

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

26/8/16

Not reportable

Not of interest to other Judges

CASE NO: A34/2016

In the matter between:

VUYOLWETHU MADLEBE

Appellant

and

THE STATE

Respondent

J U D G M E N T

SETHOLE, AJ

1. The appellant appeared in the Regional Court, Oberholzer with his co accused on two counts of robbery with aggravating circumstances as envisaged in s1 of the Criminal Procedure Act 51 of 1977. His co accused was acquitted in respect of both counts.

2. Appellant was sentenced to 12 (twelve) years imprisonment in respect of each count. The first count having occurred on the 13th July 2013 at Backstage, Carltonville wherein R 1200,00 cash and a cell phone were robbed and the second count occurred on the 06th July 2013 at Elandsrand taxi rank where a black Samsung cell phone and R 100,00 cash were robbed.

3. Leave to appeal was granted by the trial court on the 11th December 2015 in respect of both conviction and sentence.

4. The facts are briefly as follows:

On count 1: The complainant is Sechaba Michael Dube and that on the 12th July 2013, he had gone to Randburg and on his way back it was late and when he arrived at Carltonville, he could not find taxis home as it was late. It was then that he decided to sleep over at Backstage so he can leave in the morning for home.

5. At backstage he went to the toilet and at the toilet, two people attacked him, throttled and searched him but failed to take anything from him. One of his assailants hit him with a fist on his left eye. He managed to break loose and went back inside the tavern.

6. Around 5 O'clock in the morning as he walked out of the Backstage in order to go home, he was attacked by four people who took from him an amount of R1 200, 00, a cell phone, passport and a bank card. One of his assailants threw back his passport and the bank card at that time. Regarding identity of his assailants, he could identify accused number 2 (two), which identity is irrelevant for the purposes of this appeal as accused number 2 (two) was acquitted on both counts.

7. While Sechaba Michael Dube was being robbed, Constable Mpanza and Constable Molefe patrolled the area and witnessed the robbery. The four robbers fled and Constable Mpanza gave chase to one of the robbers and never lost sight of him until he apprehended him. It transpired that it is the appellant in this matter who was apprehended. Upon being caught nothing was found in his possession. The appellant was then arrested in respect of count one.

8. The appellants version is that he was arrested while standing as a bystander busy smoking his cigarette. The appellant denied that he was part of the people who were committing the robbery.

9. On count 2: The complainant is Robert Maku and that on the 06th July 2013 around twelve O'clock midnight, he was from a Chesa Tarven on his way to take a taxi to Ellisrand. He was attacked and robbed by three male persons who threw him on the ground searched and took an amount of R100,00 and a Samsung cell phone worth R 430,00. At that time the police arrived at the scene which led to the robbers fleeing. The police gave chase and managed to arrest one of the robbers. It transpired that it is the appellant on count two.
10. The state led similar evidence of Sergeant Kanalemang Mokatsane and Constable Dluthu who testified that on the 06th July 2013 around twelve O'clock midnight, they were patrolling towards Backstage. While driving past the taxi rank, next to the Total Garage, they witnessed a robbery by three males on a person who was pinned down. Upon seeing the police vehicle, the three males fled the scene.
11. Constable Dluthu gave chase and apprehended one of the robbers in less than 100 metres. He never lost sight of the robber he was chasing until he apprehended him. It transpired that it is the appellant in the second count who was apprehended. He was searched and nothing was found on his person.
12. The appellant's version in respect of the second count is that he was never chased by police but he was just walking when he was arrested.
13. Upon the appellants' arrest, nothing was found in his possession that was robbed from complainants in respect of both counts. He was convicted by the trial court on the basis that he was a co-perpetrator in the commission of the offences. In respect of the first count he was seen by Constable Mpanza and Constable Molefe busy committing the act of robbery on the complainant with three of his companions who the fled the scene and were not arrested. The only one arrested was the appellant.
14. Even on the second count, he was convicted by the trial court on the basis that he was a co-perpetrator in the commission of the offence. Sergeant Kanalemang Mokatsane and Constable Dluthu saw the actual scene of robbery by three male persons and pursued one of them and apprehended the appellant.

15. Identity of the appellant in both counts is not in dispute as he was seen by both pairs of police witnesses in respect of both counts. From both scenes, the arresting officers chased and never lost sight of the appellant until he was apprehended.

16. I now turn to whether, the state has proved its case beyond reasonable doubt, of robbery with aggravating circumstances as envisaged in section 1 of the Criminal Procedure Act 51 of 1977, in respect of both counts.

17. In terms of Section 1 of the Criminal Procedure Act 51 of 1977 defines 'aggravating circumstances', as follows:-

(a)

(b) *robbery or attempted robbery, means-*

(i) *the wielding of a fire-arm or any other dangerous weapon;*

(ii) *the infliction of grievous bodily harm; or*

(iii) *a threat to inflict grievous bodily harm,*

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;

18. There is no evidence on record that there was any act by the robbers which was carried out as envisaged by section 1 of the Criminal Procedure Act 51 of 1977. At the hearing of this appeal, it was further conceded by both counsels of the appellant and respondent, that there were no aggravating circumstances in both counts.

19. Regarding conviction I find that the state did not prove its case of robbery with aggravating circumstances beyond reasonable doubt but proved a case of common robbery.

SENTENCE

20. The trial court erroneously found the appellant guilty of robbery with aggravating circumstances wherein the minimum sentence of 15 years was to be applicable in respect of both counts.

21. The sentence of 12 years imprisonment was imposed as the appropriate sentence by the trial court. It is not clear from the record on what basis did the trial court arrive at the 12 year sentence as the appropriate sentence.

22. Whilst it is trite that the sentencing powers are pre-eminently within the judicial discretion of the court that tries and convicts the accused, the appeal court will interfere where a sentence is based on incorrect facts or it is shockingly inappropriate or where there is an irregularity or misdirection. *S v Rabie 1975(4) SA 855 (A) AT 857 D-E.*

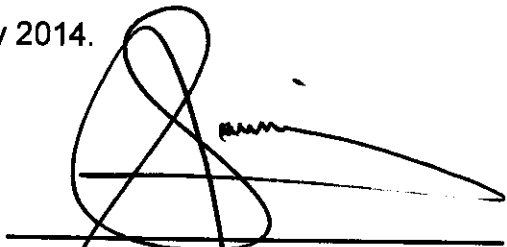
23. I now turn to consider the personal circumstances of the appellant placed on the trial record and arguments advanced on his behalf. At the sentencing stage the appellant was 29 years old at the time of the trial, he had three children, he was residing at Khutsong for the past 16 years at the time with his mother, wife and children. He was unemployed at the time of his arrest. He had a pending case which is not clearly defined from the record, at the time. He had been in custody for a period of ten months prior to the date of his sentencing, and since his sentencing he has been in custody to date. He has previous convictions of escaping from custody, theft, assault, housebreaking and robbery.

24. From the sentencing record, it appears the appellant is a repeat-offender and his previous convictions involves element of violence and dishonesty as correctly described by the trial court.

25. When the trial court considered both the mitigating circumstances and aggravating circumstances, the aggravating circumstances do indeed need a court to attach weight to them with respect to the nature of the appellants previous convictions and further that for both offences which the appellant has been convicted of, happened within one week.

26. In the result the following order is made:

1. The appeal on convictions in respect of both counts is upheld and set aside and replaced with the following:
 - 1.1. The accused is guilty of common robbery in respect of both count 1 and 2;
2. The appeal in respect of sentence in both counts is upheld and set aside and replaced with the following:
 - 2.1. The appellant is sentenced to 7 years' imprisonment in respect of each of the two counts;
 - 2.2. The sentences in counts 1 and 2, are to run concurrently.
 - 2.3. The sentences are ante-dated in terms of section 282 of the Criminal Procedure Act 51 of 1977 to 16 May 2014.



E.E. Sethole
Acting Judge of the High Court

I agree and it is so ordered.



N. Janse Van Nieuwenhuizen
Judge of the High Court

Date of judgment: 26 August 2016

For the appellant: Mr H Steynberg

Instructed by: Pretoria Justice Centre

For respondent: Adv. J.J Kotzé

Instructed by: Director of Public Prosecutions, Pretoria