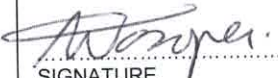




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: A247/2021

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

 SIGNATURE	17/08/2022 DATE
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In the matter between:

FELIX KHOZA

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

MOSOPA, J

1. The appellant was convicted in the Regional Court, Sebokeng, of the following counts;
 - 1.1. Count 1: robbery with aggravating circumstances, read with the provisions of section 51(2) of Act 105 of 1997;
 - 1.2. Count 2: attempted murder;
 - 1.3. Count 4: unlawful possession of a firearm;
 - 1.4. Count 5: unlawful possession of ammunition;
 - 1.5. Count 9: contravention of section 49(1)(a) of the Immigration Act 13 of 2002 (being an illegal foreigner).

and sentenced as follows;

- 1.1.1. Count 1: ten (10) years imprisonment;
- 1.1.2. Count 2: six (6) years imprisonment;
- 1.1.3. Count 4: five (5) years imprisonment;
- 1.1.4. Count 5: five (5) years imprisonment;
- 1.1.5. Count 9: fine of R300.00 or thirty (30) days imprisonment, wholly suspended for three (3) years.

It was ordered that the sentence in count 2 run concurrently with the sentences in counts 1, 4 and 5, with the effective sentence being twenty (20) years imprisonment.

- 2. This appeal against conviction only, is with leave granted by the trial court. Initially, the appellant was charged along with two co-accused and at the commencement of proceedings, the charges against accused 1, Clement Mohlatsi, were withdrawn, and the State proceeded against the appellant and his co-accused, Bongani Sithole.
- 3. The appellant was legally represented throughout his trial.

CORRECTION OF THE ERROR COMMITTED

- 4. At the end of the State's case, the trial court discharged the appellant in terms of section 174 of Act 51 of 1977, of count 1. When discharging the appellant, the trial court remarked as follows;

"There was robbery with aggravating circumstances. Be that as it may that offence is repeated in count 7, and the complainant is still Esther. Therefore, as a result both accused in respect of count 1 at the end of the state's case, they are found not guilty and discharged."

- 5. From the above *obiter* by the trial court, it is plain that the trial court was aware of the fact that count 1 and count 7 are duplicated charges, as they relate to the same complainant, place and date of the commission of the offence. However, at the end of the case, the trial court convicted the appellant of count 1, despite having discharged him, and acquitted him of count 7. This has the effect that the appellant is acquitted of the robbery which took place at the home of Ms Esther Mokwana.
- 6. It is plain that this is a *iustus* error on the part of the trial court and the appeal court is empowered by the provisions of section 304(4) of Act 51 of 1977 to rectify such error.

7. The error is therefore rectified to read as follows;

- 7.1. The appellant is discharged in terms of count 1;
- 7.2. The appellant is convicted of count 7, robbery with aggravating circumstances; and
- 7.3. The appellant is sentenced to ten (10) years imprisonment in respect of count 7.

BACKGROUND

- 8. The State called a number of witnesses to prove the guilt of the appellant beyond reasonable doubt and the trial court found such evidence to be honest and credible, and consequently, convicted the appellant of the aforementioned charges.
- 9. In respect of count 7, Ms Esther Mokwana testified that she was at that stage selling fruits from her house. A person came to her place and knocked on the door and she thought it was a customer, but that person pointed a firearm at her, instructed her to turn around and demanded money from her. The second person then arrived as she was still being pointed at with firearm. She had R670.00 with her which she put on top of a refrigerator and that person called out the name of Khoza for that person to put the money into the bag.
- 10. She screamed loudly and three police officers arrived at her place. Two of the police officers went into her house and asked what was happening. The two people then threatened to shoot the three-year-old child. The appellant then managed to put his firearm on his waist and managed to run out of the house and the police chased after him. This evidence turned to be wrong as she wanted to say that the appellant's co-accused is the one who ran away, but this will become cleared when her evidence is analysed.
- 11. She then told the police that there was another one inside the house. The appellant's co-accused then shot at the police and fired two (2) shots. The appellant and his co-accused ran away, leaving the money behind. She saw the faces of the two robbers, as neither of them had their faces covered. She also pointed the appellant out at the identification parade as one of the people who robbed her. As they were running away, they left behind one (1) "tekkie" shoe, which was pink and black in colour, and a bag containing a blue jacket.
- 12. David Lebea, one of the police officers who arrived at the scene of the robbery after hearing the screaming, went there to investigate. He confirmed that as they were entering the house, he saw a man who he mistook for a family member leaving the premises. He only gave chase after he was informed that that man

was one of the robbers. He could not catch the man. When he returned to the house, he saw the appellant shooting at Warrant Officer Mofokeng and he fell to the ground. This person also pointed a firearm at him, but did not shoot at him.

13. Molefe Lucas Mofokeng is the police officer who was shot by the appellant, in the company of Lebea. He confirmed that they went to the scene of the robbery after hearing the screaming. He also confirmed seeing a person leaving the house, which they thought was a family member, as he greeted them. He was seeing that person for the first time. He described that person as dark in complexion and he did not take much notice of his face. The person was wearing a blue overall top. That person is the appellant's co-accused.
14. Ms Mokwana informed Warrant Officer Mofokeng that there was another person in her bedroom, who was about to leave the bedroom. She also informed him about the other door which could be used to exit her bedroom. He then went to that door and saw a person he described as the appellant coming out of that door. He grabbed the appellant, and as they were wrestling, Warrant Officer Lebea arrived, and the appellant fired a shot at the ground. Thereafter the appellant turned the firearm and pointed it at Mofokeng and shot him and he fell to the ground. He was shot on his left waist. The appellant's face was not covered. After shooting, the appellant ran away. Warrant Officer Mofokeng was then taken to the hospital for medical treatment.
15. Lebohang Mongatso is the police officer who received information regarding the whereabouts of the appellant and went to that address to arrest him. He found the appellant hiding in the wardrobe. When the appellant emerged from the wardrobe, he pointed a firearm at Mongatso, who then drew his own firearm and pointed it at the appellant. The appellant then dropped his firearm and ran away. Mongatso then detained the other two (2) people who were present in the house after the appellant ran away, one of whom was the appellant's co-accused.
16. Bafana Abel Radebe is the police officer who arrested the appellant after he received information regarding his whereabouts. He knew the appellant prior to the incident, and he knew him as "Khoza". Several witnesses who attended the identification parade also testified. The identification parade was not challenged, and the appellant was pointed out by two of the witnesses. In this parade, Ms Mokwana pointed the appellant out as the person who shot Warrant Officer Mofokeng.
17. The appellant also testified in his defence. His defence was one of bare denial. His co-accused placed him at the scene, albeit for a different reason, being that he was there to purchase dagga, whereas the appellant denied ever being there.

CONVICTION

18. It is trite that the appeal court's powers to interfere with the findings of fact of a trial court are limited. The court of appeal will be reluctant to upset the factual findings and examination of evidence by the trial court, and will only interfere where the trial court materially misdirected itself in respect of its factual and credibility findings (see **R v Dhlumayo and Another 1948 (2) SA 677 (A)**; **S v Francis 1991 (1) SACR 198 (A)**).
19. All the witnesses in respect of the robbery charge, including the police officers who attended at the scene, saw the appellant for the first time on that date. Ms Mokwana testified that she was able to see the appellant's face, as it was not covered. Visibility was clear at the time because it was daylight. Warrant Officer Mofokeng struggled with the appellant before he was shot. By virtue of the struggle between them, Warrant Officer Mofokeng was in close proximity to the appellant and he was able to observe his face. Warrant Officer Lebea was also able to see the appellant's face before he retreated and took cover.
20. What also tips the scale against the appellant is that the name "Khoza" was mentioned by his co-accused during the commission of the robbery, where he was instructed to put the money in the bag. The appellant was positively identified at the identification parade. DNA was found in a "tekkie" shoe left behind at the scene of the robbery, the finding thereof admitted as correct by the appellant, which matched the DNA of the appellant.
21. The Supreme Court of Appeal, when dealing with evidence of identification, in the matter of **S v Mthethwa 1972 (3) SA 766 (A)** at 768A-C, Holmes JA stated;

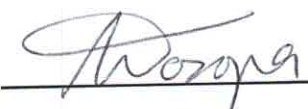
"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, 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 are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as R. v Masemang, 1950 (2) SA 488 (AD); R. v Dladla and Others, 1962 (1) SA 307 (AD) at p. 310C; S. v Mehlahe, 1963 (2) SA 29 (AD)."

22. I am alive to the fact that this was a mobile scene, but it was in a confined space, as can be gleaned from the crime scene photo album. The robbers were in close proximity to Ms Mokwana when they robbed her and she had the opportunity to observe them. Warrant Officer Mofokeng initially did not know that the appellant had a firearm, and when they were engaged in the struggle, nothing prevented him from observing the appellant. He was also in close proximity to the appellant. The evidence of Ms Mokwana is corroborated by the evidence of Warrant Officers Mofokeng and Lebea in as far as to what they observed when they arrived at the scene.
23. I am satisfied that the witnesses had ample time to observe the appellant and the trial court correctly relied on their observation of the appellant when convicting the appellant.
24. Mongatso, the police officer who seized the firearm and ammunition for the appellant, was clear in his evidence. He firstly had the opportunity to observe the appellant when he was hiding in the wardrobe through the opening. Thereafter, when the appellant emerged from the wardrobe, he again observed him in a well-lit room, and again as he was chasing after him as he ran away. The trial court did not misdirect itself in convicting the appellant, as his firearm was the only firearm and ammunition seized in this matter.
25. The appellant admitted that he is in the country illegally, in contravention of section 49(1)(a) of the Immigration Act 13 of 2002 and this court need not interfere with this conviction.
26. The appellant was identified as the person who shot at Warrant Officer Mofokeng. Warrant Officer Mofokeng could not attend the identification parade as he was still recuperating at home at the time the identification parade was conducted, and thus he only identified the appellant at court. However, as indicated *supra*, Ms Mokwana identified the appellant as the person who shot at Warrant Officer Mofokeng. This court need not interfere with the finding of the trial court on the charge of attempted murder of Warrant Officer Mofokeng.
27. In conclusion, there is no legal basis for this court to interfere with the factual findings of the trial court, as the trial court did not commit irregularities which could vitiate the conviction.

ORDER

28. In the consequence, the following order is made;
 1. The appeal against conviction is dismissed.

2. The order is rectified to read as follows;
- 2.1. The appellant is discharged in respect of count 1 of robbery;
 - 2.2. The appellant is found guilty of count 2 of attempted murder and is sentenced to six (6) years imprisonment;
 - 2.3. The appellant is convicted of count 4 of unlawful possession of a firearm and is sentenced to five (5) years imprisonment;
 - 2.4. The appellant is convicted of count 5 of unlawful possession of ammunition and is sentenced to five (5) years imprisonment;
 - 2.5. The appellant is convicted of count 7 of robbery with aggravating circumstances and is sentenced to ten (10) years imprisonment;
 - 2.6. The appellant is convicted of count 9 of contravention of section 49(1)(a) of the Immigration Act 13 of 2002 and is sentenced to a fine of R300.00 or in default of payment thereof, to undergo thirty (30) days imprisonment which is wholly suspended for a period of three (3) years.
3. The sentence in count 2 is ordered to run concurrently with the sentences in count 4, 5 and 7, and the effective sentence to be served by the appellant is twenty (20) years imprisonment.
4. In terms of section 103(1) of Act 60 of 2000, the appellant is declared unfit to possess a firearm.



MJ MOSOPA

JUDGE OF THE HIGH
COURT, PRETORIA

I agree,



NV KHUMALO

JUDGE OF THE HIGH
COURT, PRETORIA

APPEARANCES

For Appellants: Mr MB Kgagara

Instructed by: Legal Aid SA

For Respondent: Adv TS Nyakama

Instructed by: The DPP

Date of hearing: 7 June 2022

Date of delivery: Electronically transmitted