REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

22-03-2017 - MJ.
DATE SIGNATURE

CASE NO: A334/2016

In the matter between:

MALATJIE, MATHOME KINGSLEY **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Sutherland J

Introduction

[1] The appellant was convicted of two counts of robbery with aggravating circumstances. The counts relate to two separate incidents on 29 April and 8 May 2014. In those incidents, respectively, the appellant used a knife and screwdriver to intimidate the victims, both women, walking alone in the street. He grabbed their bags and thereby took the contents.

[2] He was convicted on 27 August 2014, and sentenced to 19 years' imprisonment on each count, the terms to run concurrently. The magistrate found no substantial or compelling reasons to impose less than the prescribed minimum sentence as contemplated in section 51(3) of the Criminal Law Amendment Act 105 of 1997.

[3] The appeal is against both conviction and sentence.

The Convictions

[4] I deal first with the common cause facts or facts not in dispute:

4.1. On 29 April 2014, about 7h00, Gloria Mhlanga, a 44 year-old woman, was robbed at knife point. The robber took her handbag containing a cellphone, toiletry bag, a wallet with R20 cash, and shopping and bank cards.

4.2. On 8 May 2014, about 16h00 Elizabeth Mbele, a 39 year-old woman, was robbed by a man wielding a screwdriver. The robber took her handbag containing, clothes, keys and purse with money and cards.

4.3. On 8 May 2014, in the evening, the appellant was arrested.

4.4. He had in his possession a purse. The contents of the purse included, money, keys. And credit cards.

4.5. The cards belong to Mhlanga and the keys belong to Mbele.

4.6. On 9 May 2014, the two robbery victims were brought to the police station where they identified certain goods as their property and also, upon been shown the appellant in a cell, claimed that he was the person who robbed them.

[5] The appellant's version is that he was minding his own business whilst walking home. Near a bridge, he saw a purse on the ground. He picked it up. He did not open it. He squeezed it and to him it seemed empty. Shortly thereafter, a police car passed by. The police officers asked to search him. He consented. The purse was found in his pocket, and upon its opening he saw money and keys. He told the police he picked it up. They disbelieved him. He was arrested.

[6] The police version is that they were called about the robbery perpetrated on Mbele. They responded quickly. Constable Selolo estimates it to have been about 16h50 when they reached Mbele. Mbele estimates it was about fifteen minutes after the robbery that the police arrived. Mbele, was in a state of shock. She gave a description of her attacker as a man, dark in complexion, wearing green pants, perhaps addidas, because of the stripes on them, a Bafana Bafana t-shirt, and a black tracksuit top. She also described the items robbed from her.

[7] After taking her cell number, he and a colleague proceeded to search in the direction that they were told the attacker had fled. Asking passers-by if they had seen such a person, they moved about. Sometime after sunset, he saw a man who fitted the description. He pursued the man who ran away. He arrested the appellant. According to Selolo, the appellant was found in possession of keys, cars, money and was wearing a female slip-on shoe. One of the cards bore the name of Mhlanga.[1]

[8] At the police station, according to Selolo, it was then noticed that the appellant was wearing a skirt under his clothes. When asked about the skirt the appellant denied knowledge of it.

[9] Thereafter, Selelo got the complainants to call at the police station.

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[1] The record refers to Nkana and Nkandla but the reference is to Mhlanga, a point cleared up in Selolo's evidence.

[10] Mhlanga came and identified some of her cards; ie from Clicks, Absa, Jet and Milady that had between taken on 29 April. Other cards were not recovered, along with her cellphone and her purse. She was shown the appellant. She claims to recognise him as the attacker. A notable feature was a swollen lip, still visible at the trial on 28 July 2014, some seven weeks later. Apparently, the prominent lip is a birth phenomenon.

[11] Mbele was called the night of the robbery to come to the station the next day when she was shown the appellant. She saw him wearing one of her slip-on shoes taken from her in the robbery. She also identified the skirt supposedly found on the appellant, and keys which it is common cause were found on the appellant, as belonging to her.

[12] As regards the place where the appellant claimed he picked up the purse, near a bridge in the vicinity of Rand Airport, Mhlanga stated that she was nowhere near such place, and thus could not have dropped her belongs there. Mbele, similarly was not ever at such place. The purse that the appellant says he found there, was not claimed by either robbery victim.

[13] What are the probabilities relevant to resolving the contestation in these versions? First, property of both victims were found in his possession. Neither were ever in the vicinity he claims to have found the purse. The purse, which is not the property of either victim contained their property. It must follow that the stolen items were transferred to that purse. Second, the possession of property taken only a couple of hours earlier, at most, demands a plausible explanation. Had the appellant possessed a purse belonging to

Mbele with her property only in it, but no money, the proposition that the robber had discarded it would require serious interrogation. But the purse had money in it too, which is wholly inconsistent with that possibility. However, the presence of items robbed 7 days earlier renders that thesis wholly implausible. The explanation offered by the appellant is incredible.

[14] Moreover, if the appellant was not in possession of the shirt and the slip-on shoes how did the police come to have them? The only alternative theory has to be a conspiracy to falsely implicate the appellant. But if so, it was superfluous as the admitted possession of the cards and keys put the appellant on the spot to offer an explanation.

[15] The police action in showing the appellant to the victims was inappropriate. The identification is unreliable for that reason. However, the objective evidence, the time lapse and the recent possession of items from two robberies within 7 days constitutes sufficiently weighty evidence to seal the fate of the appellant.

[16] The conviction is sound

The Sentence

[17] The magistrate found that there were no factors warranting a sentence less that the prescribed 15 years. He then imposed a term of 19 years.

[18] The magistrate rightly accords weight to the trauma experienced by both victims, faced with violence and threat of the use of a knife or screwdriver.

[19] The appellant is a first offender. That is an important factor to weigh. The judgment on sentence makes no attempt to address its significance or to explain why, in the particular circumstances, why that factor should not be weighed at all. Oddly, the short period in custody, barely two months, is mentioned as a factor to be weighed even though it is negligible. The age of the appellant, 24 years old, is mentioned but no real assessment of its relevance is attempted.

[20] In my view an assessment of the presence of substantial and compelling circumstances does not imply a diminution of the heinousness of the crimes.

[21] The evidence shows that the appellant is a serial robber, concentrating on soft targets. Were this a single, opportunistic robbery there may have been material with which to work to consider the presence of circumstances warranting a lesser sentence that the prescribed minimum. But as he demonstrates the attributes of a professional criminal, in my view the finding that no such circumstances are present is correct.

[22] However, why the minimum period of imprisonment should be exceeded is not explained at all. I am unable to grasp why an additional four years is thought to be appropriate. A default approach which leans towards lengthy sentences is not appropriate. The strictures on the court's discretion by Act 105 of 1997 must be

understood as setting a norm and variations from the norm require substantiation both for less or for more. There is none apparent in the judgment on sentence.

[23] In my view a term of 15 imprisonment, the prescribed minimum, is appropriate.

The Order

An order is made thus:

1. The appeal against conviction is dismissed.

2. The appeal against sentence is upheld.

3. The sentence of 19 years imprisonment on each count is set aside and substituted by a sentence of 15 years on each of the two counts, which terms shall run concurrently.

Sutherland J
Judge of the High Court,

Gauteng Local Division, Johannesburg

I agree.

Shangisa AJ
Acting Judge of the High Court,
Gauteng Local Division, Johannesburg

Hearing: 16 March 2017.
Delivered: 22 March 2017

For the appellant:
Adv A Mavatha,
Instructed by Legal Aid South Africa.

For The State:
Adv N Serepo.