated the correct approach as follows:

“The proper approach in a criminal case is to consider the totality of the evidence. That is to say to examine the nature of the state case, the probabilities of all the witnesses and then to ask oneself at the end of all this whether the guilt has been established beyond the reasonable doubt.”

See also **S v NTULI** 1975 (1) SA 429 AD and **S v RADEBE** 1991 (2) SACR 166 (T) at 167 J.

- [12] The court with appellate jurisdiction does not likely interfere with the trial court’s live observation and evaluation of the oral testimony precisely because of the fact that the trial court unlike the court of appellate jurisdiction is in a privileged position to observe all the witnesses live. **S v**

FRANCIS 1991 (1) SACR (AD) at 204 c – e and **R v ABELS** 1948 (1) SA 706 (O).

[13] During the course of his judgment the magistrate remarked:

“Mnr Peete was inderdaad korrek soos die Hof reeds gesê het, kon hy aangevoer het dat hierdie saak draai rondom identiteit. En nou is dit so dat dit geykte reg is dat getuienis wat handel oor identiteit deur die Hof met groot versigtigheid benader moet word. Die rede daarvoor is dat ‘n getuie soms selfs al is hy hoe eerlik ‘n vergissing kan begaan, of ‘n fout kan maak wanneer iemand uitgeken word. Wanneer die Hof getuienis oor identiteit beoordeel dan kyk die Hof na ‘n veelvoud van faktore. Die Hof kyk na die sig op die betrokke dag toe die voorval plaasgevind het, of dit lig was of dit donker was, of daar enige versperrings was ensomeer. Die Hof kyk ook na die tydsduur van die waarnemeings, omdat dit logies is dat hoe meer tyd ‘n persoon het om ‘n uitkenning te maak, hoe betroubaarder of meer betroubaar sal so ‘n uitkenning uiteindelik wees. Die Hof kyk ook na vorige kennis van ‘n persoon, omdat dit makliker is om iemand uit te ken wat aan ‘n mens bekend is. Die Hof beoordeel ook die waarnemeingsvermoë van ‘n spesifieke getuie, en ook sy vermoë van rekolleksie.”

[14] The foregoing passage was in keeping with the principle

enunciated by Homes JA in the case of **S v MTHETWA** 1972 (3) SA 766 AD at 768 a – d. The following reliable aspects of the prosecution's evidence as regards the identity of the robbers were telling against the appellant. The armed robbery took place during brought daytime at or about 10h00. The victim's encounters with the robbers endured for approximately ten minutes. The robber standing at the door was in a position where he was visible to the victims. There were no obstructive obstacles between him and the victims. He was wearing a white t-shirt with the word Vodacom printed on it. A man wearing such a shirt was seen fleeing from the scene and chased by an independent witness. Shortly after the robbery a man wearing such a shirt was spotted on the playground by one of the victims, Litali, and pointed out to the police. He was later identified as accused number 2. During the robbery in the stall one of the robbers had a gun. The appellant's companion was found with a loaded gun in his possession. The appellant tried to run away from his companion shortly before their arrest. Besides the gun, the appellant's companion was found in possession of money.

The money was contained in incriminating plastic bags. The two men arrested at the sportsground were dressed the same way as the robbers in the stall. The victim Litali knew the appellant before the robbery. She recognised him as Detere's boyfriend. Detere and Litali were neighbours.

- [15] The testimonies of the seven state witnesses did not form one perfect and harmonious version. There were contradictions, discrepancies and other unsatisfactory aspects. However the two lawyers before us were unanimous that the finding of the trial court that such differences as existed in the respective accounts of the witnesses were not of a material nature. On the whole the credibility and the reliability of the collective version of the seven witnesses was not materially or substantially diminished as a result of one or more or all of such discrepancies. I have no hesitation in endorsing the findings of the trial court that their evidence was both credible and reliable.

[16] I am therefore inclined to confirm the conviction of the appellant in respect of the first charge, namely armed robbery. However, as regards his conviction in respect of the second charge, unlawful possession of a firearm and the third charge unlawful possession of ammunition, I have some reservations. The available accepted and proven facts showed that the appellant never had the gun or the ammunition in his physical possession throughout the entire episode. The undisputed facts indicated that the firearm was continuously in the physical control of a different member of the criminal gang. There was glaring lack of evidence to establish beyond reasonable doubt that such physical detentor intended to exercise such physical possession on behalf of the appellant or the gang as a whole. Similarly there was a glaring lack of evidence to suggest that the appellant intended that the real detentor should possess and use the gun as he did for the mutual benefit of the gang. **S v MBULI** 2003 (1) SACR 97 SCA at paragraph 71 – 72 per Nugent JA. In contrast see **S v KHAMBULE** 2001 (1) SACR 501 SCA per Olivier JA.

[17] Mrs. Ferreira's argument for the confirmation of the conviction in this regard boiled down to justification of the doctrine of common purpose and not that of joint possession. As regards the former, it must be readily appreciated that the appellant has correctly been found guilty of an armed robbery although he did not personally have a firearm in his hands or physical possession. As regards his participation in that common mission the appellant has therefore been duly punished. He is paying his debt to the society offended by serving a prison term of 15 years. The conviction of the appellant as a joint possessor in respect of these last two charges would have been justified, for instance, if there was evidence that the appellant was seen drawing the gun out and handing it over to the real detentor during the robbery. Therefore I would set aside the conviction of the appellant in respect of the aforesaid second and third charges.

[18] As regards the sentence I am satisfied that the court below followed the correct approach by considering the personal circumstances of the appellant as an offender, the gravity

of the crime of armed robbery as well as the interests of the society. As a court with appellate jurisdiction we have limited powers to interfere with the sentence imposed by the trial court. We can only interfere provided we are satisfied that the court *a quo* materially misdirected itself or that the court *a quo* imposed a sentence which was shockingly severe and inappropriate and therefore unbalanced in all the circumstances. Where a court *a quo* has exercised its sentencing discretion in a reasonable and proper manner there is no room for a court with appellate jurisdiction to alter the sentence.

S v PIETERS 1987 (2) SA 717 (AD) at 728 b – c.

S v PILLAY 1997 (1) SA 531 (AD) at 535 e – f.

- [19] The court *a court* took into account all the mitigating factors peculiar to the appellant's individual profile. In addition the court *a quo* also took into account all the aggravating factors. I am of the view that in doing all this the court *a quo* maintained a proper balance between the mitigating factors on the one hand and the aggravating factors on the

other.

[20] The penal provisions of section 51 of the Criminal Law Amendment Act No. 105/1997 was kept in mind by the trial court. Its conclusion that there were no substantial and compelling circumstances in favour of the appellant to justify a lesser sentence than the prescribed minimum sentence of 15 years imprisonment cannot be faltered. Indeed this much Mr. Reyneke conceded. On the facts, the sentence of 15 years imprisonment in respect of robbery was justified in my view. I would therefore confirm it. The sentence of 3 years imprisonment in respect of the unlawful possession of a firearm and the unlawful possession of ammunition cannot be allowed to stand for the reasons I have enumerated.

[21] Accordingly I make the following order:

21.1 The appeal against the conviction in respect of the first charge, in other words the armed robbery, fails.

21.2 The conviction in respect of the armed robbery is confirmed.

21.3 The appeal against the conviction and sentence in respect of the second charge, the unlawful possession of a firearm, is upheld.

21.4 The conviction and sentence in respect of the second charge are set aside.

21.5 The appeal against the conviction and sentence in respect of the third charge, unlawful possession of ammunition, is upheld.

21.6 The conviction and sentence in respect of the third charge are set aside.

21.7 The appeal against the sentence of 15 (fifteen) years imprisonment imposed in respect of the first charge is dismissed.

21.8 The sentence imposed in respect of the 1st charge is confirmed.

M.H. RAMPAL, J

I concur.

C. J. MUSI, J

On behalf of the Appellant:

Prokureur J. D. Reyneke

Instructed by:

Legal Aid Board

BLOEMFONTEIN

On behalf of the Respondent:

Adv. A. Ferreira

Instructed by:

Director of Public Prosecutions

BLOEMFONTEIN

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