IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

10/02/2014 .....

DATE SIGNATURE

Case No: A148/2013

Date heard: 27 January 2014

Date of judgment: ~~06~~ 10 February 2014

In the matter between:

SAM SITHOLE Appellant

and

THE STATE Respondent

JUDGMENT

PHATUDI J:

[1] The appellant was accused 2 when convicted at Benoni Regional Court (trial court) on robbery with aggravating

circumstances read with the provisions of section 51(2) of Criminal Law Amendment Act 105 of 1997.

[2] The trial court found no substantial and compelling circumstances and sentenced the appellant to 15 years imprisonment. With leave of the trial court, the appellant appeals against both the conviction and sentence.

[3] Mr May Skosana (Skosana) testified that he was with the complainant, Gert Frederik du Plessis (Du Plessis) who was robbed off a laptop and R15,000 in cash. Du Plessis's evidence is not placed in dispute. He could not identify the perpetrators. His testimony unfolds the occurrence of the offence.

[4] Skosana testified that at 06h20 in the morning of 04 April 2011 he saw the appellant pointing a firearm at Du Plessis. He saw the appellant take the laptop bag from Du Plessis. He later pointed the appellant out at the identification parade.

[5] The appellant contests the evidence of Skosana with regard to the appellant's identity at (i) the scene and at (ii) the identification parade. It is further contended that the identification parade was not conducted properly rendering the evidence thereof being inadmissible.

[6] On perusal of the record, it is clear that in leading Skosana in examination in chief, the following emerged:

'Pp: Did you identify the perpetrators? See them facially?

Skosana: Yah one of them, yes I did see him

Pp: Is that one of them before court today?

Skosana: Yes

Pp: Can you please show this court where that one is seated?

Skosana: Number 2

Pp: Refer to him as Accused 2 from time to time

What was his role?

Skosana: He is the one who pointed the white person with a firearm

Pp: Anything else he did

Skosana: I saw him taking the bag.'

[7] Ms Ndalane, the appellant's counsel, submits that Skosana's evidence on appellant's identification is inadmissible on the basis that he did not have an ample opportunity to observe the perpetrators.

[8] It is noted on record that Mr Katrada, who represented the appellant at the trial court, confronted Skosana with the following question during cross examination.

'Mr Katrada: And that is why you will agree with me you did not give the police a description in anyway of the perpetrators be that they were short ... tall ... dark ... their clothing.

Skosana: But I did see Accused 2

Mr Katrada: Answer my question sir. Did you (intervenes)

Skosana: Because when I turned I saw him

Mr Katrada: I am not saying that you did not see him. Answer what I am asking you. I am telling you, you did not give them a description of anybody be it complexion, height, build, nothing whatsoever

Skosana: I did not know sir because you said I did not see them. What do you mean? How? Because when I turned I saw him.'

[9] Later Mr Katrada enquired:

'Mr Katrada: Accused 2 is the very same person that you saw with the firearm, correct?

Skosana: Yes

Mr Katrada: When you identified him what was he doing at the time?

Skosana: He was pointing the white person with a firearm...'

[10] In evaluating the evidence of Skosana, the magistrate took into account that he (Skosana) is the only identifying witness and indicated that Skosana's evidence needs to be approached with caution.

[11] In accepting Skosana's evidence, the magistrate found that 'nothing obscured the visibility or the sight of Mr Skosana.' He further found that Skosana was in fact 'face-to-face with the [appellant].'

[12] The principle set out in R v Dlhumayo and Another 1948 (2) SA 677 (A) states that 'a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court, and will only interfere where the trial court materially misdirected itself in so far as its factually and, credibility findings are concerned.'

[13] Considering the evidence in totality, I find the magistrate's credibility finding in respect of Skosana's evidence to be in accordance with justice. The witnesses need not only be found to have been honest. The court in S v Matshivha 2014 (1) SACR 29

(SCA) stated that 'what is important is the opportunity [the witness] had for recognising the appellant.'

[14] It has been demonstrated that Skosana was firm in his testimony that he saw the appellant. He had all the opportunity at the time 'he was in fact face-to-face' with the appellant when the appellant was pointing the firearm at Du Plessis, the complainant.

[15] The period of time Skosana had when facing the appellant "face-to-face" is in my view, an opportunity ample to observe the appellant. I find no factual or material misdirection on the part of the magistrate. The conviction stands, on that basis, to be confirmed.

[16] In Director of Public Prosecutions v Mngoma 2009 JOL 24656 (SCA), Bosielo JA stated that 'the powers of an appellate court to interfere with a sentence imposed by a lower court are circumscribed. This is consonant with the principle that the determination of a sentence in a criminal trial resides pre-eminently within the discretion of the trial court.'

[17] In imposing the 15 years of direct imprisonment, the magistrate considered the crucial factors the appellant is relying on as substantial and compelling circumstances that warrant deviation.

[18] The magistrate indicated that 'this was a carefully planned and that the appellant must have had some information of the victim's possession of the money.' He further stated that 'this was not an impulsive decision to rob. This is evident from the evidence that an A4 Audi was organised as a getaway car'

[19] The magistrate finally found no substantial and compelling circumstances notwithstanding that the appellant is a first offender and the fact of been incarcerated for just over a year.

[20] The principle of considering the period spent in jail awaiting trial was set in **S v Brophy and Another 2007 (2) SACR 56 (W) at [15]** where the court stated that 'More importantly, and what the Court *a quo* overlooked entirely, was the period of time spent by both accused awaiting trial and sentence. It was also penned that 'what does not require evidence is that time spent in prison awaiting trial is, at the very least, equivalent to time served without remission

[21] Recently, the court in **S v Radebe and Another 2013 (2) SACR 165 (SCA)** stated at paragraph [13] in over rulling Brophy's case that 'there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. (*S v Seboko* 2009 (2) SACR 573 (NCK) para 22 was referred to). A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. It is further held that 'the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.'

[22] In **S v Kolea 2013(1) SACR 409 SCA** the court clarified the misconception of the wording "minimum sentence" as used in the Criminal Law Amendment Act 105 of 1997. The court stated that 'the term of [15 years] imprisonment referred to therein is the minimum sentence that can be imposed. This means that any sentence in excess of [15] years' imprisonment, and possibly even life imprisonment, could be imposed by a court having jurisdiction to do so'.

[23] Section 51(3) (a) provides that "if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justified the imposition of a lesser sentence than the sentence prescribed in those circumstances on the record of the proceedings and must thereupon impose such lesser sentence..."

[24] Considering the manner the offence was committed and the submissions made by both counsel, I am of the view that there are no substantial circumstances compelling deviation from the prescribed minimum sentence other than the period spent awaiting trial. – As principled in **S v Radebe and Another** – there is no thumb rule or fixed rule that the said period should be deducted. Even if deducted, the court is still at large to impose a higher sentence than the minimum. (**S v Kolea**). I neither find misdirection on the part of the magistrate nor any disproportionate of the sentence to the offence committed by the appellant. I have no reason to interfere with the sentence imposed by the magistrate.I in the result make the following order.

Order

The appellant's appeal against both conviction and sentence is dismissed.

10

A.M.L. Phatudi

Judge of the High Court

I agree.

E.M. Kubushi

Judge of the High Court

On Behalf of the Appellant: Pretoria Legal Aid Centre

FNB Building 2nd Floor

Church Square

Pretoria

Adv M.C Ndalane

On Behalf of the Respondent: Director of Public Prosecutions

28 Church Square

Pretoria

Adv S.R Sibara