HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

9/7/14

NOT REPORTABLE

CASE NO: **A748/2013**

In the matter between:

ARLINO CARLOS MACUVELE (MAKUBELA) Appellant

and

THE STATE Respondent

J U D G M E N T

MAKGOKA, J

[1] The appellant was convicted in the regional court, Benoni, on one count of robbery with aggravating circumstances. He was sentenced to 15 years' imprisonment. He appeals against the conviction and the sentence, with leave of the trial court. The conviction of the appellant arose from an armed robbery at the residence of Mr Johan and Mrs Nicolene van Zyl in Benoni on 24 July 2009. A number of household valuables, as well as the couple's two vehicles, were stolen during an armed robbery, which was carried out by a gang of six assailants.

[2] The appeal turns on identification and the doctrine of recent possession. The appellant denies that he was part of the robbers. There is no dispute that the Van Zyls were robbed in the manner they testified about. In brief this is what happened. The Van Zyls live on a plot near Benoni. During the evening of 24 July 2009 six men stormed their house, three pointing with firearms. Mr Van Zyl, his teenage son and his son's friend, were ordered to lie down. Their hands were all tied with shoe laces. Mrs Van Zyl was watching TV when she was surprised by six men who ordered her to lie down. They demanded money, but they did not harm her. Mr Van Zyl testified that throughout the robbery, one of the assailants, whom he later identified as the appellant, was standing at the door and constantly instructed Van Zyl and the boys not to look at him. He was wearing a beanie hat.

[3] The assailants ransacked the house and removed almost all valuables, including cellphones, cutlery, electronic equipment, jewellery, and clothes, among others. All the stolen goods were loaded onto the couple's bakkie, in which the assailants drove off. They also drove off in another of the couple's vehicle.

[4] After the assailants had left, the Van Zyls and their guest freed themselves and summoned help. The vehicles were, through a tracking system, recovered the same night. They were found abandoned. Later the bulk of the stolen items were recovered. Approximately two months later Mr and Mrs Van Zyl and their domestic helper, Ms Siacovimba attended an identification parade, where Van Zyl identified the appellant as one of the robbers. The two ladies were each unable to identify anyone. During cross-examination it was put to Van Zyl that at the parade, he was at first unable to identify anyone, until he was assisted by the police to identify him. He denied the supposition. He conceded, however, that he made a wrong identification. More about the identification parade later in the judgment.

[5] Warrant Officer Borchards of the East Rand Flying Squad, testified that on the day of the robbery, his information regarding a stolen vehicle led him to a house in Etwatwa, Benoni, where he found a male person standing at the door of a house, inside which a lot of the stolen items were discovered. He confiscated the items, which he booked in the SAP 13 register. The list of the items comprised household goods, electrical appliances and cellular phones, clothing items. He could not recognize the person whom he found at the house (although it was common cause it was the appellant), nor could he remember the appellant's response as to the origin of the items.

[6] Warrant Officer Buurman testified that on 24 July 2009, at approximately 20h15, while doing patrol with his colleague, Harmse, they received a report of a robbery and the description of stolen vehicles. His information led him to a shack in Etwatwa, near Benoni, where they encountered the appellant standing by the door of that shack. It was very dark, with no lighting. The only source of light was their vehicle lights, which illuminated the area. There were also women and children in the vicinity.

[7] He approached the appellant, who appeared very nervous, and would not allow him to enter the shack. He however walked past him and entered the shack, in which he found a drawer containing some items which had earlier been stolen during the robbery at the Van Zyls. He also found a photo inside the shack, depicting the appellant, a woman and a child. He continued to search the shack, during which he found a firearm inside a bag hanging by the window. He asked for an explanation from the appellant about the firearm, which the appellant failed to provide. He arrested the appellant.

[8] Warrant Officer Mahlangu was in charge of the identification parade. He testified about the logistics, and explained the notes of the parade, which he recorded in a pro-forma SAP 329. The form contains salient points of the

parade, such as the identity of the officers who guarded the witnesses before and after they attended the parade; and those who escorted the witnesses to and from the parade. There were eight persons on parade, including the appellant. The appellant had been informed of the purpose of the parade and that could choose any position on the parade which he could change before another witness is called. He was also informed of his right to make any reasonable request before a different witness is called. The appellant made no request and indicated his satisfaction with the parade procedure. The appellant took position 3 in the parade. It took approximately 8 minutes for Van Zyl to point him out. He pointed out the appellant and a person who was in position 6. On been pointed out, the appellant alleged that Van Zyl had identified him from a photo of him which was confiscated during his arrest, as well as from photos of him taken at the police station. The suggestion obviously was that Van Zyl had seen photos of him before the parade. Both Mrs Van Zyl, and Ms Siacovimba, the Van Zyl's domestic worker, were unable to identify any person.

[9] The appellant's version was that when he was arrested, he had visited his sister in Etwatwa, where he had arrived at approximately 15h00. He got bored and went to a shebeen to drink liquor and later went back to his sister's place. Upon arrival he found four strangers – three men and a woman – in his sister's shack. His sister was cooking in a nearby shack. He went to stand outside, next to the door, ~~as~~ to let the strangers in his sister's shack to finish whatever they were doing. While standing next to the door, the police arrived. Upon hearing the car brakes and tyre screeches, the four strangers got out of the shack and fled. The police enquired from him about the stolen items, to which he pleaded ignorance. The police spoke to him in Afrikaans, which he did not understand. He denied the evidence of Buurman that the photo of him and a lady was found in the shack. That concluded the evidence in the regional court.

[10] Before us, the appellant attacks the conviction on three grounds. First, that identification had not been sufficiently established. Second, that the police assisted Van Zyl in identifying him at the identification parade. Third, that the court erred in rejecting his evidence that the shack in which the stolen property was found, belonged to his sister, and therefore, he had nothing to do with those goods. I will consider these aspects, in turn.

[11] When considering the arguments on behalf of the parties, it is useful to bear in mind the proper approach to the factual findings of a trial court. The approach is found in the collective principles laid down in *R v Dhlumayo* 1948 (2) SA 677 (A) which are as a follows. A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact, the presumption is that trial court's conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it. See also *DPP v S* 2000 (2) SA 711 (T); *S v Leve* 2011 (1) SACR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another NNO* 2011 (1) SACR 469 (SCA).

[12] With regard to identification it is generally recognised that the evidence of identification based on a witness' recollections of a person's appearance is dangerously unreliable unless approached with caution: *S v Jochems* 1991 (1) SACR 208 (A); *S v Pretorius* 1991 (2) SACR 601 (A); *S v Zitha* 1993 (1) SACR 718 (A); *S v Sithole* 1999 (1) SACR 585 (W). The confidence and sincerity of the witness are not enough. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to height, built, complexion, what clothing he was wearing and so on should be put. A bold statement that the accused is the person who committed the crime is not enough. Such a statement unexplained,

untested and uninvestigated, leaves the door wide open for possibilities of mistake (*R v Shekelele* 1953 (1) SA 636 (T)).

[13] In the present case, none of the above issues were canvassed with the witnesses. In fact, when asked how he was able to point out the appellant, Van Zyl merely stated that he remembered his face. This was not investigated further, to verify the features or marks that enabled him to identify the appellant. Significantly, during cross-examination, it was put to Van Zyl that the appellant had a visible scar over his left cheek (which the trial court viewed and noted). It was suggested to Van Zyl that this scar is so visible and remarkable that he should have seen it as a distinct identifying feature, if the appellant was present during the robbery. To this Van Zyl responded that he only saw the right part of the assailant's face.

[14] I find this incredible, as he, on his own version, had a clear sight of the assailant when he entered the front door, at which stage he was not wearing the woolen beanie. He moved around into the kitchen, which gave him a good sight of the assailant at a very close range. How he was able to observe the assailant's facial features, but not the scar, is to my mind, incomprehensible. It was only later that one of the assailants gave a woolen beanie to the fellow who stood guard over him, to wear, which covered most of his face. This was when the assailant stood next to the front door, and each time he looked at the assailant, the latter would instruct him not to look at him. In this instance too, I do not think that a reliable identification could be made.

[15] In his judgment, the learned regional magistrate did not deal with the evidence of identification at the scene of the robbery. The learned magistrate seemed to proceed from the premise that the results of the identification parade were all-encompassing, and compensated for any defects in the evidence of identification at the scene. Put differently, he seems to have adopted the view

that since the appellant was positively identified at the identification parade, that fact provided sufficient corroboration for the identification at the scene of the robbery. This is a wrong premise, as the two are distinct, and should be considered on a stand-alone basis. Of course, there are instances where the two would converge. The present case is not such an instance.

[16] In my view, the result of the identification parade is not beyond reproach (but not for the reasons advanced by the appellant). The very fact that Van Zyl pointed to a wrong person during the same parade, and took about 8 minutes to make a positive identification, is indicative of the unreliability of the results. For all these considerations I conclude that the identification of the appellant was not established beyond a reasonable doubt. Having said that, I am not in any way agreeing with the appellant's supposition that Van Zyl was assisted by the police to identify him. It was correctly remarked by the trial court that this allegation appears to be based on suspicion than facts.

[17] I turn now to the appellant's arrest. Here, it would be recalled, the appellant's version was that he was simply at a wrong place at the wrong time, as he was visiting his sister. On the other hand, the state relied on the doctrine of recent possession. For successful reliance on that doctrine, the state had to first establish whether the appellant was found in possession of the stolen property, as the appellant had placed that issue in dispute. In this regard the evidence of Buurman on the presence of the appellant's photo in the shack is important. The appellant's version regarding the photo is contradictory. During the cross-examination of Buurman, it was stated that this fact (of the photo found in the shack) was not disputed. However, in his evidence, the appellant contradicted the supposition made by his attorney. The trial court correctly, in my view, found that the presence of the appellant's photo in the shack suggested that he had some form of residence in the shack, and that therefore, he had control of the

premises, where the stolen goods were found. I therefore agree with the trial court's finding that the appellant was found in possession of the stolen goods.

[18] I next consider whether the doctrine of recent possession was properly applied in the present matter. The jurisprudential basis of the doctrine was stated as follows in *S v Parrow* 1973 (1) SA 603 (A) at 604E:

"On proof of possession by the accused of recently stolen property the Court may (not must) convict him of theft in the absence of an innocent explanation which might reasonably be true. This is an epigrammatic way of saying that the Court should think its way through the totality of the facts of each particular case and must acquit the accused unless it can infer as the only reasonable inference that he stole the property. Whether the further inference can be drawn that he broke into the premises in a charge such as the present one, will depend on the circumstances. The *onus* of proof remains on the State throughout. Hence, even if, after the closing of the cases for the State and the defence, it is inferentially probable that the accused stole the property, he must be acquitted unless the only reasonable inference is that he did so; for the law demands proof beyond a reasonable doubt. I agree with the statement in *South African Criminal Law and Procedure*, volume 2 by Hunt, at p 611, that 'the "doctrine" (if it can be given such an elevated name) of recent possession is simply a common-sense observation on the proof of facts by inference.'"

[19] In *S v Skweyiya* 1984 (4) SA 712 (A) at 715C-E, the following general principles were enunciated with regard to the doctrine of recent possession:

(a) The goods must have been recently stolen;

(b) The nature of the stolen goods must be of the type which is usually and can easily and rapidly be disposed of;

(c) Anything beyond a relatively short period will usually not be recent.

(d) The court has to determine whether the article is one which could easily pass from hand to hand, and whether the lapse of time is so short as to lead to the probability that the particular article has not yet passed out of the hands of the original thief.

[20] In my view, the interval of time between the time of the robbery and the time of the discovery of the property (less than an hour) is too great to justify the inference of guilt on the count of robbery. However, that should not be

considered in isolation, but within the totality of the evidence, including the appellant's version and his credibility as a witness. The appellant was, in my view, not a credible witness. He contradicted himself during cross-examination. For example, it will be recalled that in his evidence in chief he testified that there were four strangers in the shack, who all fled when the police arrived. During cross-examination he altered this version and stated that one of the four, a lady, remained at the scene and was actually present when the police arrived. He conceded that he did not give this version to his attorney. The only plausible conclusion from this is that the appellant was adjusting his evidence as the cross-examination unfolded.

[21] What is more, the appellant's version is inherently improbable. I cite just two aspects thereof. First, that the appellant would not have told the police that there was a lady who was with the strangers who fled from the shack, who should be questioned about the property found in the shack. Second, that his sister would simply have left him to be arrested for the property found in her shack without explaining to the police that the appellant was simply a visitor there. The suggestion that she was scared as there were only white officers pales into insignificance in the light of the fact that this mysterious sister of the appellant never made a statement to the police after the arrest, nor did she testify during the trial.

[22] Overall, the appellant was a very poor witness, whose evidence was correctly rejected. The learned regional magistrate carefully considered, and applied, the doctrine of recent possession in the light of all the surrounding circumstances and came to the conclusion that the factors pointed to the guilt of the appellant. I agree. In the absence of a plausible explanation as to how the property came to his property, the trial court was entitled to assume, on the doctrine of recent possession, that the appellant was one of the robbers.

[23] Given the nature of the stolen items, it is highly unlikely that within a short space of time the stolen property could have exchanged hands between the robbers and the appellant, such that he should only have been convicted of only theft or being in possession of suspected stolen property. For those reasons the appeal against the conviction should fail.

[24] As stated in the introduction, the appeal is also directed against the sentence, an aspect I now turn to. The circumstances of the robbery brought the sentencing within the purview of s 51(2) of the Criminal Law Amendment Act 105 of 1997, in terms of which 15 years' imprisonment is prescribed. This is a prescribed, and not mandatory sentence, in the sense that the court is entitled to deviate from that sentence if it finds to exist, substantial and compelling circumstances. In the present case the trial court found no such circumstances, hence the 15 years' imprisonment.

[25] The appellant did not testify in mitigation of sentence. His personal circumstances were placed on record by his legal representative as follows: At the time of sentence, he was 28 years old. He is divorced and has 2 minor children aged 7 and 3 years old. He was living at his sister's property. He has no formal training and is therefore illiterate. He grew up in Zimbabwe where he found it difficult to gain employment. The appellant is a first offender and had no cases pending against him at the time of sentencing. He had spent a period of two years in custody awaiting finalisation of his trial.

[26] In his heads of argument, Mr Moeng, the appellant's attorney, submitted that that period was equivalent to 4 years in line with *S v Brophy* 2007 (2) SACR 56 (W). It has apparently not been brought to the attention of Mr Moeng that *Brophy* was overturned by the Supreme Court of Appeal in *Radebe and Another v S* 2013 (2) SACR 165 (SCA).

[27] In my view the trial court did not approach the enquiry into the presence or otherwise of substantial and compelling circumstances in a correct manner. It focused intently on the gravity of the offence, and concluded on that basis that the personal circumstances of the appellant did not constitute substantial and compelling circumstances. That is a flawed approach. What should be considered is a totality of factors, including the traditional triad, consisting of the nature of the offence, the personal circumstances of the appellant, and the interests of the society.

[28] In addition the circumstances of the commission of the offence (which is distinct from the *nature* of the offence), should be considered. Having done that, the court should consider whether any of the factors referred to above, taken either individually or cumulatively with others, constitute substantial and compelling circumstances.

[29] In my view, the trial court failed to take sufficiently into consideration the following relevant circumstances of the commission of the offence, namely that the complainants suffered no serious injuries, and that the robbery was carried out with minimal physical violence; although firearms were used, no shots were fired during the robbery; and that the stolen items, including the two motor vehicles, were recovered. As to the personal circumstances of the appellant, that he is a first offender and his socio-economic background is poor. These, together with the period spent by the appellant awaiting trial, in my view, cumulatively constitute substantial and compelling circumstances. Compare for example, *S v Ndlovu* 2007 (1) SACR 535 (SCA) para 13, where the Supreme Court of Appeal cautioned against imposing uniform sentences that do not distinguish between the facts of cases and the personal circumstances of offenders.

[30] By not approaching the matter in the manner outlined above, the trial court misdirected itself. In my view, it is the type of misdirection contemplated in *S v Pillay* 1977 (4) SA 531 (A) 535E-F, it being 'of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably.' This warrants interference by this court. This court is therefore at large to consider sentence afresh and impose what we deem appropriate in the circumstances.

[31] Considering all the relevant factors, I am of the view that a period of 10 years' imprisonment would satisfy the aims of punishment, be fair to the society and the appellant in the sense that he has an opportunity to rehabilitate himself.

[32] To sum up, the appeal against the conviction stands to be dismissed. The appeal against the sentence should be upheld to the extent discussed above.

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

1. The appeal against the conviction is dismissed;
2. The appeal against the sentence is upheld;
3. The sentence of 15 years' imprisonment imposed by the regional court is set aside and the following is substituted for it:

   'The accused is sentenced to 10 years' imprisonment.'
4. In terms of s 282 of the Criminal Procedure Act, 51 of 1977, the substituted sentence is ante-dated to 16 May 2011, being the date on which the appellant was sentenced.

T.M. MAKGOKA
JUDGE OF THE HIGH COURT

I agree

P.D. MOSEAMO
ACTING JUDGE OF THE HIGH COURT

DATE HEARD	**: 3 APRIL 2014**
JUDGMENT DELIVERED	**: 9 JULY 2014**
FOR THE APPELLANT	**: MR. S MOENG**
INSTRUCTED BY	**: PRETORIA JUSTICE CENTRE, PRETORIA**
FOR THE STATE	**: ADV. TV CHETTY**
INSTRUCTED BY	**: DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA**