

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: A02/2024

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
6/8/2024 DATE SIGNATURE	

In the matter between:

MOKONE KENNETH LENNY

Appellant

and

THE STATE

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 6 August 2024.

JUDGMENT

MIA, J

- [1] On 18 April 2012, the appellant was convicted on Count 1: Robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977, read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997 and Count 2: Murder, read with the section 51 (1) of the Criminal Law Amendment Act 105 of 1997. The trial court dismissed the application for leave to appeal. The appeal is before us with leave of the Supreme Court of Appeal granted on 7 June 2022.
- [2] The record is incomplete. Both parties accept, however, that it is sufficient for this court to consider the appeal.
- [3] The trial court sentenced the appellant to twelve years imprisonment in respect of robbery on count 1, and twenty-five years imprisonment (in respect of murder count 2) of which five years imprisonment imposed on count 1 were ordered to run concurrently with the sentence on count 2, an effective sentence of thirty-two years imprisonment. The appellant was declared unfit to possess a firearm. The appellants' appeal concerns both the conviction and the sentence.
- [4] The facts are fully canvassed in the trial court's judgment, and the court's reasons are succinctly set out. It is evident from the judgment that the trial court considered the identification and that the driveway was well-lit as "they have a spotlight on the garage facing the driveway, lights on the walls of the driveway and a streetlight at the entrance of her gate"¹ on the evening of the robbery when Ms Morgan and Ms Hanong were seated in the vehicle belonging to Ms Hanong in the driveway. The appellant was brought back to the scene and identified as the person who came to the scene to collect something from the two persons who were on either side of the vehicle after they had fired a shot and forced them to get out of the vehicle. Ms Hanong identified the appellant as the person who came to pick up the item in the yard after shots were fired.² The court dealt with the identification of the appellant by Ms Hanong and Ms Morgan, having regard to the lighting and the opportunity for observation during the course of the incident,³ that could affect identification and correctly found

¹ Judgment, Caselines, Record 076-900

² Judgement, Caselines, Record 076-904

³ *S v Mthethwa* 1972(2) SA 766 (AD)

that in the course of the incident, Ms Morgan and Ms Hanong had an opportunity to observe the perpetrators and that their identification of the perpetrators, was credible and reliable.

[5] Ms Machusi, who was in the area on the night of the robbery, identified the appellant who ran up Orlando Road toward the police station. The appellant was brought to the scene of the robbery and was identified as having been in the company of the persons who had committed the robbery on the evening. The appellant's alibi was that he and the accused one were on their way to visit the appellant's girlfriend in Pennyville. This alibi was discounted when the police attended the address with accused one, and the appellant and the occupant at the address denied knowing the appellant or accused one. The trial court thus correctly accepted the evidence of the identification of the appellant where there was sufficient light and an opportunity for a reliable identification. In the result, the rejection of the appellant's alibi cannot be faulted where the opportunity for an independent person to confirm the appellant's alibi existed, and the person disputed knowing him, thus eliminating the possibility of any credence to the appellant's alibi that he was on his way to meet his girlfriend. The alleged girlfriend did not know him. There was no credible explanation in this regard. The trial court correctly considered the evidence implicating the appellant, considering the alibi, the strength, and the weakness in the evidence, and correctly pronounced its conviction.⁴

[6] There was a contradiction between Ms Hanong and Ms Morgan's identification of the appellant as the person who came to fetch the item from the persons who had taken the items and fired the firearm. The trial court took this into account and was of the opinion that it pointed to the witnesses not having colluded. This was not a material contradiction. I am of the view that the trial court dealt with this contradiction correctly.⁵

[7] As far as the appellant's appeal against the sentence is concerned: the essential enquiry in an appeal is to consider whether the Court imposing the sentence exercised its discretion properly and judicially. The Appeal Court will

⁴ *S v Chabalala* 2003 (1) SACR 134 (SCA)

⁵ *S v Jochems* 1991 (1) SACR 208 (A)

only interfere with the sentence where the sentence is of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. The Court in *S v Rabie*⁶ observed that sentencing was pre-eminently a matter for the discretion of the trial court and emphasised that such discretion should only be altered if the trial court's discretion had not been judicially and properly exercised.⁷

[8] This view is reiterated in *S v Moswathupa*⁸ where the Court held that sentencing is pre-eminently a matter for the trial court's discretion. In *S v Salzwedel and Others*⁹, the Court held that an appeal court can only interfere with the sentence of the trial court, if the trial court misdirected itself or the sentence was shockingly inappropriate.

[9] Having regard to the factors considered, the court could find no substantial and compelling factors to deviate from the sentences applicable. It did, however, order a part of the sentence on count two to run together with the sentence on count one. It is apparent from the reasons for sentence that the trial court considered the appellant's personal circumstances, the seriousness of the offence and all relevant factors including the interests of the community. I cannot find that that the trial court over-emphasised the seriousness of the offence and under-emphasised or attached too little weight to the personal circumstances of the appellant. The sentence imposed in the present matter fits the circumstances of the particular case. In my view, the trial court properly balanced the seriousness of the offence, the interests of society and the

⁶ [1975] 4 All SA 723(A) 724; 1975 (4) SA 855

⁷ "1.1n every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

⁸ 2012 (1) SACR 259 (SCA) at p 261 par 4

⁹ 1999(2) SACR (SCA) at 586a- 588b

interests of the appellant. I cannot find any misdirection on the part of the trial court which warrants the interference of this court in the conviction and sentence that it imposed.

[10] In the circumstances, I propose the following order:

1. The appeal against conviction and the sentence be dismissed.



MIA J

JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree and it is so ordered.



ISMAIL J

JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree.



JOHNSON AJ

ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Appellant:

Adv E Guarneri
instructed by Legal Aid South Africa

For the State:

Adv N Kowlas
Instructed by the NPA

Date of hearing:

29 July 2024

Date of judgment:

6 August 2024