IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R155/2018
DATE HEARD: 10/10/2018
DATE DELIVERED: 12/10/2018

In the matter between

MKUSELI MXOTWA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The appellant was convicted in the Regional Court, Port Elizabeth, of one count of robbery with aggravating circumstances and was sentenced to 10 years' imprisonment. This appeal lies against conviction and sentence, with the leave of the trial court.

[2] It was not in dispute that on 27 August 2015 the complainant, Mr Lunga Simondile, was robbed by two assailants of R10.00. The dispute at the trial concerned whether or not the appellant was one of the complainant's assailants.

[3] The complainant testified that on 27 August 2015 he was walking in Indwe Street, Motherwell, between six and seven o'clock in the evening. There was sufficient street lighting for him to see any persons who were walking behind him. He noticed the appellant, to whom he referred by his nickname Dacusta, and an unknown person, behind him, but saw no reason to run because he knew the

appellant. They had attended the same school and when he passed by the appellant's home on his way to the shopping mall they would greet one another. He had last seen the appellant about a week before. There was no bad blood between them.

[4] The complainant continued walking. He heard footsteps behind him and as he turned the person with the appellant grabbed him and covered his mouth. The appellant appeared and he saw that the appellant was in possession of a knife. The complainant decided at that stage not to fight back because all he had on him was R10.00. The appellant tripped him (later he said that both men had tripped him) and sat on his back, and told the other person to search him. A car approached and the appellant told him to keep quiet and stabbed him three times on his head. He asked the appellant to leave him because the he knew that the appellant knew him. His R10.00 was taken and the appellant and his companion left. Other than the car which had passed, there were no other persons on the scene.

[5] The complainant followed the appellant and his companion and asked the appellant why he had stabbed him but there was no response. He was angry at what had happened because he and the appellant knew one another and he never expected the appellant to do such a thing. He thought that the appellant might apologise because they knew one another. If the appellant had apologised he would have forgiven him.

[6] The complainant went to the police station to report the incident. The police told him to go to hospital. At the hospital one of the wounds on his head was stitched. He returned to the police station and gave the appellant's address to the police. The next day he identified the appellant at the police station. Even at the

police station he thought the appellant might apologise and if he had done so, he would have withdrawn the charge.

[7] The complainant was cross-examined about the statement he made to the police on the night of the incident. There were some differences between his evidence and the statement. In the statement he said it was the appellant who had grabbed him and pushed him onto the ground and had then drawn a knife. In the statement he omitted to mention that the appellant had told his companion to search him or that he had followed the appellant after the attack. The complainant said that he was shocked when he made the statement and that this was the first time he had been robbed.

[8] The appellant testified. He agreed that he and the complainant were known to one another and that he is known as Dacusta. On the day that the complainant was robbed he and two companions, Luvo and Mister, entered Indwe Street. He saw that a person was being robbed by two persons. They were on the other side of the street. He continued walking and heard the person being robbed calling out his name. He looked back but did not see that it was the complainant who was being robbed. He did not do anything at hearing his name called and he and his companions walked on. He thought that maybe the complainant had called out his name because he wanted assistance. The complainant approached them and the appellant told him that he should have come to him and told him that he was being robbed, and should not have called out his name. The complainant told him that when he called out the appellant's name he was being robbed. The appellant told him that he should not have called out his name because he (the appellant) did not want to be exposed to danger. They all continued walking until they parted ways.

[9] During cross-examination the appellant said that it was after his name was called that he saw that someone was being robbed by two persons. No-one was on the ground and the two assailants were searching their victim. Further on during cross-examination he said he concluded that the complainant was being robbed because the complainant had called out his name.

[10] When asked in cross-examination what he would have done if the complainant had come to him, he said it would have depended on why the complainant was calling him and what sort of situation the complainant was facing. Later on during cross-examination he said that if the complainant had come to him he would have intervened on his behalf but what he did not like was his name being called out. When asked by the court why he had not helped the complainant, he said he was scared and feared for his life. The court further asked him how the complainant could have come to him if he was being robbed. The appellant replied that the complainant should have come to him after he had been robbed.

[11] The appellant was arrested the next day. The police told him to hand over the money he had taken from the complainant and he told them that he had not robbed the complainant. The appellant was of the view that the complainant had implicated him because he had not intervened in the robbery.

[12] The magistrate accepted the evidence of the complainant and found that of the appellant not to be reasonably possibly true. He took heed of the fact that the complainant was a single witness and that his evidence was to be approached with caution. He further was aware that the complainant's identification of the appellant was in dispute, and that it was not sufficient that the complainant was honest in this respect but also that his identification was reliable. He had regard to the fact that the complainant and the appellant were known to one another, that the lighting in the

street enabled the complainant to see his assailant, and that the appellant, on his own version, was on the scene. The magistrate was therefore satisfied that the complainant's identification was reliable.

[13] The magistrate acknowledged that there were some contradictions in the complainant's evidence but said that this was a traumatic experience for the complainant and that it was a moving scene. With regard to the differences between the complainant's evidence and his police statement, the magistrate referred to *S v Bruinders* 1998 (2) SACR 432 (SE) at 437h-i. There is a summary of this passage in the headnote as follows:

> "The purpose of an affidavit was to obtain the details of an offence, so that it could be decided whether a prosecution should be instituted against the accused. It was not the purpose of such an affidavit to anticipate the witness's evidence in court, and it was absurd to expect of a witness to furnish precisely the same account in his statement as he would in his evidence in open court."

The magistrate also found that the complainant's explanation for the differences was understandable in the circumstances.

[14] The magistrate was not impressed by the appellant and found him to be long-winded when answering questions, and to be vague and evasive during cross-examination. I would add that the record reveals that the appellant was very argumentative, often answering questions with questions. The magistrate referred to improbabilities in the appellant's version, such as the complainant falsely accusing the appellant when the appellant was known to him and the appellant's claim to be afraid to intervene when he was in the company of two others.

[15] An appellate court will not readily interfere with the credibility and factual findings of the trial court. In *S v Leve* 2011 (1) SACR 87 (ECG) the following was said at paragraph [8]:

> "The fundamental rule to be applied by a court of appeal it that, while the appellant is entitled to a rehearing, because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. See the well-known case of *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 and the passages which follow; *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645; and *S v Francis* 1991 (1) SACR 198 (A) at 204 c-f."

[16] In this matter a reading of the record fully supports the magistrate's decision to accept the evidence of the complainant and to reject that of the appellant. The finding that the complainant's identification of the appellant was reliable was clearly correct, given the factors to which the magistrate alluded. As was submitted by Mr Sinclair, who appeared for the State, a further factor demonstrating the reliability of the identification was the complainant's evidence that he had followed the appellant after the attack and had spoken to him. The summary of the appellant's evidence above demonstrates the improbabilities and the contradictions in his version. His version was nothing less than nonsensical. Clearly his evidence that the complainant should have come to him rather than call out his name, was an attempt to distance himself from the attack on the complainant. The attempt backfired because he was unable to say what he would have done if the complainant had come to him. Quite how the complainant could have come to the appellant while he was being robbed is incomprehensible. The appellant's differing versions concerning when he realised a robbery was taking place lead to the conclusion that his evidence that he was a witness to the robbery of the complainant was a fiction.

[17] The appeal against conviction must therefore fail.

[18] The prescribed minimum sentence for a first conviction of robbery with aggravating circumstances is 15 years' imprisonment (s 51 (2) of the Criminal Law Amendment Act 105 of 1997 read with Part II of Schedule 2).

[19] At the time of the offence the appellant was almost 30 years old. He had two previous convictions: unlawful possession of a firearm and unlawful possession of ammunition committed during 2013. The counts were treated as one for the purpose of sentence and he was sentenced to 5 years' imprisonment conditionally suspended for 4 years. He was not married and had one minor child for whom the mother receives a child support grant. At the time of his arrest he was unemployed and was supported by his sister.

[20] In his judgment on sentence the magistrate had regard to the seriousness and prevalence of robbery with aggravating circumstances and society's outrage at this type of violent offence. With regard to this particular offence, he had regard to the fact that the complainant had been peacefully going about his business when he was set upon by the appellant and his accomplice, stabbed, and his money taken. He also took into account the appellant's personal circumstances.

[21] At the trial it was submitted on behalf of the appellant that the following factors amounted to substantial and compelling circumstances: the small amount stolen; the appellant had been in custody for almost a year before his trial; and the complainant was not seriously injured. The magistrate was of the view that these factors did not amount to substantial and compelling circumstances, remarking that when the appellant robbed the complainant he was not aware that he only had R10.00 on him, and that considering that the complainant was stabbed three times, it was only luck which prevented more serious injuries. The magistrate however found that a sentence of 15 years' imprisonment would be disproportionate in view of the

small amount taken from the complainant, and found on this basis that there were substantial and compelling circumstances.

[22] I can find no misdirection in the magistrate's judgment on sentence, nor does it induce a sense of shock. The magistrate carefully considered all the relevant factors and did not place undue emphasis on any one to the detriment of another. He did find substantial and compelling circumstances and imposed a fairly substantially lesser sentence than the prescribed minimum sentence. It was submitted before us that the magistrate misdirected himself by not finding that the length of time awaiting trial, the small amount taken and the lack of serious injuries amounted cumulatively to substantial and compelling circumstances. I do not agree that the magistrate misdirected himself in this respect but in my view, even if the magistrate had found that those factors cumulatively amounted to substantial and compelling circumstances, it is unlikely that there would have been a difference in the sentence imposed. In any event, in finding that a sentence of 15 years' imprisonment would be disproportionate, the magistrate did have regard to the small amount taken. The sentence is in my view entirely appropriate. The complainant, walking alone and minding his own business, was attacked by two persons and stabbed with a knife on a most vulnerable part of his body. One of his wounds required stitches. It is entirely fortuitous that he only had R10.00 on him. This was a cowardly and vicious attack on a defenceless person, involving the use of a dangerous weapon. This sort of attack is all too prevalent and society needs to be protected against those who perpetrate such offences. There are no grounds for interfering with the sentence.

[23] The following order will issue:

The appeal against conviction and sentence is dismissed.

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J M ROBERSON
JUDGE OF THE HIGH COURT

BROOKS J:-

I agree

_____
R W N BROOKS
JUDGE OF THE HIGH COURT

Appearances:
For the Appellant: Ms N M Mazibukwana, Legal Aid South Africa, Grahamstown

For the Respondent: Adv L Sinclair, Director of Public Prosecutions, Grahamstown