REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: A776/2012

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

19/06/2014
DATE

SIGNATURE

19/6/2014

In the matter between:

JOSEPH SIMPHIWE NGOMANE Appellant

and

THE STATE Respondent

JUDGMENT

THOBANE, AJ

[1] The Appellant, appeared with his co-accused in the Louis Trichardt Regional Court on the following charges:

- Count 1: Robbery with aggravating circumstances,
- Count 2: Robbery with aggravating circumstances,
- Count 3: Attempted murder,
- Count 4: Attempted murder,
- Count 5: Possession of an unlicensed firearm.

[2] The Appellant and his co-accused elected to conduct their own defense and were as a result unrepresented throughout the trial.

[3] The Appellant pleaded not guilty to the charges and elected to exercise his right to remain silent and not disclose the basis of his defense. He was nonetheless convicted on counts 1 and 2, and acquitted on the rest.

[4] On the 10th July 2001, he was sentenced to an effective period of 30 years imprisonment, when the the following sentences were handed down:

- Count 1: 15 years imprisonment,
- Count 2: 15 years imprisonment.

[5] The Appellant is appealing against both conviction and sentence with leave of the trial court.

[6] The transcribed record of proceedings has been difficult to put together. The magistrate that heard the matter was put on suspension by the Department of Justice. This meant the order of reconstruction could not be seen through. The clerk of the court was

not helpful in ensuring that there is a proper reconstruction of the record. It was agreed however that the appeal not be delayed any further and that it be determined on the existing record, which was sufficient for purposes of considering the appealas that would be in the interest of justice. It would also be in the interests of justice to do so.

[7] The evidence presented by the State was briefly that Joseph Motsibane who was a bakery truck driver while delivering bread at a Cafe, saw the Appellant behind the bakery busy with his shoe. He passed him and climbed into the drivers seat. He then heard a firearm being cocked on his window. He was insulted and told to bring money. He had some money with him and the person that had pointed him with a firearm searched his pocket to remove it. In the process he stained his pocket with blood as he was bleeding. He handed over all the money and he was ordered to lie on the ground. While still pointed with a firearm by the Appellant, his companion was also ordered to climb off and he drove away in the bakery truck. Police were thereafter contacted. They went on foot in search of the bakery vehicle and found it some 5km away parked along the road. They then proceeded to the police station to lay criminal charges.

[8] Patric Masingwa testified that he was delivering bread in the company of Patric Moloto on the 14th September 1999. He went inside the tuck shop where he was effecting delivery and he noticed the Appellant's co-accused inside, who bought a box of matches. On exiting the tuck shop and while walking towards the delivery truck, the Appellant approached him from behind while holding a firearm. He was ordered to get inside the truck. He and his colleague Patric Moloto were searched and thereafter locked at the back of the delivery truck. The truck was driven away and abandoned. They were inside the truck for some forty minutes when they heard a vehicle approaching and they then banged the truck on the inside so as to draw some attention. They were eventually rescued

whereafter they proceeded to the police station to report the incident. He indicated that he had seen the Appellant and his co-accused before driving in a Toyota Conquest and that he could not have been mistaken about their identity as they had been at the place of incident for a while.

[9] The other witnesses that testified, were police officers and they gave evidence about the charges in respect of which the appellant was acquitted. Inspector Mokerong, testified about the arrest of the Appellant.

[10] While an identification parade was held in this matter, it is my view that it was correctly not relied upon by the trial court in arriving at a finding. The identification parade was fraught with irregularities to the extent that it could not have been credible. The criticism leveled by Mr Nel at the identification parade is therefore valid. So is the criticism of the court *a quo,* where it said,

> *"Let me point out at this stage that it is true that the accused committed the offences concerned. I do not doubt that he robbed the complainants in count number 1 and 2."*

Especially in light of the fact there was no attempt by the trial court to critically evaluate and analyze the evidence before it.

[11] It is my view that, despite the magistrate's failure to critically evaluate the evidence as to the identity of the perpetrator in his judgment, the identity of the Appellant was sufficiently established, on the evidence, by the two witnesses who testified about count 1 and 2. Put differently, the identity of the Appellant as the perpetrator of the robbery in count 1 and 2, was established beyond a reasonable doubt.

[12] It was argued on behalf of the Appellant that the defense of alibi must stand in that on the day alleged in the charge in sheet, as the day of the robbery in respect of the first count, the Appellant was already in custody. The details of the said alibi are as follows. The annexure to the charge sheet stipulates the date of the robbery in count 1 as the 21st September 1999. The appellant during the cross examination of Joseph Motsibane, put it to him that it could not have been him who committed the robbery as he was in police custody after being shot in the stomach and on is left thumb on the 19th September 1999. Later when he testified however he indicated that he had been shot on the 18th September 1999. Joseph Motsipane was adamant that it was the appellant who pointed him with a firearm and robbed him and that during the robbery he had observed that the appellant was bleeding and that the firearm was also blood stained. He further testified that the appellant left blood stains on his dust coat when he searched his pockets to remove money.

[13] Robert Malampane, the arresting officer, testified that on the 18th September 1999 while on standby duty, he received information about a suspect in armed robbery cases. Together with his colleagues, he followed up the information and drove to the place. On arrival they approached the place but it was dark. They knocked on the door and the door was quickly opened and quickly closed from the inside. Several gunshots rang out and they ran to their cars. His evidence was further that the following day, the 19th September 1999, they went back to the scene and arrested the appellant.

[14] The Appellant testified that on the 18th September 1999, he was visiting his girlfriend. After his girlfriend had gone to the toilet, he heard a knock on the door. He asked who it was but there was no answer. After asking for the second time the reply that came

was that it was the police. He opened the door and went outside. While outside he noticed a number of people. One of them came towards him and without saying anything, fired shots at him. He fell down and was thereafter assaulted by this group of people until he lost consciousness. He woke up in the veld the following morning. He went to some house where there was a night vigil to ask where the hospital was, as he had been injured. He was then arrested. During cross examination he confirmed that he was shot on the 18th and arrested on the 19th September 1999.

[15] What is discernible from the aforegoing, is that according to the evidence of the arresting officer Robert Malampane, the shooting occurred on the 18th September 1999 and the arrest on the 19th September 1999. This is corroborated by the appellant himself. Joseph Motsipane, the complainant in count 1, who positively identified the appellant, testified that the appellant deposited blood stains on his clothing during the robbery. This could only have been on the 19th September 1999. The appellant's alibi, in my view, can not stand. There could be valid criticism about the failure of the police to own up the shooting incident of the 18th September 1999, that however does not necessarily impact on the acceptance of rejection of the alibi.

[16] Further, the face of the charge sheet indicates the date of arrest as the 21st September 1999. In view of the evidence tendered, this could only have been a typographical error.

[17] With regard to the alibi proffered in respect of count 2, to the effect that the appellant was in Pietersburg on the 14th September 1999, the submission made on his behalf is that the state failed to adduce evidence in refutation thereof. When the complainant in count 2, Patric Masingwa was cross examined, at length, the alibi was not

put to him to comment on. Other aspects of his evidence were tested by both accused persons. Patric Masingwa was cross examined by the appellant about the blue conquest motor vehicle, the identification of the appellant as having pink lips, that Patric Masingwa witnessed the Albany Bakery robbery from a distance and reported to the police, whether Masingwa knew where the appellant stayed and finally about the road to Giyani. He state therefore could never have been expected to rebut an alibi that was not tendered to its witnesses. This alibi equally stands to be rejected.

[18] While viewed individually, the alibi might appear to be a valid ground to challenge the finding of guilt. This might appear to be the case, our courts adopt a different approach. All the evidence must be taken into account when determining the guilt or innocence of an accused person. The correct approach is set out in the following passage from ***Mosephi and others v R LAC (1980 – 1984) 57 at 59 F-H***:

> *"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body*

of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees".

[19] When the court adopts the aforementioned approach, which has been referred to in many a decided case, the submission that the alibi has been established can not stand. In ***S v Van der Meyden 1999 (1) SACR 447 (W) at 449j-450b***, the following is stated:

> *"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. 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."*

Importantly, in that case Nugent J warned against separating evidence into compartments and to examine either the defence or State case in isolation. See also ***S v Van Aswegen 2001 (2) SACR 97 (SCA) at 101a-e, S v Trainor 2003 (1) SACR 35 (SCA) at 40f-41c and S v Crossberg 2008 (2) SACR 317 (SCA) at 349f-i and 354b-g.***

[20] While the reasons by the court *a quo* for its finding of guilt are faulted, the finding itself was supported by evidence. In view of the above, the appeal against conviction on both counts must fail.

[21] Having found the Appellant guilty, the magistrate proceeded to impose an effective term of imprisonment of 30 years. The comments by the magistrate during the sentencing proceedings point to various misdirections. The following comments are worth highlighting:

> *"There must be others (offences) for which you had never been caught of, because it is difficult for police to apprehend offenders like you"*
>
> *"It will not be wrong to assume that you were seemed to be running at full speed before you were stopped"*
>
> *"Even if I acquitted you in respect of count number 3,4 and 5, it appears to me that you were the one that were shooting at the police"*
>
> *"I therefore now have to revenge on behalf of those two victims in count number 3 and 4"*
>
> *"You have been found guilty of two counts of robbery with aggravating factors. Possibly you were committing these heinous offenses with this unlicensed pistol. We do not know how it came into your hands but it was stolen"*

[22] It is trite that the trial court has discretion when imposing a sentence. A court of appeal may interfere with the trial court's sentencing discretion if it believes that the trial court failed to exercise its discretion solicitously and correctly.

[23] The applicable principles have been refined over a period of time and are now trite. The statement by Holmes JA in **S v Rabie 1975 (4) SA 855 (A) at 857D-F:**, is a case in point:

> *"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal —*
>
> *(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court, and*
>
> *(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.*
>
> *2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".*

[24] The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognized grounds justifying interference on appeal has been shown to exist. **(See S v Mtungwa en 'n Ander 1990 (2) SACR 1 (A)).** Only then will the appellate court be justified in interfering. These grounds are that the sentence is,

(a) disturbingly inappropriate;

(b) so totally out of proportion to the magnitude of the offense;

(c) sufficiently disparate;

(d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and

(e) is otherwise such that no reasonable court would have imposed it.

[25] In the premises this Court must decide whether or not an effective sentence of 30 years imprisonment imposed by the trial court provokes one's sense of shock or that it is blemished by misdirections and irregularities. If it is, this Court will have the right to interfere by setting aside the sentence and imposing what it may consider apposite in the circumstances.

[26] I agree with the submission by the Appellant's legal representative, that the afore mentioned misdirections by the trial court call for intervention. This is also in light of the fact that an effective term of imprisonment of 30 years is severe. It would appear, the sentencing court, having found that the Appellant being a 36 years old person at the time, could be reformed, failed to consider the cumulative nature of the sentence of 15 years for each of the two counts of robbery with aggravating circumstances.

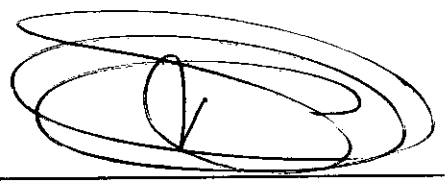
[27] It is settled in our law that sentencing needs to take into account rehabilitation, retribution and reform. Courts must strive to strike some kind of an equilibrium to guarantee that the sentences that they pass become the most perfect embodiment of the three. It would seem that in this matter the sentencing court failed to strike that balance.

[28] In my view, the sentence imposed is too disproportionate to the offenses committed. I find that the discretion by the sentencing court, was incorrectly or improperly

exercised, and that the sentencing proceedings were vitiated by misdirections, thus warranting the appeal court's interference. The appeal against the sentence imposed by the trial court therefore succeeds.

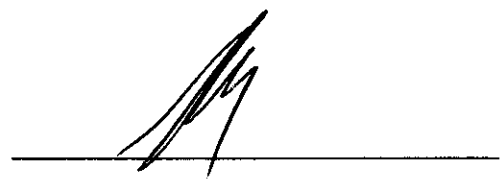
[29] Having considered all that I have mentioned hereinabove I would make the following order:

1. The appeal against conviction on the two counts of robbery with aggravating circumstances is dismissed,
2. The sentence of 15 years imprisonment on each of the two counts of robbery with aggravating circumstances is set aside, in its place the following sentence is imposed:
    2.1. On count 1 the accused is sentenced to 15 years imprisonment
    2.2. On count 2 the accused is sentenced to 15 years imprisonment
3. It is ordered that 12 years of the sentence imposed on count 2 run concurrently with the sentence imposed on count 1.
4. The sentence is ante-dated to the 10th July 2001



S.A. THOBANE
ACTING JUDGE OF THE HIGH COURT, PRETORIA

I agree, and it is do ordered



N. KOLLAPEN
JUDGE OF THE HIGH COURT,
PRETORIA