IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

A872/13

CASE NUMBER: A872/2013

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

13 JUNE 2014
DATE

SIGNATURE

13/6/14

In the matter between:

ZAMAKHAYA JOE JANTJIE **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MAVUNDLA J,

[1] The appellant was convicted at Regional Court, sitting in Cullinan, of robbery with aggravating circumstances and sentenced to fifteen years imprisonment. He is now appealing against both conviction with the leave of the magistrate, and against sentence, with the leave granted on petition by Makgoka J and Teffo J.

[2] The appellant was duly legally represented at the trial. He pleaded not guilty to the charge of robbery with aggravating circumstances in terms of s 1 of Act 51 of 1977 in that on 7th January 2010 at the district of Cullinan he unlawfully and intentionally and acting with common purpose, with violence robbed C.L. Dlamini and Kekana M.P. of 4 cell phones, car keys, cash in an amount of R4000.00, LG DVD player, DSTV decoder and a watch, their property or in their lawful possession.

[3] The appellant pleaded not guilty to the charge. There was no plea explanation and a right of silence was used by the appellant.

[4] It is common cause that on the night of 7th January 2010, the house of the two complainants, Dlamini and Kekana was invaded by

unknown men, one armed with a firearm and another with a knife. The family was robbed of the items mentioned in the charge sheet.

[5] It was also common cause that both Dhlamini and Kekana identified the appellant in an identification parade.

[6] It was submitted on behalf of the appellant that the evidence of Dlamini was not reliable and should have been rejected. It was submitted that she did not have sufficient opportunity to observe and notice the scar on the face of the appellant relied upon as an identification mark. She was not certain whether the mark was below which eye of the intruder. The probability is that she discussed the matter with her husband, Mr. Kekana. She could not have heard the name Zama being mentioned by one of the intruders because at that time she had already ran into the bathroom.

[7] The identification of the appellant at the identification parade by both Dlamini and Kekana is not reliable because, inter alia, the holding of the identification parade is flawed for want of having been properly conducted and there having been no trial within a trial conducted in that regard.The person who conducted the identification parade, informed the witnesses that a suspect is present in the parade. What should have been conveyed to both witnesses was that a suspect may or may not be in the parade. The officer conducting the parade was duty bound to ensure that not

only the appellant wore white shoes which made him distinguishable from the rest of the other people in the parade.

[8] The issue to be determined is whether the identity of the appellant was sufficiently proven beyond reasonable doubt. In the matter of *S v Mthetwa*[1] Holmes JA held that:

"Because of the fallibility of human observation, evidence of identification is approached by the Court 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 they may be applicable in a particular case, are not decisive, but must be weighed one against the other, in the light of the totality of the evidence, and probabilities; see cases such as *R v Masemang*, 1950 (2) SA 488 9A.D.); *R v Dladla and Others* 1962 (1) SA 307 (A) at 310C; *S v Mehlape* 1963 (2) SA 29."

[9] In the matter of Ntsele *v S*[2] cited with approval the following remarks made in the matter of S *v Khumalo en andere*[3]:

[1] 1972 (3) SA 766 (A) 768A-C.)

"The Court must be satisfied that the identifying witness is not only honest but also reliable (*S v Mthethwa* 1972 (3) SA 766 (A) at 768A-B. Honesty on its own is no guarantee of reliability. In this regard Van den Heefer AJ in *R v Masemang* 1950 (2) SA 488 A) at 493 quite correctly observed:

'The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence.'

Accordingly the witness' 'honesty and reliability must not be allowed to frustrate the separate investigation of the reliability of the identification' (*S v Mlati* 1984 (4) SA 629 (A) at 632H-I."[4]

[10] With regard to the alleged flaws concerning the identification parade, the courts have held that the failure to follow certain procedures in a criminal trial may *per se* amount to an irregularity which vitiates the entire process of justice and a fair trial. However it does not follow that, every non-compliance would result in the entire proceedings being vitiated by such. Each and every case must be adjudged on its own merits. The courts have held that it is not necessary that in every identification parade there ought to be a trial within a trial, otherwise this will make criminal trials unduly protracted. In the matter of *S v Felthun*[5] it was held that 'where the irregularity is not of such a nature that it *per se* results in a failure of justice, the test to be applied to determine whether there has been a failure of justice is simply whether the Court hearing the appeal considers, on the evidence (and credibility findings, if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt. If it does so consider, there was no

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[2] 1998 (3) ALL SA 517 (A) at 523a-c.
[3] 1991 (4) SA 310 (A) at 328C-G:

[4] My translation from Afrikaans.
[5] 1999 (1) SACR 481 (SCA) at 485I.

resultant failure of justice (*per* Holmes JA in *S v Tuge* 1996 (4) SA 565 (A) at 568 f-g; and see also *S v Xaba (supra)* at 736A-B) and *S v Nkata and Others* 1990 (40 SA 250 (A) at 257E-F)".

[11] According to the evidence of Ms Dlamini on the night in question, she heard her 12 year old daughter screaming in the kitchen. She ran towards her daughter and saw a man pointing at her with a firearm. She screamed at her husband who also came to the kitchen. When she was running away she fell. Her husband was already there. When she stood up, the gunman was pointing a gun at both her and her husband. A second man, who she said later, was the appellant came in. She managed to run to the bathroom where she hid herself until it was quiet before emerging.

[12] While she was in the bathroom, she heard her husband and the intruders talking in the bedroom looking for her. They instructed her husband to take her out. When they realised that she was nowhere to be found, one of them "said Zama, Zama let us go". Under cross examination she said that the second person had a big cap with a lot of hair inside the cap. Tsidi She said that she was 100% about the identity of the appellant because "He has a scar on his eyes *(sic)* that I could not forget. ...It looked like a stitched scar. She thought it was on his right eye. She was mistaken about this because when the defence asked her to point it out on the appellant in the dock; she said the scar was on the left eye.

[13] She pointed the appellant at an identification parade. In the parade room she was told to point the one that she knew by placing her hand on his shoulder. She pointed the appellant who was holding number 8. All the people who were in the parade line up held numbers.

[14] Mr. Kekana, on a careful reading of the record, substantially confirmed the version of Dlamini, his wife. He too said that the appellant was the second person to enter their house while the first intruder pointed him with a gun. He said the gun man instructed him to lie down on the floor. Because he is a big man, he struggled to do that. He looked for a suitable place to lie. The second man came to search his pocket but struggled to get his wallet. At that moment he had an opportunity to observe that he had a scar below his eye and dreadlocks under his big cap. He subsequently pointed appellant at an identification parade as the person he saw on the night in question. He identified him through the scar as well as the dreadlocks.

[15] The appellant was traced on his first name Zama and found in prison by the detectives. According to Sergeant Botha who traced the appellant, he did not take photos of the appellant nor shown the complainants any photo of the appellant prior to the identification parade. The prison does not allow cameras and cell phones, therefore it was impossible to have photos of the appellant taken in prison. Nel escorted the witnesses from the identification

parade to a separate room to ensure that they did not discuss about the case. Captain van Der Walt conducted the identification parade. There were no photos taken prior to the holding of the identification parade. The photos of the appellant were never shown to the witnesses prior to the holding of the identification parade. She informed the witnesses to point out the suspect if ever he is in the parade. He informed the people in the parade that they may change position at any time and make any reasonable request.

[16] Nothing much turns around the evidence of sergeant Masethla. He was responsible to look after the witnesses in a room from which they were then fetched individually to procede to the identification parade. The witnesses never discussed about the parade or about the matter while they were in the room

[17] According to Van Der Walt the appellant and another suspect were in the parade but only the appellant was pointed out by witnesses. Under cross examination he said that there were no photos of the suspects taken prior to the holding of the parade. He informed the witnesses that the suspects may be in the parade. He informed the appellant and another suspect of their rights to legal representation. He conceded that the appellant was the only one wearing white shoes. Had he noticed this earlier, he would have then instructed all the people in the parade to take off their shoes.

[18] The appellant denied any knowledge of the crime. He said that when he appeared at the district court on an unrelated matter, he was informed that he has another case. According to him he was taken to the police station without any explanation save that they were going to play loto. They were not informed of their rights when the identification parade was conducted. He was merely told to go fetch other people who also had dreadlocks, which he did. The reason he was pointed out was because the witnesses were shown his photos taken at New Lock prison.

[19] Under cross examination he conceded that he is known as Zama. He further said that the photos were taken by the prison officers and kept in a computer in prison. Botha also took these photos from prison to show to the witnesses. He does not know why his legal representative put to the witnesses that Botha took photos. He further said that the 7th January 2010 was on a weekend and he was at home. He denied that the 7th was on a Thursday as put to him by the state counsel. The appellant closed his case without calling any witness.

[20] The trial court found that the two witnesses had sufficient opportunity to observe the intruder they subsequently identified as the appellant. It further found that the two witnesses corroborated each other and were honest, credible and reliable. The first complainant, as pointed out earlier, conceded that the entire episode was of short duration, a matter of seconds. However, she stated that she would never forget the scar. She was not that much

attacked in cross examination on this point, it must therefore be accepted. The light was on. The mere fact that the duration was very short does not make her assertion of what she saw and observed improbable. The magistrate placed more weight on the evidence of Kekana, who testified that the appellant's face was a mere 30 centimetres away from his face because he was struggling to get his wallet from his pocket. Both complainants also identified the appellant at the identification parade.

[21] The courts have repeatedly held that the court of appeal will not interfere with credibility findings of the trial court, unless it is demonstrably clear from the record that such credibility finding is patently incorrect. In the absence of any misdirection, the trial court's finding of fact and acceptance of the evidence will be regarded as correct; vide *S v Francis*[6].

[22] The trial court found that the only attack on the identification parade was the aspect of the white shoes. The appellant testified that he was instructed to get people who looked like himself for the identification parade, who he did get. Looking at some of the photos, photo 8 and 10, it is clear that the appellant was not the only one with dreadlocks on the identification parade. The magistrate also took into account the fact that the white shoes did not have any role on the part of the two identifying witnesses,

[6] 1991 (1) SACR 198 at 204c- e.

when they pointed the appellant out. The trial court found Botha to be an honest person.

[23] The magistrate proceeded to evaluate the evidence of the appellant. It rejected his assertion that his photos were taken by Botha and shown to the witnesses prior to the holding of the identification parade. This version was also never put to the two identifying witnesses, and must have come, in my view, as an afterthought. The trial court found the version of the appellant not to be reasonably possibly true but false. I am of the view that the magistrate properly evaluated the evidence of both the state and the appellant and correctly rejected that of the appellant. I am further of the view that the trial court quite correctly found that the identity of the appellant, as well as his guilt were proven beyond reasonable doubt. Accordingly the appeal on the merits must fail.

[24] The appellant was sentenced to 15 years imprisonment, which was the minimum sentence for armed robbery. A firearm was used and Kekana was pistol whiplashed. The personal circumstances of the appellant were that he was 27 years old at the time of conviction; a father of a 7 year old child; was in custody for a year before the conviction. The trial court took into account as an aggravating circumstance the fact that, the offence was committed not by the appellant alone but a group. The trial court found that there were no substantial circumstances warranting a lesser sentence.

[25] The question of sentencing is a matter of the discretion of the trial court. The Supreme Court of Appeal has in the well known Malgus case cautioned that minimum sentences must not be lightly departed from. Encroaching at night, as a group and armed with firearm into the only domain of sanctuary of a person, as in casu, should under no circumstances be tolerated by the courts. Such an invasion warrants nothing less than a long imprisonment. *In casu* valuables of the complainants were removed and not recovered. I am of the view that the personal circumstances of the appellant are nothing special to qualify as substantial and compelling circumstances, to warrant a lesser sentence.

[26] The trial court, however, did not order that the period of incarceration of the appellant as an awaiting trial, should be taken into consideration for purposes of determining when the appellant would qualify for consideration to be released on parole.

[27] I therefore conclude that the trial court cannot be faulted, in the exercise of its judicial discretion, for imposing the sentence of 15 years imprisonment, but for not ordering the pre-sentencing as stated in the preceeding paragraph. It is within this court's inherent jurisdiction to make the order as stated herein above, and confirms both the conviction and sentence.

[29] In the result the following order is made:

1. That the appeal against conviction is dismissed and the conviction is confirmed;

2. That the appeal against sentence is dismissed and the sentence of 15 years imprisonment is confirmed;

3. That it is further ordered that the pre-sentencing custodial period of the appellant should be taken into account by the Correctional Services authorities, in determining his parole qualification.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree

S. STRAUSS

JUDGE OF THE HIGH COURT

DATE OF HEARING : 09 / 06 / 2014

DATE OF JUDGMENT : 13 / 06 / 2014

APPELLANT`S ATT : PETORIA JUSTICE CENTRE

APPELLANT'S `S ADV : J. Van ROOYEN

RESPONDENT'S ATT : DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT'S ADV : MR C. SMIT