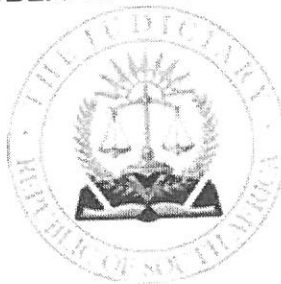


REPUBLIC OF SOUTH AFRICA



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

CASE NO: A359/2013

(1)	REPORTABLE: YES <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
21/02/12	
DATE	SIGNATURE

In the matter between:

THABO MATHE

First Appellant

JULIUS BANDA

Second Appellant

and

THE STATE

Respondent

J U D G M E N T

CORAM: R E MONAMA, J et S J R MOGAGABE, AJ:

INTRODUCTION

[1] During October 2012, the appellants were charged in the Regional Court, Johannesburg on four counts. These are robbery with aggravating

circumstances, attempted murder, unlawful possession of a firearm and unlawful possession of ammunition. The trial proceeded before the learned Magistrate Radasi who was assisted by two assessors. The appellants were legally represented. They pleaded not guilty to all counts and elected not to disclose the basis of their defences i.e. chose to remain silent.

[2] On 7 September 2012 they were convicted. First appellant was convicted in respect of count 1 of attempted robbery with aggravating circumstances and on the other three counts and second appellant was convicted on the counts of attempted robbery with aggravating circumstances and of attempted murder. He was acquitted on the other two counts.

[3] First appellant was sentenced on the first count (attempted robbery with aggravating circumstances) to 10 years imprisonment; on the second count (attempted murder) 10 years imprisonment; on the third count (unlawful possession of a firearm) 8 years imprisonment and on the fourth count (unlawful possession of ammunition) 3 years imprisonment. He was deemed automatically unfit to possess a firearm. The sentences in respect of counts 3 and 4 were ordered to run concurrently with the sentence in respect of count 1. The nett effect thereof being that he was to serve 20 years imprisonment in respect of all counts. The second appellant was sentenced on count 1 (attempted robbery with aggravating circumstances) to 12 years imprisonment and in respect of count 2 (attempted murder) to 10 years imprisonment and 4 years of the 12 years sentence in respect of count 1 was ordered to run concurrently with the 10 year sentence in respect of count 2. The nett effect

thereof being that second appellant was to serve an effective period of 18 years in respect of both counts. The court *a quo* also fixed a non-parole period of 10 years in respect of both of appellants in terms of section 276B(2) of Act 51 of 1977.

[4] On 7 December 2012 the appellants were granted leave to appeal against their convictions and sentences by the court *a quo*.

THE BRIEF SUMMARY OF THE EVIDENCE IN THE TRIAL COURT

[5] The State relied on the testimony of ten critical witnesses. They are Shakira Gangered, Alfred Sapoyi (also referred to as Alfred Saidi according to the record) Adolf Mogase, Aldrin Davis, Themba Moloto, Malesela Nkwana, Sergeant Gustav, Joseph Nkomo, Sifiso Ndlovu, and Mutokwa Munyimanyeni.

[6] The appellants testified in their own defence and called no witnesses.

[7] It is common cause if not undisputable that an armed robbery by about four men occurred at a shop in Mayfair, Johannesburg in the morning of 2 April 2010.

[8] Ms Shakira Gangered testified about the attack and identified second appellant as one of the robbers. She testified that on 2 April 2010 at about 10h40 she was about to enter the shop. She was confronted by a man

wielding a gun. This man instructed her not to run away but to enter the shop and to hand over her valuables. She entered the shop and hid her cellphone in her jeans and handed over her money to this robber whereafter this robber instructed her to lie down on the floor. She proceeded further into the store and crouched on the floor. Inside the shop there was a female customer, Sifiso Ndlovu, Alfred Sapoyi, the manager of the shop and the robbers. The shop is small. She gave her testimony in detail including the fiddling with the cash register by the other three robbers. She described the facial appearances of second appellant, the shooting of a customer (Alfred Sapoyi) and the robbers fleeing the scene. She was cross-examined at length. The main tenents of her testimony were corroborated by Alfred Sapoyi (referred to in the record as Alfred Saidi) who testified that upon the robbers fleeing the scene the victims screamed and that attracted the Metro Police officers who were nearby the vicinity of the shop. One of the robbers wielding a gun demanded money and his cellphone and he handed over his money in the sum of R160,00 and a cellphone. He was not in a position to give a description of the robbers. He was shot whilst inside the shop. Sifiso Ndlovu testified that he was employed at the shop and that on the day in question i.e. 2 April 2010 he was accosted at the shop by about three armed robbers. He was robbed of his cellphone. He did not properly see their faces because he was lying down. He heard a gunshot in the shop but did not see the shooter. He further testified that one of the robbers was wearing an Orlando Pirates T-shirt and was the one with the firearm.

[9] Officer Mogase testified that he and his crew members were in the vicinity of the shop and heard the gunshot. He saw some four robbers emerging from the shop running away. Two of them had firearms. He described their appearances. One of the two of the armed robbers whom he identified as first appellant pointed the firearm at them. He and his crew member (Officer Nkomo), chased the robbers and focussed their attention on first appellant as he was the one that pointed a firearm at them. During such chase first appellant continued pointing the firearm at them until first appellant entered a building that was under construction. They waited outside the building for police backup. The backup officers arrived including the officers from the dog unit. They searched the inside of the building and found the first appellant hiding inside the building. The first appellant was tracked down by the police dog. Officer Nkomo corroborated the version of Officer Mogase in all material respects. Officer Davis also of the Metro Police testified that he and other police members entered the building with Sergeant Gustav handling the police dog. He arrested first appellant who was pulled down from the chimney by the police dog. After being so pulled down he attempted to kick the dog which then bit him on his right leg. Upon searching first appellant he a found Norinco Parabellum pistol in his possession whose serial numbers were erased. This firearm had one round in the chamber and seven in the magazine. Sergeant Gustav testified and corroborated the testimony of Officer Davis in material respects particularly the fact of first appellant being tracked down by the police and pulled by the dog whilst hiding inside the chimney and the dog biting him on the right leg as well as Officer Davis finding the firearm in his possession.

[10] Officer Themba Reginald Moloto testified that he received, examined and tested a Norinco Parabellum pistol. He found it to be functional and without defects. It was capable of discharging more than one shot with a single or one depression of the trigger.

[11] Officer Mutokwa testified about the identification parade and how it was held. Officer Khumalo requested the parade. Ms Gangered pointed the second appellant at this identification parade. It took her three minutes to do so. Inspector Nkwana testified that he arrested second appellant in Hillbrow at about 19h00 after he was pointed out by first appellant as one of the co-robbers. He further testified that upon arrest second appellant was clad in an Orlando Pirates T-shirt.

THE DEFENCE CASE

[12] The first appellant testified and stated that on 2 April he was arrested at a construction site in Mayfair, Johannesburg where he had gone to look for work. He testified that he was asked by the police where he came from and he reported that he was from Zimbabwe whereupon the police officers wanted to arrest him for the failure to produce a passport or identity document as he was in possession of an asylum seeker document which they refused to accept. They instructed him to get inside the police van. He resisted. They took out a dog from the back of the van and instructed it to bite him and it bit him on his leg and after that they placed him in the van together with other foreigners arrested at the building construction site. They drove around with

them and at a certain area the police tried to extract a bribe from him and he told them he had no money. They then noticed the injury on his leg and took him to hospital for the treatment of his injured leg and thereafter drove around with him until they reached Hillbrow, Johannesburg at about 19h00 where they arrested more people. He disavowed any knowledge of the said robbery nor of having participated in the robbery that occurred at the shop on 2 April 2010. He also disavowed knowing second appellant prior to his arrest as well as having pointed out to the police second appellant as one of the co-robbers that robbed the shop on 2 April 2010.

[13] The second appellant testified that he was a taxi driver and was arrested in Hillbrow at about 19h00 on 2 April 2010 for no apparent reason. During his arrest he was consuming liquor with friends who were also arrested and put into a police van. He admitted that on the day of his arrest as such he was wearing an Orlando Pirates T-shirt. He did not know first appellant until on the second day of his arrest when they were going to the Johannesburg Police Station coming from the Brixton Police Station. He also disavowed knowledge of the said robbery nor of having participated in the robbery at the shop or of having shot a customer at the shop during such robbery. He further testified that on the day of the robbery at about 10h45 he was at the taxi rank located in Hillbrow where he was arrested.

THE PRINCIPLES AND EVALUATION

[14] The principle governing appeals have become settled. The appeal court can only interfere in very limited instances. The court can interfere where there is a misdirection of law and on the facts. Insofar as the sentence is concerned the interference will be justified where the sentence was inappropriate or vitiated by a material misdirection on the part of by the sentencing court.

[15] The test in criminal prosecutions is whether the State has proved its case beyond a reasonable doubt. In the assessment of evidence the court must look at the total body of evidence and not to compartmentalise the evidence. Ms Gangered is a single witness who identified the second appellant as the one who demanded her valuables at gunpoint and took her money as well as the one who shot Alfred Sapoyi (Alfred Saidi) in the shop. As such her evidence must be approached with caution. She gave personal features of second appellant. The scar was one such identifying feature. She also testified that the second appellant was wearing an Orlando Pirates T-shirt. Mr Sifiso Ndlovu corroborates the apparel or clothing being worn by second appellant on the day of the robbery i.e. the Orlando Pirates T-shirt. This witness had an ample opportunity to observe and hear the gunshot which was also heard by Officers Mogase and Nkomo. These are objective evidence to buttress her observations.

IDENTIFICATION OF APPELLANTS

[16] The issue that is central to this appeal is the identification of both appellants as part of the robbers that committed the robbery at the shop on 2 April 2010. At the hearing of this appeal both counsel for appellants confined their challenge of the conviction of the appellants as co-robbers that committed the robbery on the basis of identification. The challenge is to the effect that the evidence tendered by the State was such that it was inconclusive or doubtful that the appellants were properly identified as two of the group of robbers that participated in the robbery at the shop on the day in question. Put otherwise the challenge to the State's case is that the state witnesses had identified the wrong persons i.e. were mistaken in their identification of the appellants as co-robbers at the shop with the concomitant effect that their versions or defence relating to their arrest should be accepted as reasonably possibly true with the attendant consequences that their respective convictions and sentences should be set aside.

[17] In respect of first appellant it was submitted that the police arrested the wrong person more particularly by virtue of the fact that the Metro Police that so chased the robbers did not have a good opportunity to observe and identify the robbers and in particular first appellant during such hot pursuit and apparently relied only on the clothing he was wearing in identifying him. Furthermore it was submitted that neither of the victims of the said robbery that so testified in court about the robbery pointed out first appellant as one of the robbers that participated in the robbery at the shop on the day in question

when the Metro Police brought him back to the shop after his arrest. The net effect of such submission is that having regard to the defence or version advanced by first appellant relating to his arrest Officers Mogase and Nkomo were wrong or mistaken in linking first appellant to the robbery and that his version of being arrested outside the building was reasonably possibly true.

[18] In my view this submission attacking the conviction of first appellant predicated on the wrong or mistaken identification of first appellant is misplaced and unmeritorious for the following reasons. Officers Mogase and Nkomo maintained throughout their testimonies that the reason why they focussed their attention on first appellant from the time that the robbers emerged from the shop was by virtue of the fact that first appellant was the one who pointed the firearm at them and continued to do so until he disappeared into the building under construction. They also maintained that throughout the entire chase they particularly focussed their attention on first appellant and never lost sight of him throughout the entire chase until he entered this building so disappeared into the said building they also enquired from the construction workers on site about his whereabouts after describing his features and his clothing whereupon these workers indicated that he had entered the building. This evidence was not challenged by the defence taking into account that first appellant was throughout the proceedings legally represented.

[19] The version of advanced and tendered by first appellant relating to his arrest and how he sustained the injury on his leg as well as the police driving

around with him until 19h00 when they arrested second appellant and other persons cannot in the circumstances be reasonably possibly true and was correctly rejected by the court *a quo* as false. The evidence relating to the circumstances surrounding the arrest of first appellant was corroborated by four police officers namely Officer Davis, Sergeant Gustav and Officers Mogase and Nkomo. The court *a quo* correctly accepted their testimonies and rejected the version of first appellant in this regard. In my view there is overwhelming evidence establishing the guilt of first appellant beyond a reasonable doubt and the well-reasoned judgment of the court *a quo* cannot in law and in fact be faulted relating to the conviction of first appellant. Mr Kotze counsel for first appellant conceded likewise.

[20] Insofar as it relates to second appellant it was submitted that the victims of the robbery and in particular Ms Sharika Gangered did not have sufficient or adequate opportunity to properly observe and identify second appellant as one of the robbers and shooter of Alfred Sapoyi (Alfred Saidi) at a shop on the day in question. This submission is predicated on the short duration of the robbery as well the assertion that the victims of the robbery were made to lie down on the floor and as such could not have had adequate or proper opportunity to observe and identify second appellant as one of the robbers and shooter of Alfred Sapoyi (Alfred Saidi) at the shop on the day in question, entailing that the state witnesses were mistaken about the identity of the second appellant with the attendant consequences that a wrong person has been convicted for such robbery. Likewise this submission is misplaced and misguided for the following reasons. Ms Shakira Gangered maintained

throughout her testimony (i.e. examination-in-chief and cross-examination) that second appellant was the robber that confronted her with a firearm and took her money at the shop on the day in question. She was maintained that she would not forget his face and remembered it at the identification parade as well as in court as second appellant was the one that endangered her life on the day in question. She testified that on the day in question he was wearing the Orlando Pirates T-shirt. With regard to a question whether she had proper or adequate opportunity to observe second appellant in the shop on the day in question, she testified that she was able to observe and identify him due to the fact that she was not lying flat on the floor but was crouching coupled with the fact that she was able to see second appellant through the shelves in the shop which did not obstruct her vision of what was occurring in the shop on the day in question. Under cross-examination she steadfastly maintained that the person who ushered her into the shop at gunpoint and took her money was the same person that shot the Malawian guy i.e. Alfred Sapoyi (Alfred Saidi).

[21] Furthermore, she was able within three minutes to identify second appellant at the identification parade despite the fact that during such identification parade second appellant was not clad in an Orlando Pirates T-shirt. The testimony of Sifiso Ndlovu provides corroboration pertaining the clothing or apparel i.e. the Orlando Pirates T-shirt second appellant had on on the day in question as well as the fact that Sifiso Ndlovu corroborated her testimony that the person with the firearm at the shop on the day in question was also clad in an Orlando Pirates T-shirt and was the one who fired a shot

in the shop on the day in question. This is further corroborated by Officer Nkwana who testified that when he so arrested second appellant later on the same day at about 19h00 after he was so pointed out by first appellant, second appellant was clad in an Orlando Pirates T-shirt. The testimony of all three state witnesses particularly that of Ms Shakira Gangered conclusively identifies secondly appellant not only as one of the robbers but as well as the shooter of Alfred Sapoyi during the robbery at a shop on the day in question. As such the court *a quo*'s judgment in accepting the testimony of the state witnesses linking second appellant to the robbery at a shop on the day in question and rejecting his version as not reasonably possibly true and as such false cannot also be faulted showing that there is likewise overwhelming evidence proving his guilt beyond a reasonable doubt entailing that second appellant was correctly convicted.

AD SENTENCE

[22] It was submitted on behalf of both appellants that the court *a quo* erred or misdirected itself by not taking the convictions on count 1 and count 2 as one for purposes of sentence on the basis that both offences were committed in one day and formed part of essentially one transaction with the attendant consequences that the magistrate ought to have ordered the sentences on both counts to run concurrently. In my view there is no merit in such submission particularly having regard to the fact that the question of sentence is a matter of discretion of the sentencing court nor is it an absolute rule or principle that in situations or instances of this nature the sentencing court is

enjoined to treat such offences as one for purposes of sentence. The sentencing court retains and is vested with a discretion in determining what sentences to impose in such instances. Both counsel for appellants were unable to indicate any misdirection on the part of the court *a quo* in imposing the sentences on the appellants in respect of their convictions on the respective counts as outlined above. In the absence of any misdirection on the part of the court *a quo* in so imposing the sentences on the appellants, there is no justification in law in interfering with the sentences imposed upon the appellants by the court *a quo* as so outlined above.

[23] In the light of the foregoing and in the absence of any misdirection on the part of the court *a quo* in respect of the merits i.e. convictions as well as the sentences so imposed by the court *a quo* on the appellants as so outlined above, the appeal of the appellants against both conviction and sentences must in the circumstances fail.

THE NON-PAROLE ORDER

[24] The court *a quo* without inviting the defence or the State fixed a non-parole period of 10 years in respect of both appellants. This entailed that the court *a quo* ordered the appellants to serve 10 years of the custodial term of their respective imprisonment, which in respect of first appellant is 20 years imprisonment and in respect of second appellant is 18 years imprisonment before both appellants are eligible for parole. The trial court misdirected itself by not inviting oral argument on behalf of both the State and defence prior to

imposing a non-parole period more particularly in that the imposition or fixing of such an order has a drastic impact on the sentence to be served by convicted accused. In so fixing a non-parole period of 10 years in respect of both appellants the court *a quo* misdirected itself.¹ Accordingly the non-parole orders so fixed by the court *a quo* in respect of both appellants, is in the circumstances inappropriate and stands to be set aside.

CONCLUSION

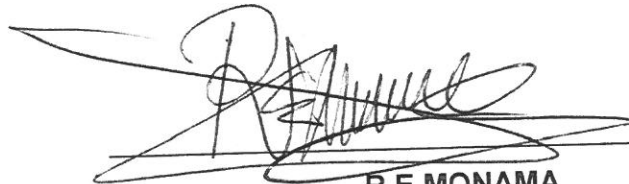
[25] In the result I make the following order:

1. The appeals of the first and second appellants in respect of conviction and sentence are dismissed.
2. The non-parole orders fixing non-parole periods of 10 years in respect of the appellants are set aside.



S J R MOGAGABE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree:



R E MONAMA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

¹ *S v Jimmale* 2016 (2) SACR 691 (CC) paras [20]-[24].

APPEARANCES

For the First Appellant

Mr L R Kotze

For the Second Appellant

Adv R Xaba

Instructed by

Legal Aid South Africa
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For the Respondent

Adv E Du Plooy

Instructed by

The Director of Public Prosecutions
Johannesburg

Date of Hearing

9 February 2017

*Date of Judgment

21February 2017