REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. A210/2010

DATE: 03/12/2010

In the matter between:

JIYANE, WANDILE **Appellant**

versus

THE STATE **Respondent**

JUDGMENT

MOKGOATLHENG J

(1) The appellant was arraigned in the regional court held at Germiston on four (4) counts of robbery with aggravating circumstance as intended in ***section 1 of the Criminal Procedure Act 51 of 1977,*** and read with the provisions of ***section 51 (2) of The Criminal Law Amendment Act 105 of 1997.***

(2) The appellant was convicted on counts 1, 2, 3, and sentenced to 4 years on each count, to an effective 12 years imprisonment. The appellant now appeals against both the conviction and sentence.

(3) The appellant contends that the court-a-quo misdirected itself in finding that neither Robertson nor Campbell had made any mistake in identifying the appellant as the person who robbed them, even though, they did not properly describe or properly identify him.

(4) Further, the appellant contends that the court-a-quo wrongly found that because Campbell saw him on a regular basis on Friday afternoons, and Robertson had also once seen him, there was no possibility that they might make a mistake in his identification.

(5) The fundamental question is whether the State has proven the identity of the appellant beyond a reasonable doubt. In this regard there are two significant and connected aspects which require consideration, the reliability of Campbell and Robertson as single witnesses and the sufficiency of the totality of the evidence.

(6) Campbell testified that before the robbery he usually saw the appellant on Friday afternoon because he attended school at Alberton College

which is situated close to Bracken High School where the appellant attended.

(7) Robertson testified that it was not the first time he had seen the appellant on the day of the robbery, he once saw the appellant coming out of the main gate of Alberton College. He stated that because the appellant held him up by placing a knife on his throat, he identified the appellant by his height, roundish smallish eyes, lips and ears.

(8) Captain Buys testified that on the 23 May 2008 after arresting the appellant, whilst attempting to establish what had occurred, he was approached by Campbell who after identifying the appellant, adviced him and his colleague that the appellant armed with a weapon, definitely robbed him and Liandra Peters of their cellphones.

(9) Further Captain Buys testified that on the 23 May 2008 Robertson arrived with his mother at the police station, and identified the appellant as the person who armed with a knife had robbed him of his bicycle.

(10) Concerning identification, in ***S v Dladla 1962 (1) SA 307 at 310*** it was held:

(a) *"One of the factors which in our view is of the greatest importance in a case of identification is the witness's previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him*

frequently before the probability that his identification will be accurate is substantially increased";

(b) In ***S v Ngcina 2007 (1) SACR 19 (SCA) Navsa JA at para [16]:***

"Lastly it should be stressed that the Courts have frequently said that 'the positive assurance with which an honest witness will sometimes swear to the identity of an accused person is no guarantee of the correctness of that evidence' ; " and

(c) In ***S v Magadla 2010 (2) SACR 316*** it was held:

"[15] the subjective honesty and sincerity of the identifying witnesses are not enough. It must be established by the State, upon which the onus rests in a criminal trial, that the identification is reliable beyond reasonable doubt……...the evidence of identification, based on a witness's recollection of a person's appearance, can be dangerously unreliable and must of necessity be approached with caution. See in this regard ***TD Zeffertt, AP Paizes & A St Q Skeen The South African Law of Evidence (2003) at 142; R v Biya 1952 (4) SA 514 (A); R v Hlongwane 1959 (3) SA 337 (A) at 341A; S v Sithole and Others (supra); and S v Majiame and Others 1999 (1) SACR 204 (O). Compare S v Charzen and Another 2006 (2) SACR 143 (SCA) ([2006] 2 All SA 371).***

(11) Although it may be cogently argued that the evidence tendered by Campbell regarding his inability to precisely describe any characteristics about the identity of the appellant save to say:

(a) he had seen him on several occasions at Alberton High School or in the vicinity thereof;

(b) the appellant robbed him in broad day light;

(c) he can still see his face in his mind;

(d) although he cannot describe the appellant he knows it is him because he saw him every Friday and he knows him; and

(e) he remembers his face and can see it in his head; is not sufficiently conclusive in properly identifying the appellant, Campbell's evidence stands as direct *prima facie* evidence.

(12) The fact of the matter is, it was not disputed that Campell had previously seen the appellant, neither was it disputed that Robertson had also previously once seen the appellant, consequently, there was direct *prima facie* evidence implicating the appellant in the robberies. The appellant elected not to testify in amplification of his alibi defence. The failure by the appellant not to testify, strengthens the reliability of the testimony of Robertson and Campbell.

(13) In ***S v Hadebe and Others 1997 (2) SACR 641*** it was held:

> ***"Presumption that the trial court's findings of fact are correct*** *– In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong – In determining*

whether the trial court's findings of fact were clearly wrong, it is a useful aid to break the body of evidence down into its component parts, but, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof – The evidence is ultimately to be assessed as a whole."

(14) It pointed out in ***S v Mthetwa 1972 (3) SA 766 (A) at 769D:***

'*Where…there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; see* ***S v Nkombani and Another 1963 (4) SA 877 (A) at 893G and E S v Snyman 1968 (2) SA 582 (A) at 588G.'***

(15) In ***S v Chabalala 2003 (1) SACR 134 (SCA) in para 20*** it was held: *"The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. He was also called on to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralized by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge…."*

(16) Similarly in this matter, in paraphrasing the Learned Nugent JA, if the appellant was innocent he could have ascertained his own

whereabouts and activities on 18 April 2008 and 5 May 2008 and have been able to vouch for his non-participation in the robberies. He was also readily able to deny that the complainants had indeed failed to identify him at Bracken High School and the police station. *"To have remained silent in the face of the evidence was damning. He thereby left the prima facie case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt."*

See ***Kashief Naude and Garreth Solomons v The State Case No 488/10/2010 ZASCA 138*** delivered on 29 September 2010. See ***also S v Boesak 2001 (1) SACR (CC) at para 24 and Mapande v S (046/10) [2010] ZASCA 119 (29 September 2010).***

(17) The court-a-quo cautioned itself against the unequivocal acceptance of the evidence pertaining to identification, more particularly because the State relied on the evidence of single witnesses in both robberies. The court-a-quo sought certain guarantees before accepting the evidence of the identifying witnesses, even where such witnesses had prior knowledge of the appellant. Such guarantees were found in the reliability of the undisputed evidence of Campbell and Robertson, and in the light of the probabilities and the failure of the appellant to testify in his defence, which in his plea explanation is predicated on an alibi.

(18) ***Navsa JA in on Kashief, Naude Garreth Solomons v The State (supra) paragraph 18*** expressed himself thus with regard to the defence of an alibi where the proponent thereof had testified as follows:

> *"As the Appellant Division as said in* ***R v Hlongwani & R v Khumalo & Andere*** *the correct approach is to consider the alibi in the light of the totality of the evidence and the*

> *Court's impression of the witnesses. It is sufficient if it might reasonably be true. This does not mean that the Court must consider the probability of the alibi in isolation if someone says that he was in bed at midnight and no other evidence may be considered, it would be difficult to say that it could not reasonably be true, but if there is sufficiently strong evidence to show that he was in fact breaking into a shop, the Court may consider that his story can safely be rejected."*

(19) In my view, the court-a-quo evaluated the evidence in terms of the set out legal principles in the preceding paragraphs. The record shows that the court-a-quo took pains to consider the totality of evidence, it left none of the material evidence out of account. The court-a-quo correctly accepted the evidence of Robertson and Campbell.

(20) In the final analysis, the court-a-quo in accepting the evidence of the identifying witnesses cannot be faulted because it correctly found that such evidence was not only satisfactory but was truthful, and that the identification of the appellant was reliable. See in this regard ***R v Masemang 1950 (2) SA 488 (A) at 493; S v Jochems 1991 (1) SACR 208 (A) at 212a-e; S v Pretorius en 'n Ander 1991 (2) SACR 601 (A) at 609a-b; S v Sithole and Others (supra) at 591c-g and S v Mthethwa 1972 (3) SA 766 (A) at 768A-C***

(21) On the facts of this case it is my view that the risk of mistaken identification is substantially reduced, if not entirely eliminated, when regard is had to the uncontroverted evidence of Campbell and Robertson. Consequently, the appeal against conviction, is dismissed with the caveat that count 1 and count 2 constitute one offence instead of two distinct and separate offences, an issue which is later addressed in this judgment.

(22) In respect of sentence it was argued that the court-a-quo erred in that it did not to take sufficient consideration that the appellant was still a youth, was a first offender, that having regard to all the factors relevant in the imposition of sentence, the sentence imposed upon the appellant was inappropriate and severe;

(23) The power of a court to interfere with the sentencing discretion of a trial court is limited. The limits were set out as follows in ***S v Malgas 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220***:

'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". It must be emphasized that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

(24) In my view the court-a-quo considered the personal circumstances of the appellant, the seriousness of the offence, the interests of society, and correctly found that there were substantial and compelling circumstances as envisaged in ***section 52 of the General Law Amendment Act 105 of 1997.***

(25) I however am of the view that the court-a-quo misdirected itself in the imposition of sentence with regard to count 1 and 2. I agree with appellant's counsel's submission that the robbery of the two cell phones was committed with a continuous intention in pursuance of one criminal transaction.

(26) In the matter between ***Luvuyo Maneli v The State Case No. 494/07 [2008] ZASCA 50*** delivered on the 1 April 2008 it was held:

"*To determine whether there had been an improper duplication of convictions the courts have formulated certain tests. However, these*

tests are not equally applicable in every case. One such test is to ask whether two or more acts were done with a single intent and constitute one continuous criminal transaction. Another is to ask whether the evidence necessary to establish one crime involves proving another crime." ***S v Grobler and Another 1966 (1) SA 507 (A) at 511G-H; and S v Prins and Another 1977 (3) SA 807 (A).***

(27) In the present case for the reasons stated above, in my view the robbery of the cellphone from the Campbell and Liandra Peters by the use of firearm to induce submission, was done with a single intent and constituted one continuous criminal transaction.

(28) Consequently, in such a case, a conviction of robbery in respect of each cellphone constitutes an improper duplication of convictions as the "*robberies*" were committed within the preview of a continuous intent transaction and should have been treated as one conviction. It follows that the conviction in respect of count 1 and 2 should be set aside. See ***S v Verwey 1968 (4) SA 682 (A) at 687F-688B and 689D-F).***

(29) In the premises the appeal against the cumulative sentence of 12 years partly succeeds. Consequently, the sentences of 4 years in respect of count 1, 2 and 3 respectively, are set aside and are substituted with the following order:

(a) The appellant is sentenced to 4 years imprisonment in respect of count 1 and 2 which

are taken as one offence for purposes of conviction and sentence;

(b) The appellant is sentenced to 4 years in respect of count 3; and consequently

(c) The effective sentence is 8 years imprisonment which is antedated to the 24 January 2009.

Dated at Johannesburg on the 3rd Deceember 2010.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT

I CONCUR

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BADENHORST AJ

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 1ST NOVEMBER 2010

DATE OF JUDGMENT: 3RD DECEMBER 2010

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