REPUBLIC OF SOUTH AFRICA

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

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

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CASE NO: A65/2016

In the matter between:

MAKHALIMA, NQOBANI	Appellant 1
KHUMALO, BONGANI	Appellant 2
And	
THE STATE	Respondent

JUDGMENT

MIA, J

[1] The appellants appeared in the Regional Court Johannesburg on 5 May 2015. Appellant one, Mr Makhalima and appellant two Mr

Khumalo, were convicted of robbery with aggravating circumstances, read with section 51 (2) of the Criminal Law Amendment Act 105 of 1997(CLAA). Mr Khumalo was further found guilty of possession of a prohibited firearm and possession of ammunition. Both appellants' were acquitted of the fourth charge of being in possession of suspected stolen property. Both appellants were sentenced to 13 years imprisonment on count 1. Mr Makhalima was acquitted on count 2 and 3. Mr Khumalo was convicted on counts 2 and 3 which were taken together for the purposes of sentence. Mr Khumalo was sentenced to a further 5 years imprisonment, and thus a total of 18 years' imprisonment. The court *a quo* did not order the sentence on count 2 and 3 should run concurrently with the sentence on count 1 in respect of Mr Khumalo. The appeal is before this court with leave of the court *a quo* in respect of the conviction for both Mr Makhalima and Mr Khumalo and in respect of the sentence for Mr Khumalo.

[2] On 2 April 2014 the complainant was driving a Toyota Avanza taxi near Ivory Park. At around 17h50 that evening he picked up four passengers near Phoenix station who wanted to be dropped off at Freedom Drive. When they arrived he heard someone behind him cock a firearm. The person tried to grab his hand. He managed to open the door and ran away. They drove off in his vehicle with his identity document, his wallet, his cell-phone and some cash. He went to Rabie Ridge police station and called Car Track, the tracking company that tracked his vehicle. He testified that he recognised Mr Makhalima as he was the person seated in the front seat next to him. He recalled that he had dreadlocks at the time of the robbery even though his hair was cut short during the trial. His wallet and his identification book were returned however the sound system and an amount of R1200 in cash were taken from the vehicle.

[3] Mr Mogale and Mr Davids, employees of Car Track, were on duty on 2 April 2014. At 19h30 they received a call to look for a hijacked vehicle, a Toyota Avanza, with registration number […] GP. The picked up a

signal for the vehicle and followed the signal towards the N1 and ended up in Yeoville. At 20h45 they found the vehicle in Rockey Street, Yeoville. It was parked in the road. Mr Khumalo was sitting in the back seat and Mr Makhalima was outside of the vehicle. Mr Makhalima opened the driver's door and got in behind the steering wheel.

[4] When Mr Makhalima saw the Car Track employees approach the vehicle he jumped to the back seat and both men exited the vehicle through the rear doors. Mr. Davids apprehended Mr Makhalima who had dreadlocks at the time. Mr. Mogale apprehended Mr Khumalo. Both the appellants were apprehended approximately 3 m from the vehicle. According to the Mr Mogale, Mr Khumalo removed a firearm from the front of his pants and threw it on the ground. Mr Mogale and Mr Davids left the firearm on the ground and called the police. When the police arrived the witnesses handed the scene over to the police. The police recovered cell-phones, hair clippers and other items inside the vehicle. The police also found the car keys on the ground next to the appellants. The appellants denied that either of them was found inside the vehicle.

[5] The appellants' version was that they had nothing to do with this vehicle. They were going to Super Bets to place a bet that evening. They met at Nandos and proceeded to a shop to buy air time. They were in the process of walking back from Nandos when the Mr Makhalima stopped next to the vehicle to load the airtime onto his cellphone. Mr Mogale and Mr Davids ordered them to lie down whilst pointing firearms at them. They testified they were apprehended for no reason whatsoever. They also deny that Mr Khumalo was in possession of a firearm. Warrant Officer Mashilo testified that the firearm was a 7.65 mm Walter semi-automatic pistol and was loaded with 4 rounds of ammunition and the identifying markings on the firearm had been obliterated.

[6] The first issue before this court is whether the court *a quo* correctly convicted the appellants where the identification of the appellants in the robbery is in dispute, bearing in mind that the complainant was a single witness to the robbery. The vehicle was recovered by Car Tracker recovery agents in Rockey Street Yeoville, a considerable distance from where the robbery occurred in Freedom Drive. The appellants' dispute being in the vehicle when the tracker recovery agents arrived. They also deny being in possession of a firearm and the complainant's identity document and wallet, which were found in the vehicle.

[7] The second issue is whether the sentence imposed is disproportionate to the crimes which Mr Khumalo was convicted of. Mr Makhalima did not pursue an appeal with regard to sentence.

AD CONVICTION

[8] Mr Miller appearing for the appellants argued that the identification by the complainant, Mr Farisani, was not reliable as it was dark and Mr Farisani was a single witness. He argued that there was no physical evidence linking the appellants to the robbery. This he submitted must be compared with the appellant's version that they were not inside the vehicle found in Rockey Street. He maintained that their version was reasonably possibly true. He also argued that the identity document and wallet found in the vehicle were left behind by the robbers.

[9] Mr Miller submitted the court should be cautious about the reliability of identification evidence of a single witness in these circumstances and referred to the case of *R v Mputing* 1960(1) SA 785(T) where Boschoff J pointed out that where there was uncertainty regarding identification an identification parade should be held. He also relied on the decision of *R v Shekele* 1953 (1) SA 636 (T) at 638 where Dowling J indicated that where identification is to be proved the witness must answer questions about identifying features and marks as well as questions relating to the person's build, complexion, height and clothing worn to ensure that identification is accurate. Mr Miller also referred to *S v*

Mthetwa 1972(3) SA 766 (A) at 768 where the Court indicated that the reliability of the witnesses observation must be taken into account bearing in mind various factors.

[10] He continued that in view of the complainant only identifying the appellants in the dock, the view of the court per Blieden J in *S v Maradu* 1994(2) SACR 410 (W) was applicable as it was not dissimilar to a leading question in examination in chief as it suggests the answer desired and therefore should be inadmissible. He argued consequently that the evidence of identification of the appellants in the dock should be inadmissible. Further, he continued, the role of the second appellant was not clear. The evidence before the court *a quo* was contradictory regarding the firearm as the tracking agents testified it was inside Mr Khumalo's tracksuit pants whilst the police officer found it on the ground when they arrived. On considering the evidence he submitted that the appellants must be given the benefit of the doubt and be acquitted.

[11] Mr. Mpekana appearing for the State, conceded that the complainant was a single witness and his evidence was to be treated with caution. He submitted however that the court *a quo* did just that. He contended that whilst identification was raised in dispute, this issue was clarified when Mr Farisani, the complainant, recognised Mr Makhalima who had dreadlocks during the robbery when he appeared without his dreadlocks in court. This identification he submitted was possible because Mr Farisani had an opportunity to look at Mr Makhalima when the vehicle's cabin light was switched on when Mr Farisani collected money from Mr Makhalima. Mr Makhalima sat next to him for twenty five minutes during the trip. This afforded him sufficient opportunity to observe Mr Makhalima's features and to notice the dreadlocks.

[12] He submitted further that Mr Farisani's evidence of identification did not stand alone. It was corroborated by the tracker agent, Mr Mogale who

confirmed that Mr Makhalima was seated in the front seat of the vehicle when they approached. He confirmed that Mr Makhalima had dreadlocks at the time they arrested the two appellants. Whilst no identification parade was held both witnesses identified Mr Makhalima independently of each other and recalled that he had dreadlocks at the time of the robbery which had since been cut.

[13] He submitted further that the appellants' version that they were on the street loading airtime in the dark in a dangerous area was correctly rejected by the court *a quo*. Further their version was riddled with contradictions in that they testified they were going to place bets at Super Bets but were not moving in that direction. They stopped to purchase airtime but did not load it in the store where there was sufficient lighting but stopped coincidentally next to the stolen vehicle in a dangerous area. A further inconsistency in their version was that they alleged being assaulted but did not put that version to the state witnesses. Their version regarding the time they were arrested by the police is earlier than the time the tracker report was received regarding the call for assistance. In view of these inconsistencies, Mr Mpekana submitted that the court *a quo* was correct in rejecting their version.

[14] In *S v Mthetwa* [1972] 3 SA All SA 568 A at 570 the Court stated:

> "…evidence of identification is approached by the Courts 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 as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation both as to time and situation, the extent of his prior knowledge of the accused; the mobility of the scene, corroboration, suggestibility, the accused's face, voice build, gait and dress and the result of the identification parades, if any; of course the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them are applicable in a 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."

[15] In *S v Charzen* [2006] 2 All SA 371 SCA the Court stated the following with regard to identification:

> "But, as our courts have emphasised again and again, in matters of identification, honesty and sincerity and subjective assurance are simple enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance can be "dangerously unreliable", and must be approached with caution. This illustrates the risks"

[16] The court *a quo* took into account that the complainant was a single witness and that even honest witnesses may make mistakes and applied the necessary caution required. It found that the complainant and the tracker agent Mr Mogale both testified that Mr Makhalima had dreadlocks on the night of the robbery which were cut when the trial commenced. Yet both witnesses were clear and consistent in their recognition and pointed to Mr Makhalima as the person who sat next to the complainant and in the driver seat of the vehicle after the complainant fled. The Court noted that the complainant's evidence on its own was not sufficient for a conviction because the complainant despite remembering Mr Makhalima's dreadlocks identified him by his facial features. It however found corroboration in Mr Mogale's and Mr Davids' evidence which the court noted was impressive regarding their tracking of the vehicle's location and their approach to the appellants. Their attempt to escape and to discard the keys and firearm in their possession upon seeing the tracker agents left no doubt with regard to the events which had occurred.

[17] Whilst Mr Miller submitted that the present matter was similar to the facts in *Charzen supra,* I am of the view that the facts are

distinguishable. The Court noted in *Charzen* that the identification of the accused by a single witness by means of his dreadlocks was not the most reliable evidence and there were other aspects of his evidence which were less than satisfactory. In the present matter not only did the trial court take cognisance of this aspect of identification but noted that it did not rely on this alone. Further unlike in *Charzen*, the complainant's evidence was corroborated by Mr Mogale and Mr Davids, the tracker recovery agents who also identified Mr Makhalima as the person who sat in the driver's seat of the vehicle and had dreadlocks when the vehicle was recovered. The complainant's wallet and ID were found in the vehicle however the amount of R1200, the cellphone and the vehicle's radio was missing. The disposable items were removed while the wallet and ID document were left in the vehicle.

[18] In view of the above I can find no misdirection by the court *a quo* with regard to the conviction on count 1 or counts 2 and 3. The inconsistencies which Mr Miller refers to are easily explained by the evidence tendered that the tracker agents observed Mr Khumalo remove the firearm from his track suit pants and place it on the ground which is where the police officers found it upon their arrival. There is no inconsistency or contradiction. The vehicle keys were also found near the appellants. I have had regard to *R v Blom* 1939 AD 188, where the court extracted two rules for drawing inferences, the initial rule being that the inference sought to be drawn must be consistent with all the facts. Having satisfied the first it should follow that the proved facts should be such that they exclude every reasonable inference, save the one sought to be drawn.

[19] In applying the above rules to the present matter the inference is consistent with the facts. The tracker agents tracked the vehicle and found the appellants in the vehicle. Mr Makhalima fits the description provided by the complainant. Mr Khumalo was found in possession of a firearm which he discarded upon being arrested. The only inference

that can be drawn is that they were involved in the robbery earlier that day.

AD SENTENCE

[20] Section 51(2) (a) of the CLAA provides for a sentence as follows in Part II of Schedule 2:

> "… In the case of
>
> (i) A first offender, to imprisonment for a period not less than 15 years;
>
> (ii) A second offender, to imprisonment for a period not less than 20 years;
>
> (iii) A third or subsequent offender of any such offence to imprisonment for a period of not less than 25 years;"

[21] Part II of Schedule 2 refers to robbery of a motor vehicle using a firearm and prescribes a sentence of 15 years imprisonment for a first offender. Where substantial and compelling circumstances are present, the court may deviate from the prescribed sentence. In the present matter the court *a quo* took into account the fact that the appellants spent more than a year awaiting trial, considered this a substantial and compelling circumstance and reduced the sentence to 13 years imprisonment on count one.

[22] Mr Khumalo was convicted of possession of a semi-automatic firearm where the identification markings were obliterated as well as possession of ammunition. The court *a quo* sentenced Mr Khumalo, applying section 51(2) (a) Part II Schedule 2 and expressed that the prescribed sentence was at least 15 years imprisonment. The court noted that in view of the markings have been obliterated the sentence

may be increased to 25 years imprisonment. Once more the court *a quo* found substantial and compelling circumstances in the youth of the offender and that it was Mr Khumalo's first offence. The court *a quo* also took into account that the vehicle was recovered and no physical harm was visited upon the complainant. The appellant had spent almost a year in prison awaiting trial. The court also expressed the view that the firearm found in the Mr. Khumalo's possession could not be linked to the firearm used during the robbery. In view of the firearm and ammunition being in possession together the court took the offences together for the purpose of sentencing and sentenced Mr Khumalo to five years imprisonment.

[23] In *S v Rabie* 1975 (4) SA 855 (A) at 857 the Court set out the guiding principles with regard to interference with a sentence on appeal. Recognising that sentencing is a matter for the trial court and an appeal court should not lightly erode such discretion, unless it has not been "judicially and properly exercised" or the sentence is "vitiated by irregularity or misdirection or is disturbingly inappropriate." In S *v Blignaut* 2008(1) SACR 78 (SCA) the Court held that factors need no be exceptional to be substantial and compelling.

[24] The trial court deviated from the prescribed minimum sentence triggered by the provisions of section 51(2) (a) of the CLAA, however the factors taken into account appear to fall under the usual mitigating factors. Per Blignaut *supra* those factors need not be exceptional to be regarded as substantial and compelling justifying the deviation. Even though Mr Mpeka called for a sentence of twenty five years imprisonment to be imposed, I am not persuaded that there are sufficient facts before the court *a quo* which persuaded it to increase the sentence to the highest possible. So too, am I, unpersuaded that the maximum sentence be imposed because it is possible. Sentencing entails a blending of factors which include retribution, rehabilitation and mercy. Imposing the maximum sentence must justify the circumstances. The trial court did not find aggravating factors apart

from the use of the firearm and to sentence Mr Khumalo to the maximum is not warranted on the charge of possession especially where the sentences were not ordered to run concurrently. Consequently the sentences do not induce a sense of shock. I am unable to find that a greater or lesser sentence is warranted under the circumstances.

[25] In the circumstances, I make the following order.

ORDER

1. The appeal against conviction in respect of both appellants be dismissed.
2. The appeal against sentence in respect of appellant two be dismissed.

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S C MIA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

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U BHOOLA

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv M Miller (acting *pro bono*)
Instructed by	:	Johannesburg Justice Centre advocatemiller@gmail.com
On behalf of the respondent	:	Adv P. T. Mpekana
Instructed by	:	Office of the Director of Public Prosecutions tpmpekana@npa.gov.za
Date of hearing	:	5 May 2020
Date of judgment	:	29 May 2020