IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A183/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3)

20/6/19
DATE

SC Mia

In the matter between:

TOONA, ALFRED	**APPELLANT 1**
TSHABALALA, MKHULU	**APPELLANT 2**
and	
THE STATE	**RESPONDENT**

JUDGMENT

MIA, AJ:

[1] The appellants (then accused one and three respectively) were on 30 June 2008 convicted of robbery with aggravating circumstances in the Regional Court, Soweto. The trial had proceeded in the absence of the second accused in terms of section 159(2) (b) of the Criminal Procedure Act 51 of 1977. The appellants were each sentenced to nine years imprisonment. The appellants approach this Court on appeal against conviction and sentence with leave of the Trial Court.

[2] On 14 December 2006 the complainants were at the first appellant's home. One of the complainant's, Mr Maleka Machaka (Machaka) had purchased the house on auction and wanted to view the property. Machaka, Mr Wilson Tshabalala (Tshabalala) and a lady named Thuli Mbatha (Thuli) went to inspect the premises. They at first could not access the property and went to a nearby mall where they bought food and waited to access the premises. Tshabalala withdrew R20 000 for an auction the following day. The R20 000 was kept in two envelopes. Machaka deposited a cheque for R70 000. They returned to the premises in the late afternoon and found the first appellant's wife at home. She called the first appellant who instructed them to wait for him at the premises. A while later the first appellant arrived accompanied by the second appellant and a third person and asked everyone to step outside whilst he spoke to Machaka. Thuli stepped outside at that stage. Tshabalala refused to leave.

[3] Machaka's evidence was that the three persons were fighting with them without asking any questions. They were assaulted with fists and they had firearms pointed at them. The first appellant asked him why they bought houses on auction. He then searched Tshabalala and found the two envelopes each with R10 000 in cash and Tshabalala's identity document and bank card. The first appellant kept the money, the bank card and the identity document. Machaka was pushed outside but testified that he pushed to remain inside the house as he did not want Tshabalala to "die alone". Machaka was of the view the first

appellant would harm Tshabalala. During this struggle to remain in the house between Machaka and the appellants, Tshabalala saw the opportunity to escape and ran away. Machaka followed behind Tshabalala.

[4] The two complainants fled and on the way to the police station came across a police vehicle. They explained to the police officer that they had been assaulted and robbed. Whilst speaking to the police officer, Inspector Sylvester Khumalo (Khumalo), the appellants arrived. The police officer escorted the complainants to Protea police station and instructed the appellants to follow them to the police station as he saw the appellants were aggressive and in a "fighting mood"[1]. Upon arrival at the police station they were informed to take their complaint to Moroka police station, because one of the persons in the group among appellants was an ex- police officer.

[5] The complainants went to Moroka police station immediately and laid a charge of robbery. They were escorted by the police to the first appellant's home to recover the money and identity document of Tshabalala. Upon arrival, the first appellant was asleep. He was requested to return the money and identity document but he refused. Eventually the wife of the first appellant returned the identity document of Tshabalala to the police officer. The police officers experienced resistance from the appellant that evening.

[6] The evidence of Machaka indicated further that the matter was poorly handled and investigated after an intervention by the Independent Complaints Directorate. He testified that his statements' were taken down incorrectly and cancelled despite him raising concern about the veracity of the statements. His concerns were dismissed by the police officer who said the discrepancies pointed out by

[1] Record P43 Line 24

him were not relevant. One of the discrepancies he pointed out was that he was not in possession of the R20 000.00 but that Tshabalala was. This was dismissed by the police officer taking the statement.

[7] The first appellant's version was that his wife called to inform him that there were people looking for him and it concerned his home. He returned home and was informed his house had been sold on auction and purchased by Machaka. He requested Tshabalala and Thuli to leave. Thuli left whilst Tshabalala remained behind with Machaka. The first appellant testified that Tshabalala informed him he worked for Nedbank and was required to be present. He requested proof which Tshabalala did not have and only produced his identity book. He took it to write down the identity number. Whilst writing down the number Tshabalala pulled Machaka to leave the house. They ran away and stopped a police vehicle 200 meters from the house.

[8] They were on either side of the police vehicle when the police officer instructed them to proceed to the police station to discuss the matter further at the police station. The first appellant admitted he was in possession of Tshabalala's identity document when they arrived at Protea police station and stated that the complainants then accused them of robbing them of R 20 000.00. They were referred to Moroka Police station but as the vehicle they were using needed to be returned they only went to Moroka police station the following morning. He denied that they assaulted the complainants or wielded firearms. He explained that the reason one of the complainants was not wearing a top was because they were pulling their tops as they exited the house[2]. He explained the top must have come off as they pulled at each other. The first appellant testified that they did

[2] Record P63 Line 20-22 and P64 Line 1-2

not have firearms but they would have shot them when they were running and in the same breath stated that there was no reason to shoot them.[3]

[9] The second appellant also testified that Machaka and Tshabalala were in the house when the first appellant asked them to leave. Tshabalala refused to leave because he said he was a Nedbank employee. A noise ensued and Tshabalala pulled Machaka whilst Machaka refused to leave. According to the second appellant Tshabalala collided with the fridge. Tshabalala continued pulling Machaka and they pulled each other. After they pulled each other Tshabalala gave the first appellant his identity document. They ran out and the appellants followed them as they were confused. When they encountered a police vehicle that Machaka and Tshabalala had stopped, the police officer instructed them to follow him to Protea police station which they did. He denied robbing or assaulting the complainants. He denied owning a firearm or using one on the day. He explained he was not permitted to use a firearm according to a family tradition.

[10] The first appellant's wife was also present and testified that she observed Machaka and Tshabalala pulling each other when Tshabalala wanted to leave and Machaka wanted to remain to speak. Tshabalala pulled Machaka out and they both left. She did not see anyone assaulted or see any firearm. She also did not see Tshabalala bump into the fridge and was not aware of anything that could have caused injuries to Machaka or Tshabalala. She testified that she observed Tshabalala exiting but he did not collide with the fridge when he exited. She testified that Tshabalala appeared to be aggressive when he left but she did not know why. She was not aware that he did not have a top on when he exited.

[3] Record P69 Lines 6-8

AD CONVICTION

[11] Mr Tlake, appearing for the appellant, submitted that the trial court erred in finding the robbery had taken place as testified by the complainants as the evidence of Machaka was that the first appellant took the envelopes from Tshabalala, however his statement to the police reflects that the first appellant took the envelopes from him and not Tshabalala. Further he submitted that no evidence was presented to the trial court to show that an amount of R20 000 was in fact drawn on the day in question. Whilst Tshabalala allegedly presented proof to the investigating officer, this same evidence was never presented to the trial court. He conceded however that the evidence indicated that the identity document was found in the possession of the first appellant.

[12] Mr Tlake argued that the State was required to prove its case beyond a reasonable doubt (see *S v Van Der Meyden* 1990 (1) SACR 447 (W); *S v Jackson* 1998(1) SACR 470 (SCA)). In view of the above he submitted that the State had not proved the appellants were in possession of the R20 000.00 the complainants testified was taken from them and the State had not proved its case beyond a reasonable doubt in this regard. He submitted further, that it was improbable that the appellants would follow the complainants after robbing them and further that that no money was found at the residence of the first appellant. In view hereof he argued the appellants were entitled to an acquittal if their version was reasonably possibly true.

[13] He stood by his heads of argument wherein he relied on *S v Sithole* 1999(1) SACR 585 (W) where the court held "an accused person is entitled to an acquittal if there is a reasonable possibility that an innocent explanation which he proferred might be true". He submitted that he stood by his submissions and relied on *S v Jaffer* 1988 (2) SAA 84 CPD at 89d-e for the submission that the appellant's version need not be true and that " the court does not need to believe

his story; still less believe its details. It is sufficient if he thinks there is a reasonable possibility that it might be true"

[14] He relied also on *S v Shackell* 2001(2) SACR 185 (SCA) at 194 g-i where the court held:

> "a court does not have to be convinced that every detail of an accused's version it true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

He also relied on *S v V* 2000 (1) SACR 453 (SCA) at 455 par [3] where the court stated that "whether one subjectively believes him is not the test. As pointed out in many judgments of this court the test is whether there is a reasonable possibility that the accused's version may be true"

[15] Ms Van Heerden, submitted on behalf of the State regarding the conviction, that the state witnesses' evidence were coherent and logical. Their evidence contained no improbabilities. The state witnesses corroborated each other on all material aspects. In contrast the appellants' evidence indicated that Tshabalala willingly handed over his identity book which was not likely. She submitted that it was also unlikely that the complainants would run away without reason. It was also inexplicable that one of the complainants was not wearing a top and the explanation that it was torn when the other complainant pulled him away did not make sense. Ms Van Heerden argued further that the appellant ought to have been focused on Machaka who purchased the property not Tshabalala. That they (appellants) were attacking the complainants is consistent with the evidence that they pursued and followed them after the complainants escaped. They would

not have known the complainants were going to the police station hence the pursuit.

[16] Ms Van Heerden submitted that the first and second appellant's evidence provided support for the evidence of the state witnesses that the appellants were angry. According to first appellant he was angry and spoke in a loud voice[4]. The first appellant also testified that he would have shot the complainant.[5] The first appellant also testified that the complainant thought that once he wrote the identity number down the first appellant would "further assault him"[6]. This corroborated Machaka and Tshabalala's version of an assault and attack. In addition Thuli's evidence indicated that a firearm was present.

[17] In contrast to the state's witnesses evidence which was consistent, Ms Van Heerden pointed out various contradictions in the defence version. They included that first appellant testified that Machaka was pulled away by Tshabalala, when he was resisting leaving the house whilst the defence witness Muti Malefa (Malefa) testified that they both "exited the house nicely pulling each other".[7] The second appellant testified that Tshabalala collided with the fridge whilst Malefa did not see Tshabalala colliding with the fridge as they exited nicely.[8]

[18] She pointed out that the complainants encountered problems with the investigation as testified by Machaka who sought to correct the statement when it was read back to him. The police officers dismissed his attempts and told him it was insignificant. He specifically corrected the issue of the possession of the R20 000.00 and this was dismissed. He had to engage the assistance of the

[4] Record p 67 Lines 15-19
[5] Record p 69 Lines 6 - 8
[6] Record P 68 Lines 1-3
[7] Record P69 lines 2-4, P 73 Line 3-5, P 83 Line 19,
[8] Record P76 Lines 8-9, P83 Line12

Independent Complaints Directorate (now IPID) for assistance to ensure the matter was dealt with properly. Notwithstanding the intervention, the statement which conflicted with Machaka's evidence was not removed despite him clarifying the position. The complainants experienced problems with police officers taking down their statements incorrectly, resulting in the statement made by Machaka to the police officer "that is not what I told you"[9]

[19] Ms Van Heerden argued that no value could be placed on the submission that the money was not found on the premises as the premises were not searched on the day in question when the police returned to the premises and there was a lack of co-operation by the police officers. The evidence was clear that the money was withdrawn and that it had been taken by the first appellant assisted by the second appellant and the third person. In view hereof she argued that the appeal against conviction be dismissed.

[20] There are well established principles which regulate the appeal court's consideration of findings of the trial court. In the absence of a clear and material misdirection, the findings are presumed to be correct. (See *S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426 f-h). It is also accepted that the appellants are entitled to an acquittal if their version appears to be reasonably possibly true. This is so even where the court is not convinced of the detail of their version.

[21] When it comes to the factual findings of the trial court, the proper approach is that a court of appeal will not disturb the factual finding of a trial court unless the latter committed a misdirection. The decision of the trial court will only be overturned where the appeal court is convinced that it is wrong. Where there is no doubt as to the correctness of the conclusion of the trial court, the decision

[9] Record P47 Lines 19-25, P48 Line 1

will be upheld. (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA); *Director of Public Prosecutions v S* 2000 (2) SA 711 (T) and *Minister of Safety and Security and Others v Craig and Others NNO* 2011 (1) SACR 469 (SCA)).

[22] I have considered the reasoning of the trial court by perusing the record and reasons of the trial court. The trial court found that Machaka and Tshabalala's evidence was consistent and there were no discrepancies. In addition to being consistent it contained no glaring improbabilities. The court found that Inspector Khumalo found the complainants in a state of shock and Tshabalala without a top. Despite there being no attempt to recover the money immediately he nevertheless found the complainants had been robbed. In view of the aggression noted by Inspector Khumalo among the appellants it is understandable that he was not in a position to single handedly confront the appellants or to search for the money. He appears to have wanted his colleagues at Protea police station to assist and to confront the appellants and to demand to search for the money immediately. When they arrived at Protea police station they were directed to Moroka police station. Once more a delay which resulted in the trial court finding the complainants had not been properly assisted at Protea police station in view of the missing accused being an ex-colleague at Protea police station.

[23] The trial court also found that the appellants' version was improbable in view of the contradictions present and thus rejected it. The trial court accepted that the first appellant was angry that his house was sold and followed the complainants "to sort them out" and that they were threatening complainants with firearms. In view of the contradictions with regard to the manner in which Tshabalala and Machaka exited and the contradiction between Malefa and second appellant regarding Tshabalala wearing a top or not, in the appellants version, the trial court correctly rejected their version. I can find no misdirection and am satisfied that the trial court found that the credibility of the state witnesses withstood

rigorous cross examination. Further that the appellants' version was improbable and contained contradictions so that it was correctly rejected it.

[24] Having regard to the totality of the evidence and the reasons for the conviction, I am not persuaded that the trial court erred as argued by Mr Tlake and I cannot find any reason to fault the decision of the trial court. In my view and for the reasons advanced above, the appellants were correctly convicted of robbery with aggravating circumstances.

AD SENTENCE

[25] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (CLAA) provides that a maximum term of imprisonment that a Regional Court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than 5 years. Part 2 of schedule 2 in the case of a first offender provides for a period of not less than 15 years imprisonment whilst a second offender of such offence may be sentenced to a period not less than 20 years imprisonment. Part 2 of schedule 2 refers to "Robbery-

a) when there are aggravating circumstances: or

b) involving taking of a motor vehicle"

[26] In the present matter a firearm was used. The prescribed sentence for robbery where there are aggravating circumstances in the case of a first offender is imprisonment for a period of fifteen years. The trial court deviated from the prescribed sentence and found that there were substantial and compelling factors which justified a deviation from the prescribed minimum sentence in that the appellants were not aware of the money carried by Tshabalala and therefore could not have planned the robbery. The court thus reduced the sentence. The

appellants acknowledge this concession and argue that the sentence can be reduced further.

[27] The only case law relied on is *S v Malgas* 2001(1) SACR 469 (SCA) which looks at traditional factors to find substantial and compelling factors and *S v Blignaut* 2008(1) SACR 78 (SCA) which held that factors need not be exceptional to be substantial and compelling. Mr Tlake does not submit how and which factors ought to be taken into account to justify a further reduction in sentence and to enable us to determine whether the trial court exercised its discretion properly as stated in *S v EN* 2014 (1) SACR 198 (SCA) at para 14 where the Court per Shongwe JA stated:

> "Sentencing is the most difficult stage of a criminal trial, in my view. Courts should take care to elicit the necessary information to put them in a position to exercise their discretion properly"

[28] Whilst acknowledging that the trial court deviated from the prescribed minimum sentence triggered by the provisions of section 51(2) of the CLAA, he submitted nonetheless that a further reduction was appropriate but did not make the submission that the sentence was shocking or induced a sense of shock.

[29] Ms Van Heerden submitted that trial court considered the relevant legislation applicable and found factors surrounding the commission of the crime relevant to be substantial and compelling which justified a lesser sentence. This was an appropriate sentence and did not warrant interference as there was no misdirection or irregularity committed by the trial court.

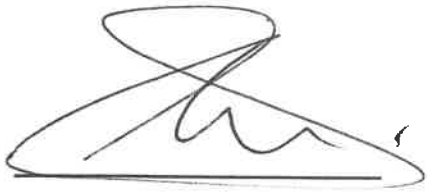
[30] In *S v Rabie* 1975 (4) SA 855 (A) at 857 the Court set out the following guiding principles with regard to interference with a sentence on appeal:

> "1.In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –
> (a) should be guided by the principle that punishment is
> "pre-eminently a matter for the discretion of the trial Court";
> and
> (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".
>
> (2) The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[31] We are enjoined to interfere with the sentence only where there has been a misdirection in respect of the sentence. The minimum sentence was applicable in terms of the CLAA. The trial court considered the specific facts of the matter and found substantial and compelling factors applicable in the matter based on the robbery not being premeditated. The money has not been recovered to date and the complainant is still out of pocket as he pays rates for a property he owns and cannot access. In weighing all the factors, the trial court suitably adjusted the sentence and reduced it appropriately. I am unable to find that a lesser sentence is warranted under the circumstances.

[32] In the circumstances, I propose that the following order be made:

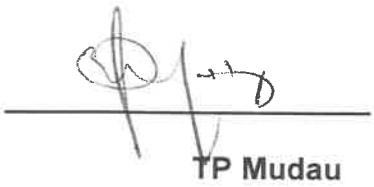
1. The appeal against conviction be dismissed.
2. The appeal against sentence be dismissed.



S C Mia

Acting Judge of the High Court, Johannesburg

I disagree/ agree and it is so ordered.



TP Mudau

Judge of the High Court, Johannesburg

Appearances:

On behalf of the appellant	:	Adv E Tlake (011 8701480)
Instructed by	:	Johannesburg Justice Centre
On behalf of the respondent	:	Adv M Van Heerden(011 220 0924)
Instructed by	:	DPP
Date of hearing	:	13 June 2019
Date of judgment	:	20 June 2019