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

CASE NUMBER: A143/2019

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

6 March 2020
DATE

SIGNATURE

In the matter between:-

JOOSTE, KINGSLEY Appellant 1

VAUGHAN, DAVIDS Appellant 2

and

THE STATE Respondent

JUDGMENT

FMM SNYMAN (AJ):

Introduction

[1] This is an appeal against the conviction and sentence of both appellants after they were found guilty on 1 February 2018 in the Regional Court on the following charge:

> *"ROBBERY WITH AGGRAVATING CIRCUMSTANCES as intended in section 1 of the Criminal Procedure Act 51 of 1977.*
> *THAT the accused is guilty of the crime of Robbery with aggravating circumstances (read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997*
> *IN THAT upon or about 7 March 2017 and at or near Regional Division of Gauteng the accused did unlawfully and intentionally assault Alwyn Hefkie and did then and with force take the following items from him, to wit wallet and content, cellphone, tools, his property or property in his lawful possession, aggravating circumstances being the wielding of a dangerous weapon and/or the infliction of grievous bodily harm."*

[2] On 1 February 2018 the appellants were convicted as charged and sentenced to 15 years imprisonment each. Both were also declared unfit to possess a firearm in terms of section 103(1) Act 60 of 2000.

[3] In the Court *a quo* the following was common cause:

[3.1] Mr Alwyn Hefkie ("the complainant") was attacked by two perpetrators, stabbed with a screwdriver resulting in two chest wounds, and robbed of his personal property;

[3.2] The attack occurred in the complainants' residence whilst he was alone;

[3.3] After the attack took place, the complainant was left behind injured and locked inside his flat;

[3.3] Both the appellants are well known to the complainant;

[3.4] The complainant is also well known to both the appellants;

[3.5] At the time of the assault, the appellants and complainant resided in the same block of flats. Appellant 1 lived on the 3rd floor, appellant 2 lived on the 5th floor and the complainant lived on the top floor.

[3.6] Both of the appellants are known to each other and they are friends;

[3.7] Appellant 2 sold a screwdriver and other hand tools to the complainant; and

[3.8] The complainant sustained serious injuries in the attack and was hospitalised for 3 days.

The appeal

[4] The basis of the appeal is two-pronged:

[4.1] That the State failed to prove its case against the appellants beyond a reasonable doubt, thus that the State did not acquit the onus in proving the crime; and

[4.2] That the identity of the persons who robbed the complainant, was not established beyond a reasonable doubt.

[5] Should one or both of these grounds be found to be correct, the appellants would be entitled to an acquittal.

First ground: Onus

[6] In relation to the first ground of appeal it was argued by Mr Mavatha on behalf of the appellants that the Court *a quo* was incorrect in rejecting the version of the appellants. It was submitted that the version of the appellants were reasonably possibly true.

[7] The appellants argument in relation to the incorrect application of the onus and with reference to *S v Sackell* 2001 (4) All SA 279 (SCA), is as follows: even in the event that the Court is not convinced that every detail of the appellants' version is the truth, if the appellants' version is reasonably possibly true in substance, the Court should have decided on that version. The matter of *S v Sithole 1999 (1) SACR 585 (W)* was similarly brought to the attention of the Court in relation to the principle that even if there is only a reasonable possibility that an innocent explanation might be true, the appellant would be entitled to an acquittal.

[8] Mr Mavatha further argued on behalf of the appellants that the Court *a quo* was faced with two mutually destructive versions presented by the complainant as opposed to both appellants. This is mainly because both appellants deny being present when the complainant was attacked, and denied having attacked the complainant and robbed him of his belongings.

[9] The version of the complainant was that he was attacked during the day in his flat, where-as the version of Appellant 1 was that he was visiting his girlfriend. In order for the versions to be mutually exclusive, the one version would not have been able to take place in face of the other. On my analysis of the evidence, the complainant could possibly have been attacked by the appellants, only for the appellant to visit his girlfriend before or after the attack. The versions would thus not be mutually exclusive.

[10] It was also argued that the evidence of a single witness should be vetted against the cautionary rule in terms of Section 208 of the Criminal Procedure Act 51 of 1977. This section reads as follows:

> ***"208 Conviction may follow on evidence of single witness***
> *An accused may be convicted of any offence on the single evidence of any competent witness."*

[11] The "cautionary rule" in relation to single witnesses were discussed in the Appeal Court matter of *S v Sauls and Others* 1981 (3) SACR 172 (A) where it was held that:

> *"The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to in R v Mokoena 1932 OPD 79 at 80 may*

be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded". It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

and at 173:

"If a complainant was a single witness the further enquiry is whether she was credible. The evidence of a single witness must be clear and satisfactory in every material aspect."

[12] The Magistrate evaluated the evidence as follows:

"I now proceed to evaluate the evidence. Before coming to the evidence it will be useful to state the basic principles that have a bearing on how evidence should be evaluated. It is trite that a trial court must adopt a holistic approach in evaluating evidence and have due regard to the mosaic of proof in its totality and accord it to all the evidence in the light of all the inherent probabilities of the case. See S v Hadebe & Others 1998 (1) SACR 422 (SCA) at 426 f – h. *One of the fatal challenges and probabilities, I refer to what was said in* S v Shaeker 2001 (4) SA (1) para 13 *it is trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt, and that the mere preponderance of probabilities is not enough. He qualified his observation that in view of the standard of proof in a criminal case 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, then the Court must decide the matter on the acceptance of that version."

[13] The appellant's versions were a bare denial. Appellant 1 informed the court that on 24 March he was at his girlfriend's place.

[14] Appellant 1 testified that he was not working in March 2017 and could recall it clearly as he was helping his girlfriend clean their house. Under cross examination, he testified that his girlfriend cleans her house every day, sweeping and scrubbing of the floors happens every day. His evidence was not convincing on the reason why 24 March 2017 would be memorable as his girlfriend, on his version, cleans her house every day. In cross-examination the appellant testified that he woke up in his own flat, and went over to his girlfriend's flat to help her clean.

[15] It must be noted that the defence did not call the girlfriend of Appellant 1 to testify in support of this alibi, and no reason for the failure to call her was advanced.

[16] Appellant 1 also admitted that he knew the complainant and conceded that he saw the complainant every day. He also admitted that he was friends with the complainant's step-children.

[17] Appellant 2 testified that he knew the complainant very well and used to have dealings with him, alleging that he would buy drugs for the appellant and he had previously sold the appellant some tools. He denied the allegations of assault against the complainant and was not able to provide details of his whereabouts on 24 March 2017.

[18] Both the appellant denied the allegations levelled against them. Both had no idea why the complainant would accuse them of the crimes, and both persisted that they were not involved.

[19] I am satisfied that the Magistrate properly evaluated the evidence, had due regard to the cautionary rule of a single witness and applied the onus of proof beyond reasonable doubt correctly to the evidence. I am satisfied that the State has proven their case beyond reasonable doubt.

[20] This ground of appeal can thus not succeed.

Ground two: Identity

[21] Both appellants denied that the complainant could sufficiently identify them. They persisted with the denial that they were not the perpetrators.

[22] As mentioned above, it was common cause that the appellants and the complainant were known to each other. They lived in the same block of residential flats. Although the two appellants were friends, both the appellants and the complainant knew each other by name.

[23] The complainant was unwavering in his evidence, both evidence in chief and under cross-examination. He testified that *"I am a hundred present sure that I was assaulted by accused 1 and stabbed by accused 2."* The evidence before the Court *a quo* was that the complainant immediately recognised both the appellants, the appellants did not wear any masks or covers over their faces, the lightning in the flat was good as it was during the day, and he had ample time to converse with his assaulters, being the appellants.

[24] Both the appellants confirmed in their evidence that the complainant knows them. It follows that the complainant would be able to identify the appellant, having known them before the attack and having ample time in favourable circumstances to confirm the identification of his attackers prior to, and during the attack.

[25] In the judgment in relation to identification of the appellants, the Magistrate summarised as follows:

"This brings me to the identification of the accused at Maxwell Court Building, on the day of the incident. The dangers general tendered upon identification is self eviden(t). See S v Tandwa & Others 2008 (1) SACR 613 (SCA) para 129 – 131. *The identification that was made forms part of the evidential matter upon which the case must be decided. I have given careful consideration to the lighting in the flat, and where the incident occurred. It was during the day it was not too short. The accused and the witness were well known to each other; they were staying in the same building, and the complainant testified that he spoke face to face with his attackers. They were in close proximity of him and they were searching him. He had a struggle with accused 1. He knew the accused for a long period of time, they even know each other by their names. The accused in their evidence vehemently denied having been at the complainant's flat as testified by the complainant. It is important to bear in mind that the complainant had testified that the attackers did not cover their faces. He knew them very well, they had been staying in the flats, he met them when he went to the library, and he met accused 1 again when he came back from the library.*

The possibility of mistaken identification on the facts of this case does not arise. Even if it does arise I am satisfied that there is no mistaken identification of the accused. But the inquiry does not end there, the identification of the accused must thoroughly be considered not in isolation, but in the context of the totality of the facts of this matter. In S v Liebenberg 2005 (2) SACR (2) 355 (SCA) *the Supreme Court of Appeal held where in defence finds a bar has been raised and the Trial Court accepts the evidence in support thereof, as being possibly true, it follows that a Trial Court should find there is a reasonable possibility that the prosecution's evidence is a mistake or false. There cannot be a reasonable*

possibility that the two versions are both correct. This is consistent with the approached alibi evidence laid down by this court more than 50 years ago in R v Sebia 1954 (4) SA 541 A at 521 C-D *Greenberg JA said, if there is evidence of an accused person's presence at a place and time that makes it impossible for him to have committed the crimes charged, then if on all the evidence there is a reasonable possibility that his alibi evidence is true, it means the same possibility exists that he has not committed the crime."*

[26] The appellants did not elaborate on the reason why they hold the view that the complainant mistakenly identified them. Their defence was a bare defence of misidentification.

[27] The Magistrate in the Court *a quo* had regard to the defence of misidentification, and evaluated the evidence with due regard to the defence presented.

[28] The facts before the Court *a quo* was of such a nature that any unsure issue of mistaken identity could be clarified under cross examination. This is not one of the matters where an identity parade would be necessary, or where the assailants were unknown to the complainant. The complainant did not have to rely on distinguishing marks or descriptions for identification of the appellant, as he knew the appellants and they knew him.

[29] The complainant was consistent and persistent in his evidence that it was Appellant 1 who came into the bedroom, and Appellant 2 who assaulted him with the screwdriver.

[30] Both the appellants admit that they saw the complainant the morning when he left for the library. This is in line with the complainant's evidence.

[31] I am satisfied that this is not a matter of mistaken identity. I am satisfied that the State has proven, beyond reasonable doubt, that the assailants were Appellant 1 and Appellant 2.

[32] The appeal can therefore not succeed on this basis.

Sentence

[33] In **S v Pieters** 1987 (3) SA 717 (A) appeal court confirmed the position that an appeal court should not intervene unless the sentence is shocking and/or startling inappropriate.

[34] In relation to assault with intent to do grievous bodily harm the legislature has prescribed minimum sentences to which the Court should adhere, unless substantive and compelling evidence exists which would amend the application of the minimum sentences.

[35] It is trite that previous convictions are taken into account with sentencing. The following previous convictions as found in the SAP 69's of the appellants, were read in the record.

[36] Appellant 1 had the following previous convictions:

[a] Assault with intent to do grievous bodily harm on 9 December 2014 at Newlands Court. He was sentenced to the sum of 12 months imprisonment which was wholly suspended for three years, on condition that the appellant was not convicted of a similar offence during such period of suspension.

[b] On 3 December 2015 appellant was convicted of housebreaking with intent to steal and theft, and he was sentenced to five-year imprisonment.

[37] Appellant 2 had the following previous convictions:

[a] On 13 July 2005 convicted of robbery and sentenced to seven years imprisonment, and was declared unfit to possess a fire-arm.

[b] On 7 December 2009 at Newlands Court he was convicted of theft and sentenced to a fine of R1,000 or 3 months imprisonment, wholly suspended for five years, on condition that appellant is not convicted of the same offence during the period of suspension.

[c] On 22 February 2013 appellant was convicted of theft at Newlands Court and sentenced to 12 months imprisonment.

[38] The Court *a quo* found no substantial and compelling circumstances when rendering the sentences.

[39] On appeal, the following was argued to be personal circumstances that is compelling and substantial in mitigation for both appellants:

Appellant 1:

[a] He was 23 years old;

[b] He was not married;

[c] He had no children or dependants;

[d] He had two previous convictions namely assault and house breaking and theft;

[e] He was unemployed; and

[f] He completed Grade 9.

Appellant 2:

[a] He was 31 years old;

[b] He was not married;

[c] He had two children aged 7 years and 1 year old;

[d] He had three previous convictions, namely: robbery, theft and theft;

[e] He was unemployed;

[f] He completed matric; and

[g] He was in custody for a period of 10 months awaiting finalisation of this matter.

[40] As much as previous custody is a factor to take into consideration in determining an appropriate sentence, the previous convictions amplifies the development of a criminal habit of the appellants.

[41] I do not find that any of the circumstances as raised in the Court *a quo* or in this appeal would affect the sentencing to result in the sentencing being shocking and/or startling.

[42] I agree with the Court *a quo* that a proper sentence for both appellants would be a period of 15 (Fifteen) years imprisonment.

I therefore make the following order:

1. The appeal on both conviction and sentence is dismissed.

2. In terms of Section 103(3) of Act 60 of 2000 both appellants are declared incompetent to possess a fire-arm.

FMM SNYMAN, AJ
ACTING JUDGE OF THE HIGH COURT

I agree

MMP MDALANA-MAYISELA, J
JUDGE OF THE HIGH COURT

DATE OF HEARING: 2 February 2020
DATE OF JUDGMENT: 6 March 2020

Appearance for the appellants: Adv A Mavatha
Johannesburg Justice Centre

Appearance for the respondents: Adv PT Mpekana
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