



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal Case No: A236/24

Lower Court Case Number OSH113/16

In the matter between:

OCTAVIUS STRYDOM

Appellant

and

THE STATE

Respondent

CORAM: WILLE, J et PARKER, AJ

Date of Hearing: 31 January 2025

Date of Judgment: 11 February 2025

JUDGMENT

PARKER, AJ:

Introduction

[1] The Appellant and his co-accused stood arraigned in the Oudtshoorn Regional Court in terms of Section of Act 51 of 1977, where he was convicted of one count of robbery with aggravating circumstances in that the Appellant and his co-accused had on

the 27th March 2016, unlawfully and intentionally assaulted the complainant and did then with force take an amount of R500 and a cap. The Appellant was arrested on the 2nd of March 2016 and pleaded not guilty. He was legally represented. He was convicted by the Regional Court Magistrate Mr. Van Wyngaard, on 24 August 2016 and sentenced to 15 years direct imprisonment.

[2] On 26th October 2016, the Appellant applied for leave to appeal against the conviction and sentence, which was dismissed resulting in a petition being granted on the 25th of March 2024.

Conviction

[3] The state called two witnesses, an off-duty police officer, Divaan Esau and the complainant. The Appellant testified, and he called a witness, Geneve Mc Quinton.

[4] The appellant raised several grounds as to why the conviction was not sustainable. After reading the record, I do not agree that the learned magistrate had heavily relied on the witness's evidence even though it is alleged that there were discrepancies, contradictions and improbabilities as listed in its heads of argument. The Appellant opined that due to the discrepancies, not much weight can be attached to the evidence of the witnesses, suffice to say the learned Magistrate failed to give sufficient weight to these contradictions. Accordingly, it was argued that the evidence taken as a whole did not establish beyond reasonable doubt that the Appellant is guilty.

[5] It was argued that the evidence of the state failed to prove beyond reasonable doubt that the Appellant had robbed the complainant. I do not agree as the testimony on

the evidence is clear, by Mr Esau. His evidence on what he saw was solid; he said he saw the cap being removed as he stood five meters away from the accused and the complainant, and he saw the Appellant armed with a knife. Furthermore, he saw the Appellant's hands in the pockets of the complainant and he heard "jy moet march of ek steek jou." The complainant however, testified that he did not see the knife, and it is noteworthy that he did exaggerate what he saw.

[6] Furthermore, it was argued that the learned Magistrate did not properly consider whether the Appellant's version was reasonably possibly true and failed to evaluate the probabilities of the version appropriately. I am satisfied that the court's findings of the evidence of the state witness were satisfactory, which led to the conviction of the Appellant, despite contradictions in the evidence. This aspect was raised by the learned Magistrate that there are differences in the evidence led by the complainant and that of Mr Esau. However, he found their evidence as a whole acceptable as the inconsistencies were not material.

[7] The appellant was accused number three. The complainant was known to both accused number one and two, as he lived with accused one and stayed close to accused two and attended the same school. The versions of the three accused differed and the learned Magistrate found that it did not make sense and found that their versions were conspired.

[8] The witnesses for the state confirmed the versions of events and testified about how it unfolded. Importantly the evidence was such that the complainant was approached by the Appellant, then taken to two other males where he was threatened

with a knife, then robbed of his belongings. It was conceded that the Appellant was on the scene when the complainant was robbed. In this regard, I agree with the respondent's submissions that it is not correct that the state failed to discharge its onus of proof. Further, the finding that the version of the Appellant was not reasonably possible true was indeed accurate.

[9] The state bears the onus in a criminal trial to prove the guilt of an accused beyond reasonable doubt¹.

[10] It is trite that the state must prove its case beyond reasonable doubt, and when evaluating the evidence and deciding whether the state has done so, the court must consider the evidence as a whole². A court is not entitled to convict unless it is satisfied not only that the explanation given is improbable but that beyond any reasonable doubt it is false. In such determination, one will look at the probabilities of the case to determine whether the version of the accused is reasonably possibly true and whether one subjectively believes him is not the test, as pointed out in many judgments. The test is whether there is a reasonable possibility that the accused's evidence may be true³.

[11] In evaluating the evidence, the principle was laid out in *State v Van Aswegen*⁴.

"The conclusion which it arrives at must account for all the evidence... The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent"

¹ State v Western Asian and another 2020 (1) SCR 561 (SCA) at paragraph 13

² State v Chabalala 2003(1) SACR134 (SCA) at para 139

³ State v V1991 (1) SACR 198 (A)

⁴ State v Van Aswegen 2001 (2) SACR 97 (SCA) at 101 para 8

[12] The approach of an appeal court to findings of fact by a trial court was summarized in *State v Francis*⁵. That the powers of the Court of Appeal to interfere with the findings of fact of a trial court are limited and whether there was a misdirection at the trial court's conclusion, including the acceptance of a witness's evidence, interference will only be in exceptional circumstances;

"In order to succeed on appeal the Appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence and a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of Appeal will be entitled to interfere with a trial court's evaluation of oral testimony"

[13] Even if there were inconsistencies and contradictions in the evidence of the State, a witness is not expected from an honest but imperfect recollection, observation and reconstruction of the evidence to remember precise detail.⁶ The complainant's recollection might not have been perfect; however, the evidence was such that it led to the conviction. Mr Esau's evidence cannot be faulted. He stated what he saw and he did not appear dramatic in his testimony. In the result there are no reasons for this court to interfere in the conviction of the Appellant.

Sentence

⁵ *State v Francis* 1991 (1) SACR 198 (A)

⁶ *Jacob Notsi v The State* [2022] ZAFSHC 120

[14] It was argued that the court *a quo* was incorrect in finding that no substantial and compelling circumstances existed. Therefore, its appeal concerns a justified deviation from the minimum sentencing regime.

[15] When considering what constitutes an appropriate sentence, regard has to be had to the well-known triad of sentencing,⁷ the offender (the personal circumstances of the accused), the interests of society and the seriousness of the offence. A sentence must be individualised and each matter must be dealt with on its own particular facts, tempered with mercy, and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence calling for a balance to be struck.⁸

[16] The perusal of the transcript of proceedings revealed that the Appellant's personal circumstances were considered by the learned Magistrate when dealing with the issue of substantial and compelling circumstances.

[17] The contention by the Appellant's, that no weapon was used on the complainant and that he was not injured should weigh in Appellant's favour, the court *a quo* reflected on the Appellant's previous convictions and stated that "*they specialized in dishonesty*". The court reasoned that the fact that no one was injured and the value taken from the complainant being low does not downplay the veracity of the offence. For these reasons the learned Magistrate did not consider those factors as exceptional or compelling reasons to depart from the minimum sentence being imposed.

⁷ State v Zinn 1969(2) SA 537 (A) at 540 G

⁸ Samuels v State 2011 SACR 9 (SCA) at 13 at para 9

Discussion

[18] It was conceded by the Respondent that direct imprisonment is indeed warranted. However, the period of direct imprisonment imposed was not commensurate with the extent of crimes of a similar nature of severity. Counsel for the Respondent also agreed that there are degrees of aggravation in robbery, and this particular circumstances fell on the lower end of the scale.

[19] In examining what is an appropriate sentence, it is trite that sentencing is pre-eminently within the discretion of the trial court⁹.

[20] A Court of Appeal will interfere where the difference in the sentence to be imposed. If the inference can be made that the trial court acted unreasonably and therefore improperly, then in that event, the court will alter the sentence.¹⁰

[21] The applicable principles on sentencing were dealt with in *S v Malgas*¹¹, affirmed in *S v Dodo*¹²;

'if the sentencing court on consideration of the circumstances of the particular case 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, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence'

[22] In *Ganief Fortune v S*,¹³

⁹ State v Gule 2019 JDR 0173 (ECB)

¹⁰ State v Anderson 1961(A)

¹¹ S v Malgas 2001(2) SA 1222 (SCA) para 25

¹² S v Dodo 2001 (3) 282 (CC) para 40.

¹³ S v Fortune 2014 (2) SACR 178 (WCC)

"What appear to be incommensurate sentence, are in many cases explicable by the realities that no one case is exactly like another, and the applicable principles, although they contain a recognition that the legislation enjoins standardized rigour and severity, nevertheless emphasise that the statutory provisions do not derogate from the duty on sentencing court in prescribed sentence matters to have appropriate regard to the individual characteristics of each case. Indeed, it is the latitude allowed to courts by the legislation to depart from the prescribed minimum sentence in appropriate cases that resulted in it passing constitutional muster."

[23] Insofar as minimum sentences are concerned, a court no longer has a clean slate to inscribe whatever sentence he/she thought fit for the specified crime as parliament had enacted the minimum sentencing legislation.¹⁴ Courts are thus bound to impose the prescribed minimum sentences unless there are truly convincing reasons for departing from them. In the current case, the evidence was such that a knife was seen, there was no physical injury to the complainant, and R500,00 and a cap was stolen which cannot be ignored for the purposes of evaluating what a suitable sentence is.

[24] In applying the balancing of the interests of the community, the personal circumstances of the accused and the crime, the sentence of 15 years on the evidence presented on the facts in this case is harsh and induces a sense of shock.

[25] In assessing what would be a suitable sentence one has to be mindful that setting it too low sends out the incorrect message to communities who are at the brunt of crimes and who battle with the prevalence of such crimes in their communities.

¹⁴ State v Matyityi (695/09) ZASCA 127 (30 September 2010) at para 11

Setting it too high does not serve a purpose either and does not act as a deterrent. In evaluating all these circumstances, a suitable sentence of direct imprisonment for a period of 8 years is appropriate, given the degree of robbery concerned, the value taken, in line with the

Ganief judgment. In the *Ganief Fortune v The State*, Binns-Ward J who considered an appeal against sentence in very similar circumstances; there was no physical injury, and R800,00 in cash was taken from the complainant. The appropriate sentence imposed was reduced from 15 years to 8 years imprisonment.

[26] In the result, in this matter, the awaiting trial period of 2nd March 2016 to 24th August 2016 is also to be taken into account for the purposes of sentencing.

[27] In the result, the following order is proposed:

1. The appeal against the conviction is refused.
2. The appeal against the sentence is upheld.
3. The sentence of 15 (fifteen) years' imprisonment imposed upon the Appellant by the trial court is set aside.
4. A substituted sentence of eight (8) years imprisonment is imposed on the Appellant.

5. The substituted sentence of eight (8) years imprisonment is antedated to 24th August 2016 in terms of s 282 of the Criminal Procedure Act 51 of 1977.



PARKER, AJ

Acting Judge of the High Court

I agree, and it is so ordered



WILLE, J

Judge of the High Court

Appearances

Appellant's Legal Representative:	Mrs N Abdurahman Legal Aid South Africa: St Georges Mall
Counsel for the Respondent:	Adv K Uys Office of the DPP: W Cape