IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

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GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: A60/2018

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: 07/02/19 Signature:

In the matter between:-

DUBE THEMBINKOSI Appellant

and

THE STATE Respondent

JUDGMENT

MATSEMELA AJ

[1] The Appellant appeared in the Wynberg Regional Court facing two counts of robbery with aggravating circumstances and was convicted on both counts. He was sentenced to 15 (fifteen) years direct imprisonment on count 1 and 10 (ten) years imprisonment on count 2.

[2] This appeal is with the leave of this Court and is against both conviction and sentence.

Evidence by the State

[3] It appears from the record that on the 3rd of April 2008 the complainant, Suzanne Moatshe, hereinafter referred to as the 1st complainant, disembarked from a taxi and was walking at Vorna Valley Bel Air Complex, Langeveld Street, Midrand. She came across 3 males. One of these males then proceeded to rob her at gunpoint and forcefully taking her Nokia E65 cellular phone and R7000.00 (seven thousand rand). The other two ensured that she does not escape by guarding her. The ordeal lasted for approximately a minute or two. She had a good look at the man who was robbing her with a gun and there could be no possibility of mistaking him. There was good visibility.

[4] She saw her assailants the following day and within the same vicinity she had been robbed. They were still wearing the same clothes. They were still robbing people and carrying on their

criminal enterprise. She was able to recognize accused 2 by the shape of his legs which were buckled.

[5] The police then brought accused 2 at the complex for her to identify. She was informed that the two other assailants have run away. Accused 2 was wearing All Star style Tekkies. She did not attend the identity parade.

[6] Babalwa Twantwa, hereinafter referred to as the 2nd complainant testified that on 04 April 2008 while walking with a friend at or near Bel Air Complex, Langeveld Street, Vorna Valley at around 18:00 they saw three unknown males robbing a couple that was walking in front of them. She then alerted her friend, Xolani, who then crossed over to the other side of the road as these men then approached them. Then accused 1 approached her with a gun she was ordered to the side. Accused 2 ordered her not to make noise because they can shoot her. Accused 2 searched her and took her laptop computer.

[7] She attended the identity parade at the police station. She identified accused 2 and 3. She testified that she was not entirely sure about accused 3

[8] Inspector, Joseph Ramaula, who is stationed in Midrand, testified that he was the investigating officer in this case. He testified that on 11 April 2008 he was present when Appellant was arrested at Langeveld Street, Vorna Valley. The following day the Appellant intimated that he wanted to point out his co-perpetrators. He arranged for a pointing out. He was accompanied and assisted by Inspector Molapo and Captain Monale to the place of residence of Accused 3 in Hillbrow. When Accused 3 saw the police he tried to flee but was apprehended. They then proceeded to Accused 2's

place of residence where Accused 2 was found hiding on the rooftop on top of a geyser.

[9] The Appellant testified in his defence that, on the day he was arrested he was on his way to work. He was in a taxi. When he disembarks from the taxi he saw a white VW Golf which stopped nearby. The police came, searched and apprehended him. They took him to the townhouses and called for some residents at that place. The police asked one of the people who stayed there as to whether he was the one who robbed them. One woman said he almost looked like the person who robbed her. This woman said this because he the accused is light in complexion as the person that robbed her.

[10] It is trite that, the onus is on the prosecution to prove the commission of the offence beyond reasonable doubt, no more no less.

[11] In the case of **S v Jackson 1998 (1) SACR 470 (SCA) at 476** the court stated as follows:

"Burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

[12] In the case of **S v Ntsele 1998 (2) SACR 178 (SCA)** Eksteen AJA (as then he was) stated the following:

"Prove guilt beyond reasonable doubt – not beyond a shadow of doubt – if only remote possibility in his favour which can be dismissed with the

sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt."

[13] In the case of **Shackell v S 2001 (4) ALL SA 279 (SCA)** Brand AJA (as then he was) stated the following:

"A Court does not have to be convinced that every detail of an accused's version is 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."

[14] It was argued on behalf of the Appellant that both complainants are single witnesses in so far as their incidents of robberies is concerned. It is further contended that the cautionary rule applies in assessing the evidence of a single witness. It does not appear from the record that the court *a quo* cautioned itself when assessing the evidence of the single witnesses. The testimony of both complainants was not corroborated.

[15] I do not agree with this contention. Section 208 of the **Criminal Procedure Act 51 of 1977** as amended stipulates that an accused person may be convicted on the evidence of a single witness. Further, it is not for the magistrate to state on record he is now applying the cautionary rule. He is expected always to be alive to that fact. Nothing in the record shows that he was not alive to that fact.

[16] In **R V Mokoena 1956 (3) SA 81** (A) De Villiers JP said that the evidence of such a single witness must be found to be clear and satisfactory in all material respect. The cautionary rule in the case of evidence by a single witness is aimed at overcoming the danger of an accused being wrongly convicted.

[17] As stated above the court can convict on the evidence of a single witness if it is clear and unambiguous. The evidence should be satisfactory in all material respect. In my view the evidence of both complainants viewed in totality of the whole case cannot be faulted. Their evidence cannot be criticized in any manner.

[18] It was argued on behalf of the appellant that his identity was suggested to the complainant. She was given the Appellant on the silver platter because he was brought to her at the complex for identification. I do not agree with this contention.

[19] In the case of **S V Mthethwa 1972 (3) SA 766** it was said

"because of the fallibility of human observation, evidence of identification is approached with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors such lighting, visibility, and eyesight; the proximity of the witnesses, his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused.....These factors, or some of them are applicable in particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence and the probabilities.

[20] The evidence of Ms Moatshe is clear. She had ample time to look at the Appellant. She saw the Appellant when they were robbing her. She saw the Appellant and his cohorts again the following day at the same place, wearing the same clothes when they continued to rob other people. She further saw the Appellant when he was brought to her complex for identification. Clearly this cannot be an issue of mistaken identity.

[21] The evidence of Ms Twantwa is that she saw the Appellant on the day she was robbed and went to point him out at the identity parade. She was robbed at same place where Ms Moatshe was robbed. I am of the view that this cannot be construed as mere coincident.

[22] It was further argued that Ms Twantwa made a mistake in court when she said it was Accused 1 who was arrested afterwards and not Accused 2. The learned Magistrate correctly found that this mistake was immaterial.

[23] Looking at the evidence in totality, I have no doubt in my mind that the state has proved the guilty of the appellant beyond reasonable doubt and that the court a quo correctly found the Appellant guilty on both counts.

AD SENTENCE

[24] It is trite that sentencing is the prerogative of the trial court. The appeal court will only interfere with the sentence if it is shockingly inappropriate It is trite law that the court when sentencing the accused must take into account the triad. See **Sv Zinn 1969** (2) SA 573 A-541 B

The personal circumstances

[25] The personal circumstances of the Appellant were that he was 20 years of age, unmarried and had no children. He did not go far in

school and was employed at a car wash earning R40 per car. He was a first offender.

[26] The appellant was convicted of a very serious offence for which the Legislature has deem fit to promulgate a minimum sentence, unless there are substantial and compelling circumstances which enjoyed the court to deviate therefrom.

[27] The complainants were both women who were attacked on their way from work to their homes. The appellant chose the vulnerable members of the society and robbed them their hard earned belongings. Women should feel safe walking on the streets at any time of the day. The society expect courts to impose heavier sentences to restore and maintain safe living conditions.

[27] In **S v Chapman 1977 (2) SACR 3 SCA** the following was said

> "Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peaceful on the streets, to enjoy their shopping and their entertainment, to go and come back from work and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and the enjoyment of their lives"

Cumulative effect

[29] It is trite that when dealing with multiple charges the cumulative effect of sentences must be considered

[30] In **S v Young 1977 (1) SACR 369** SCA it was held

"Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused".

[31] The court a quo could have sentenced the Appellant to 15 years direct imprisonment on both counts. However, on the second count the appellant was sentenced to 10 years direct imprisonment and both sentences are to run concurrently.

[32] The record shows that the learned magistrate did take into account the cumulative effect of the sentences and the fact the appellant was to spend a considerable amount of time incarcerated. I am therefore satisfied that the court a quo did find that there are substantial and compelling circumstances in this case which enjoined it to deviate from imposing the prescribed minimum sentence. I am of the view therefore that the sentence imposed by the court a quo is not startlingly inappropriate and does not induce any sense of shock.

I therefore make the following order:

The appeal against both conviction and sentence is dismissed.

MATSEMELA AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

I agree

It is so ordered

TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

DATE OF HEARING	**: 11 OCTOBER 2018**
DATE OF JUDGEMENT	**: 7 FEBRUARY 2019**
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