OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA

A328/14

CASE NO: 8328/2014

DELETE WHICH IS NOT APPLICABLE

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

15/2/2016
Date

Signature

In the matter between:

KHULEKANI MKHABELA — FIRST APPELLANT

BHEKI PHIRI — SECOND APPELLANT

And

THE STATE — RESPONDENT

JUDGMENT

VUKEYA AJ

INTRODUCTION

[1] The two appellants were found guilty in the Regional Court Nelspruit, on four counts of Robbery with aggravating circumstances read with the provisions of section 51 (2) of

act 105 of 1997. The first appellant on counts 1, 5, 8 and 10 and he has noted an appeal against the convictions and the sentences. The second appellant on counts 1, 3, 8 and 10, he notes an appeal against the convictions and sentences on all the charges except on count three where his appeal is only against the sentence.

[2] The appellants were sentenced as follows:

The 1st appellant: count 1: 7 years

count 5: 4 years

count 8: 5 years

count 10: 5 years; and

The 2nd appellant: count 1:7 years

Count 3: 4 years

Count 8: 5years

Count 10: 5 years

[3] The appellants were unrepresented during the trial because the first appellant, on the day of the trial his Attorney withdrew as his attorney of record and he had to conduct his own defense and the second appellant terminated his attorney's mandate and proceeded on his own. The two appellants, with the assistance of the court, despite the appellant's submission in this regard, conducted their cases properly and did well in challenging the witnesses during cross examination.

[4] On the convictions the appellants contend that the Magistrate erred in finding that the complainants' identification was reliable and trustworthy; that the appellants robbed the complainants, that the state has proved the guilt of the two appellants beyond a reasonable doubt and also erred in not considering the serious discrepancies in the complainants' evidence.

[5] And on sentence it was contended that the Magistrate erred in failing to consider that no brutal force was used during the robberies and no serious injuries were inflicted on the victims. It was further contended that the time spent in custody awaiting trial was not taken into consideration and that the sentences were shockingly inappropriate. According to the appellants, the Magistrate failed to consider that the value of the stolen property was small; and he failed to have regard to the cumulative effect of the sentence

The facts can be summarized as follows:

[6] Regarding count 1: Mr Leonard Magagula said that on 05 February 2005 he was robbed in the township of Matsulu. His assailants pointed a cocked fire-arm at him and robbed him of his wallet containing R500. When the fire-arm was cocked for the second time he realized that the gun was empty then he chased them and followed the first appellant until he caught him and handed him to the police. He knew the accused very well and also stated that he never lost sight of him when he started chasing him until he caught him. He had a good opportunity to see both of them at the scene as there was enough light coming from the nearby houses.

[7] Leonard Magagula was correctly found to be a reliable and honest witness by the trial court. He was a single witness with regard to the robbery and the identity of the appellants. I am of the view that the cautionary rule applying to the evidence of single witnesses was correctly applied and the evidence with regards to the identity of the

accused is satisfactory. These were people he knew and he chased and caught one of them immediately.

[8] Regarding Count 5: Sandile Mabuza was robbed at Matsulu township. He left the tavern and got into his bakkie and soon thereafter the first and second appellants appeared. They were both unknown to him but he came face to face with them as they robbed him. The spotlight from the tavern provided light as it shone directly to where the incident was happening and there was light all over the place. At an identification parade he was only able to identify the first appellant.

[9] The trial court correctly found that this witness was reliable and that his observation of his assailants and his identification of the first appellant was satisfactory. The Magistrate rightfully rejected this witness's observation of the second appellant because he could not put any weight on the "dock identification" of the accused hence the second appellant was acquitted.

[10] Counsel for the appellants argued that because evidence of the identification parade of the second appellant was rejected therefore it should also be rejected in respect of the first appellant. This view is incorrect because, as the counsel for the state correctly submitted, the Magistrate's finding was based on the evidence tendered by Mr Mabuza on how he identified the appellant at the scene. He concentrated on his observations and was satisfied that even in the absence of evidence of an identity parade; the first appellant could be convicted but not the second.

[11] Regarding Count 8: Mr Mduduzi Nyathi said he was robbed by the two appellants on the evening of the 30th July 2005, at Matsulu Township. He knew the two for at least 6 years before the incident. The first appellant stood right in front of him during the robbery while the 2nd stood four meters from him. The source of light which assisted him to identify

the two came from the nearby houses. In an identity parade he was able to point at the first appellant.

[12] The Magistrate rightfully found that the witness's observations of the appellants when the incident occurred were satisfactory and that the circumstances around the identification were enough to satisfy the cautionary rule.

[13] Regarding count 10: Norman Lubisi also told the court that he was robbed by the two appellants on 15 May 2005. He had been drinking but said that he was able to identify the two with the assistance of a High Mass Light which provided enough light as bright as daylight. The two appellants were facing him when they robbed him and he even called the 1st by his name. At an identification parade he identified the first appellant.

[14] As the two appellant were also known to this witness and the Magistrate correctly found that he made a satisfactory identification of the appellants. The Magistrate rightfully found that even though the witness had a few intoxicating beverages he was not so drunk that he could not see what was happening around him

[15] The two appellants elected not to testify at the trial and remained silent.

[16] Though the accused elected to remain silent during the plea stages as well at the end of the state's case, it was clear during cross examination that the primary bone of contention was the question of identity in all the counts in which they were convicted. It is also clear from their heads of argument in this appeal that they contend that the magistrate erred in finding that they had committed the offences.

[17] The Learned Magistrate correctly evaluated the evidence before him; he rightfully approached the evidence as a whole. He was very cautious in his evaluation of the

witnesses' evidence more especially those that presented evidence regarding the appellants' identity.

[18] He correctly rejected the evidence of identification parades because they were conducted only in respect of the 1st and not the second appellant and relied on the evidence of identification given by the witnesses as they observed their assailants at the scenes. This approach has been applied strictly in respect of counts 3 and 5 and it is evident that only accused 2 in count three was convicted and only accused 1 was convicted of count 5.

[19] I cannot find any sort of criticism on the evaluation of the evidence by the trial court nor can I fault the manner in which such evidence was assessed leading to the conviction of the two appellants. I am of the view that the approach to the evaluation of evidence as it was stated in ***S v Trainor* 2003 (1) SACR 35 (SCA) by Navsa JA at 41, in *paragraph 9*** *as follows:*

"[9] A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety" was followed religiously.

[20] The Magistrate in his judgment considered the evidence as a whole, weighed the reliable evidence alongside that which is not reliable, he applied the cautionary rule properly where it had to be applied and then arrived at a decision that the appellants were

indeed guilty of the offences they were convicted of and correctly acquitted them where they needed to be exonerated.

[21] The discrepancies in the state's case were not material at all, the Magistrate gave sufficient reasons in his judgment why he elected to admit and reject certain evidential material and I am satisfied that such was done correctly.

AD SENTENCE

[22] The appeal is with regards to sentences passed on counts one, three (in respect of the second appellant) ,five (in respect of the first appellant), eight and ten.

[23] The duty of sentence falls within the judicial discretion of the trial court. The appeal court will only interfere if the trial court has misdirected itself or has committed an irregularity during the sentencing process which is prejudicial to the accused and requires interference or the sentence is so disturbing that it induces a sense of shock. See S v De Jager and Another 1965 (2) SA 616 (A)

[24] In the instant case, the appellants were found guilty of offences referred to in Section 51 (2) of the Criminal Law Amendment Act 105 of 1997 as it was found that they used a fire arm when committing the robberies.

[25] The Magistrate correctly stated to the appellants in his remarks that because of the nature of the offences they had committed they were facing 60 years of imprisonment.

[26] He found that no real harm was done to the complainants as they did not sustain any serious injuries and also found that the stolen property was of a relatively low value. And based on those factors, he concluded that there were substantial and compelling circumstances that justify a deviation from the minimum sentence provision of 15 years for each count.

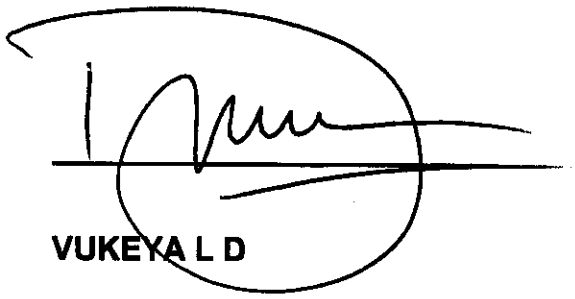
[27] The court, having found substantial and compelling circumstances, correctly deviated from the expected minimum sentence of 15 years each which would have resulted in the accused serving 60 years if not ordered to run concurrently.

[28] The court was referred to the case of *S v Brophy and Another* 2007 (2) SACR 56 WLD in order to persuade it to consider the time spent by the appellants awaiting trial. This decision is noted but not necessarily agreed with.

[29] The fact that a person was in custody awaiting trial for a lengthy period is not necessarily a "substantial and compelling circumstance" that justify the imposition of a lesser sentence. The question is whether the affective sentence proposed is proportionate to the crime or, (in this case), crimes committed, and whether the sentence in all the circumstances including the period spent in detention prior to conviction and sentencing, is a just one. See *S v Radebe and Another* 2013 (2) SACR 156 (SCA) a decision which seems to have overruled Brophy *(supra)*.

[30] In the premises I propose that the following order be made the following order is made:

That the appeal against the convictions and sentences is dismissed.

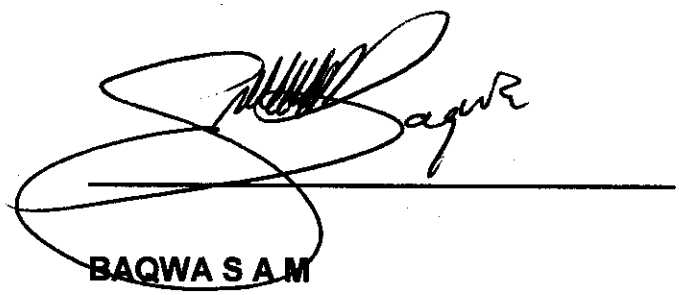


VUKEYA L D

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA GAUTENG DIVISION PRETORIA

I agree and it is so ordered.



BAQWA S A M

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA GAUTENG DIVISION PRETORIA

HEARD ON: 15 FEBRUARY 2016

DELIVERED ON:

COUNSEL FOR PLAINTIFF: ADV

ATTORNEYS FOR PLAINTIFF:

COUNSEL FOR DEFENDANT: ADV

ATTORNEYS FOR DEFENDANT: