REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A956/2013

1/12/2014

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

In the matter between:

MHLAMBI MLUNGISI ISAAC — **APPELLANT**

MATSHEGO TSHEPO REGINALD — **SECOND APPELLANT**

and

THE STATE — **RESPONDENT**

J U D G M E N T

Date of Hearing: 17 NOVEMBER 2014

Date of Judgment: 01 DECEMBER 2014

KUBUSHI, J

[1] Both the appellants, as well as the erstwhile accused 3, stood trial in the regional court in Oberholzer. Accused 3 passed away before the trial was finalised. The three were charged with five counts, namely, counts 1 to 3: robbery with aggravating circumstances - aggravating circumstances being that a firearm was used; count 4: the illegal possession of a firearm and count 5: the illegal possession of ammunition.

[2] The first appellant was convicted on counts 1, 2, 4 and 5. She was sentenced to 15 years imprisonment for each conviction in count 1 and 2 and 5 years imprisonment for each conviction in count 4 and 5. The sentences in counts 2, 4 and 5 were ordered to run concurrently which resulted in an effective sentence of 30 years imprisonment.

[3] The second appellant was convicted on counts 2, 4 and 5 and sentenced to 15 years imprisonment in respect of count 2 and 5 years imprisonment for each conviction in count 4 and 5. The sentences in the three convictions were ordered to run concurrently which resulted in an effective sentence of 15 years imprisonment.

[4] Leave to appeal both the convictions and sentences were refused by the trial court. However, on petition to this court, the appellants were granted leave to appeal against their convictions and sentences.

[5] The case involves two incidents of robbery with aggravating circumstances. In count 1, a passing motor vehicle indicated to a truck driver that something was wrong at the back of the truck. The truck stopped to inspect what was wrong and the occupants

were robbed, at gun point, of the truck. The truck driver, two of his passengers and the investigating officer testified for the state. An identification parade form (SAP 329) was handed in as exhibit "J" by the state with the approval of the defence.

[6] In count 2, the same modus operandi was used. A passing motorist alerted a truck driver that his lights were at fault. The truck driver pulled off the road to inspect and the occupants were, at gun point, robbed of the truck. One of the occupants was robbed of his cell phone. The police were assisted in their search for the robbers by members of a satellite tracking company. Whilst so searching, the members of the tracking company came across a red Corolla motor vehicle the occupants of which were the first and second appellants. A firearm was found in the cabin hole of the Corolla. Eight witnesses, including a fingerprint expert were called to testify.

[7] At the end of the state's case the appellants applied for a dismissal of the states' case in terms of s 174 of the Criminal Procedure Act, 51 of 1977. The application was refused. The appellants closed their case without leading any evidence. At the end of the trial the appellants were found guilty as already stated in paragraphs [2] and [3] of this judgment.

[8] The appellants raised the following grounds of appeal:

a. In respect of count 1, the first appellant's contention is that there is no indication from the identification parade form that the correct procedures were followed and that it was conducted in a fair and proper manner.

b. In respect of count 2, the first appellant's contention is that one palm print cannot constitute enough evidence for conviction.

c. In respect of 4 and 5 the appellants' contention is that the description of the firearm in the charge sheet differs as described in evidence

d. Taking the conduct of the appellants' legal representative at the trial the trial court should have intervened.

[9] Before I deal with the merits of the appeal, I want to deal first with the contention by the appellants' counsel that the legal representative (Mr Nkomo) who represented the appellants at the trial was not a competent and diligent lawyer. The contention is important to be determined at this stage as such incompetence, if any, may have rendered the trial unfair warranting the setting aside of the proceedings. Counsel in this regard, referred us to the judgment in *S v Saloman* [1] wherein the duty of a legal representative was clearly spelled out.

[10] There are two grounds on which counsel relied on for his contention. Firstly, it is his contention that Mr Nkomo should not have consented to the handing in of the identification parade form. According to counsel, proper procedures were not followed and the parade was not conducted in a fair and proper manner and as such if Mr Nkomo was a competent lawyer, he should have objected to the handing in of the form. Counsel also submitted that there was a duty on the trial court to intervene in such circumstances and should have called the person who conducted the parade to establish what happened at the identification parade.

1 2014 (1) SACR 93 (WCC)

[11] It is common cause that Mr Nkomo represented the appellants at the identification parade. I must say that it is unusual for a legal representative to be in attendance at an identification parade. However, in this instance, Mr Nkomo appeared for the appellants. His failure to object to the handing in of the identification parade form should be construed to mean he was satisfied with the manner in which the identity parade was conducted and with the outcome thereof. As the identification parade and the results thereof were not in dispute and it was not necessary for the respondent to lead evidence in that regard. Counsel's contention that the trial court should have intervened is as a result misplaced. There was no duty on the trial court to call witnesses to address an issue which was not in dispute.

[12] Counsel's other contention that in closing the defence case without leading evidence of the appellants, Mr Nkomo did not act in a manner befitting a diligent and prudent lawyer, is unfounded as well. It is not unheard of for a legal representative after refusal of the s 174 application to close his or her client's case without leading any evidence. Mr Nkomo consulted with the appellants before he closed the case and exercised his discretion in favour of closing the defence case without leading the evidence of the appellants. It cannot be said that he exercised the discretion improperly.

[13] It has been held that the right to legal representation cannot be a right to anything but effective legal representation. Whatever else, effective legal representation could connote; it denotes that the representative must act in the best interest of his or her client, while still ensuring that his or her inherent duty towards justice is maintained. [2]

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[2] See *S v Mofokeng* 2004 (1) SACR 349 (WLD) at 355

[14] In the light of the *Saloman*-judgment and from the record as it stands, there is, in my view, no inference that can be drawn that Mr Nkomo was incompetent or acted in such a manner that he did not represent the interests of the appellants. This ground of appeal must fail.

[15] On the merits, it is common cause that the case was based purely on circumstantial evidence as the appellants were not identified at the scene of the crime. The trial court also took this into account in its judgment. The trial court relied in its judgment only on the state's evidence as the appellants did not testify.

[16] The trial court, correctly so, in count 1 accepted the results of the identification parade in which the witness Madai identified the first appellant as one of the persons who took part in the robbery. There being no evidence tendered by the first appellant the evidence must stand.

[17] In respect of count 2 the first appellant was placed on the scene of the crime by a palm print lifted on the body of the truck which was found to belong to him. From the grounds of appeal it does not appear as if the first appellant is contesting the authenticity of the palm print. His issue is that there was no evidence tendered about the age of the palm print and that a single print cannot constitute enough evidence to convict the appellant. From his argument in court the appellants' counsel seems to have abandoned the issue of the age of the print.

[18] It is normally so that a single print would not provide *prima facie* evidence, though it is sometimes decisive. [3] In this instance, it is my view that the probative value of the palm print evidence is undoubted. There is no doubt that the presence of the first appellant's palm print lifted on the truck so soon after the robbery operates powerfully against him. His failure to give evidence militates further against him. Without his evidence there is no way it can be established whether the first appellant did perhaps come into contact with the truck before the robbery. The inference that the first appellant was one of the robbers is consistent with the palm print. The trial court was therefore correct to have convicted the first appellant on this evidence.

[19] It is common cause that the charge sheet refers to a 1 x 9mm parabellum pistol whilst the witness Davis testified about a Vector Sp1 pistol with serial number S101400. The appellants are taking issue with the description of the firearm in that the firearm referred to by the witness Davis differs from the firearm described on count 4.

[18] In terms of s 88 of the Criminal Procedure Act, 51 of 1977, where a charge is defective for want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the attention of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred. Since the defect in the charge was not brought to the attention of the trial court, the evidence of the witness Davis should be regarded as having automatically cured the defect.

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3 *S v Arendse* 1970 (2) SA 367 (C)

[19] The appellants counsel referred us to the judgment in *S v Mukwevho* [4] wherein the description of the firearm in the charge sheet was not the same as stated in the evidence. It is my view that the facts in that judgment are different from this instance in that the principle enunciated in that judgement was in respect of the prescribed minimum sentence. In that case the appellant was charged with the possession of a semi-automatic rifle which attracted the prescribed minimum sentence. The court in that case held that all the necessary elements must be proven at the stage of conviction in order to attract the prescribed minimum sentence. I do not understand the judgment to mean that in all cases where an accused is charged with the possession of a firearm, all the elements must be proved at the stage of conviction without taking into account the provisions of s 88 of the Criminal Procedure Act, 51 of 1977. My understanding is that the principle set out in that judgment would be apposite only where the prescribed minimum sentence finds application.

[20] In the circumstances I hold that the appeal should also be dismissed in respect of this count as well.

[21] The appellants were also charged with the unlawful possession of ammunition. I have to agree with the concession by the respondent's counsel that the appellants should not have been convicted of this offence. After diligent perusal of the record I could not find any evidence that the appellants were in unlawful possession of ammunition. As such the appeal in respect of this count should succeed and the conviction is set aside.

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4 2010 (1) SACR 349 headnote at p350

[22] I now turn to the appeal on sentence.

[23] It has now become trite that when a prescribed sentence is imposed, without warning an accused person that he or she faces a prescribed sentence, such sentence is irregular and infringes an accused person's right to a fair trial in respect of sentence. [5] In this instance, the trial court made a finding that in respect of counts 1 and 2, there are prescribed sentences even though the appellants were not made aware of the applicability of the provisions of the Criminal Law Amendment Act 105 of 1997. The charge sheet made no reference of the Act nor was it placed on record when the appellants pleaded. It is, however, not in dispute that although the trial court incorrectly referred to the prescribed sentence, its jurisdiction in any way entitled it to impose a sentence of 15 years imprisonment in respect of counts 1 and 2.

[24] The appellants attacked the sentences imposed by the trial court on the ground that the trial court paid lip service to the personal circumstances of the appellants and by so doing imposed a sentence that induces a sense of shock.

[25] The trial court did take the personal circumstances of the appellants into account when passing sentence. And, it is my view that nothing much turns on the personal circumstances of the appellants to have persuaded the trial court to impose a lesser sentence than that imposed.

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5 *Ndateni v The State* (959/13) [2014] ZASCA 122 (19/9/2014) para [14].

[26] As far as the first appellant is concerned, the trial court took into account that he lived in Evaton since 2003; he is the owner of the premises and the contents of the house which pointed to some stability; he passed matric; he has two children, aged 9 and 13 years; he had one previous conviction for a traffic fine in 2006; he is 33 years of age; his wife was not working at the time; for a living he manufactured and installed burglar doors; his income was R800 *per* week. The trial court also took into account the fact that the case dragged for about five years.

[27] As far as the second appellant is concerned, the trial court considered the following factors: he was 30 years old at the time; married with two children, aged 9 months and 6 years; for employment he was driving a taxi which was an improvement because at the time he applied for bail he only washed the taxis; he made grade 10 or standard 8; the spouse was not working and he was steadfast in that he had been living at the same address for some time.

[28] In aggravation of sentence, the trial court took into account that even thought there were no fatal injuries sustained, the offence is rife in the district, in both counts of robbery trucks were taken – the truck in count 1 was valued at R1 million and the load on the truck was R300 000. The offences were pre-planned; one of the trucks was retrieved in a neighbouring country.

[29] The interest of society was also considered in that society expects its members to show respect to each other and each other's property. And the trucks contribute to the economy of the country.

[30] A court of appeal does not have a general discretion to ameliorate the sentences of trial courts. The matter is governed by principle. It is the trial court which has the discretion, and a court of appeal cannot interfere unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this regard an accepted test is whether the sentence induces a sense of shock, that is, to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognised that for appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited. [6]

[31] As already stated the first appellant was sentenced to an effective imprisonment term of 30 years. While, it is so that individual sentences are not to be interfered with where there is no misdirection by the sentencing court, however, it is my view that the effective sentence of 30 years' imprisonment meted against the first appellant is excessive and induces a sense of shock and does not serve the interest of justice.

[32] The Supreme Court of Appeal has repeatedly warned against excessively long sentences being imposed by trial courts, and advocated for realistic sentences of imprisonment. Such sentences should serve the offence, the community, the offender and be in the interest of justice. [7]

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6 *S v De Jager* and Another 1965 (2) SA 616 (AD) at 629A – B

7 *Zondo v S* (627/12) [2012] ZASCA 51 (28 March 2013)

[33] Normally, the interest of justice would be best served if counts 1 and 2 would run concurrently. However, in the light of the first appellant having been convicted together with the second appellant in count 2 I am of the view that ordering the two sentences imposed on the first appellant in respect of counts 1 and 2 to run concurrently in their entirety would in effect defeat the purpose of adequately punishing the first appellant for his conduct. I would therefore propose that the sentence in count 1 be reduced to ten years imprisonment.

[34] The sentence imposed upon the second appellant is in my view not excessive and does as such not induce a sense of shock and should not be interfered with.

[35] In the result, I would propose that the following order be made:

(a) The appeal against convictions is dismissed.

(b) The appeal against sentence is upheld to the extent indicated below:

'(i) The sentence of fifteen (15) years' imprisonment imposed in respect of the conviction in count 1 is set aside and substituted with a sentence of ten (10) years' imprisonment.

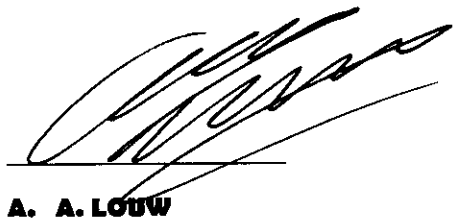
(ii) The effective term of imprisonment shall be twenty five (25) years.

(iii) The substituted sentence is ante-dated to 14 March 2012'.

E. M. KUBUSHI,

JUDGE OF THE HIGH COURT

I concur and it is so ordered



A. A. LOUW

JUDGE OF THE HIGH COURT

Appearances:

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