IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A770/2013

Date: 21 February 2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

24/1/2014 Pretoria
DATE SIGNATURE

In the matter between:

NICOLUS WILSON MADIROMU MTHOMBENI Appellant

and

THE STATE Respondent

JUDGMENT

PRETORIUS J,

[1] The appellant was convicted in the Regional Court, Giyani on three counts on 11 November 2009 and was sentenced as follows:

Count 1: Robbery with aggravating circumstances – 15 years imprisonment;

Count 2: Contravening Section 3 of the Firearms Control Act, Act 60 of 2000 – Possession of firearm – 5 years imprisonment;

Count 3: Contravening Section 90 of the Firearms Control Act, Act 60 of 2000 – Possession of ammunition – 24 months imprisonment wholly suspended for 5 years.

An effective sentence of 20 years imprisonment.

[2] The appellant was legally represented throughout the proceedings. Leave to appeal was granted by the court *a quo*.

Conviction:

[3] Ms Maluleke's evidence was that on 12 October 2008 she was at work as a cashier at Caltex, Giyani. At 12h00 there was a collision in the driveway of the petrol station, which resulted in all the employees running to investigate.

[4] Two men entered the shop, they took a packet of biscuits from the shelf. When she opened the till as they paid, one of them produced a firearm and ordered her and her co-cashier, Ms Mabunda, to lie on the ground, whilst pointing the firearm at them. The other man moved behind the tills and took cash and cellphone airtime vouchers from the tills. The two perpetrators then left together and ran away.

[5] The appellant does not deny the robbery but claims it is a case of mistaken identity. Ms Maluleke and Ms Mabunda's evidence was that there were bright lights in the shop and the two perpetrators had not covered their faces, although both were wearing caps. The one man was wearing a blue jean and a white sweater, whilst the other was dressed in black.

[6] Both witnesses testified that the person pointing them with the firearm was the appellant, who wore black cloths. They recognized him as Ms Maluleke testified that a piece of his ear was missing and Ms Mabunda testified that he had a scar on his ear. Both witnesses attended an identity parade where they identified the appellant as the person who had pointed the firearm at them. They both poited out the appellant at the identity parade without any hesitation

[7] Ms Maluleke identified the firearm that was in court as the firearm which had been used in the robbery. She remembered the scratches on the firearm.

[8] Inspector Mashali arrested the appellant. He accompanied the appellant to his homestead. He received a report from a lady and proceeded to a certain house at Bambeni village where Mr Godfrey Mabunda dug out a firearm with 8 living rounds from the ground. It was

wrapped in a cloth and was in a plastic container. Ms Rikhotso was a cousin of the appellant. She had visited him at the SAPS cells and he told her about a plastic container, but she only found the cloth containing the firearm. She identified the exhibit in court as the firearm she had found in the cloth. She gave the firearm to Mr Godfrey Mabunda.

[9] In **S v Mthetwa 1972 (3) SA 766 (A)** Holmes JA found at 768:

> *"Because of the fallibility of human observation, 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; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as 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;"*

[10] In the present instance the evidence was common cause that there were bright lights in the store and both witnesses were close to the appellant, who was pointing a firearm at them. Ms Maluleleke and Ms Mabunda corroborated one another as to the clothing the prepetrators were wearing. They both saw that there was something wrong with the appellant's ear and both identified him at the identity parade without any hesitation. The further fact the court takes into account is that the firearm in question was found at the homestead where the appellant was living with Ms Rikhotso. This firearm was identified by Ms Maluleke as the firearm which was pointed at her.

[11] There can be no criticism levelled at the evidence of Ms Maluleke and Ms Mabundla. The court has weighed all the facts and considered the probabilities, improbabilities and evidence. In **S v van den Meyden 1999 (2) SA 79 (W)** at p 82 E, Nugent J held:

> *"Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."*

[12] The court cannot come to any other conclusion but that the appellant is guilty as charged and that the court *a quo* was correct in finding the appellant guilty as the State has proved the appellant's guilt beyond a reasonable doubt.

Sentence:

[13] In **S v de Jager 1965 (2) SA 612 (A)** at p 629 A Holmes JA found:

> ***"It is the trial Court which has the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it."*** (Court's emphasis)

[14] In terms of section 51 (2) (a) of Act 105 of 1997 the minimum sentence of 15 years imprisonment is applicable in this instance, unless the court finds substantial and compelling circumstances.

[15] In **S v Malgas 2001 (1) SACR 469 (SCA)** at 481 it was held by Marais JA:

> *"The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate*

needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence."

[16] In **S v Matyiti 2011(1) SACR 40 (SCA)** at paragraph 23 e - g the court found in relation to minimum sentences:

"Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. ***Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness.*** *Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."* (Court's emphasis)"

[17] The appellant is a first offender, he is 29 years old, he is married with a child. He was self-employed earning R1000.00 per month.

[18] Due to the fact that it not clear which facts the court *a quo* took into consideration, when considering sentence, this court considered all

the mitigating and aggravating facts which had been presented in the court *a quo*.

[19] In **S v Dodo 2001 (1) SACR 594 CC** at par 38 Ackermann J held:

> *"[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in para 37 above) the offender is being used essentially as a means to another end."*

[20] In **S v MM; S v JS; S v JV 2011 (1) SACR 510** the court held in a full bench appeal in paragraph 13:

> *"[13] While a long period of imprisonment is appropriate, the court must guard against a sentence that can ultimately destroy the appellant, either physically or mentally. There is no reason to believe that he cannot be rehabilitated and return to continue to*

be a worthy and valuable member of his family and his society. The sentence must accordingly reflect both society's deep displeasure against conduct of this kind, and society's concern that the appellant, as a first offender, should not be crushed under the weight of an unduly lengthy period of incarceration."

[21] In all the circumstances and having regard to the seriousness of the offence, the interests of society and the interests of the appellant the court finds that 20 years imprisonment is too harsh a sentence and is disproportionate to the crime committed. The court finds substantial and compelling circumstances as the appellant has no previous record, is relatively young with his whole life in front of him. Nobody was injured during the robbery.

[22] Robbery is prevalent in South Africa and a scourge in our society which should be combatted in the interests of society, but the appellant should not be penalized.

[23] The court is aware that society demands that courts treat these prepetrators harshly, but the courts do not cater exclusively for public opinion, but has to consider the crime, the interests of society, the perpetrator and the victim.

[24] In all the circumstances a sentence of 12 years is deemed appropriate. The sentence on count 2 is also too high in that the disparity between what this court regards as appropriate and the sentence by the court *a quo* is too great to ignore.

[25] I propose the following order:

1. The appeal against conviction is refused;
2. The appeal against sentence is upheld in regards to counts 1 and 2;
3. The sentence on count 3 is confirmed;
4. The sentences on counts 1 and 2 are set aside;
5. The appellant is sentenced to:
   - 5.1 12 years imprisonment on count 1;
   - 5.2 3 years imprisonment on count 2;
   - 5.3 It is ordered that the three years imprisonment in count 2 run concurrently with the 12 years imposed on count 1.

   The effective sentence is thus of 12 years imprisonment;
6. The 12 years imprisonment is ante-dated to 11 November 2009.

C Pretorius

Judge of the High Court

I agree,

MJ Teffo

Judge of the High Court

Case number	:	A770/2013
Heard on	:	21 February 2014
For the Appellant	:	Adv M Klein
Instructed by	:	Legal Aid South Africa
For the Respondent	:	Adv MD Majokana
Instructed by	:	Director of Public Prosecutions
Date of Judgment	:	24 February 2014