IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISON, PRETORIA)

CASE NO.: A119/2021

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

[redacted] 08/02/2022
SIGNATURE DATE

In the matter between:

STHEMBISO MAZIBUKO **1st Appellant**

TSHWARELO TLADI **2nd Appellant**

ZWELI MAHLANGU **3rd Appellant**

and

THE STATE **Respondent**

JUDGEMENT

NQUMSE AJ

[1] The appellants who were all legally represented were convicted in the regional court of Gauteng held in Benoni on one count of robbery with aggravating circumstances. Following their conviction, the first appellant (accused 2) and the second appellant (accused 1) were each sentenced to 12 years imprisonment whilst the third appellant (accused 3) was sentenced to 15 years imprisonment.

[2] The second and third appellants were granted leave to appeal against their convictions only whilst the first appellant was granted leave to appeal against both conviction and sentence.

[3] The background facts underlying their convictions are briefly that the complainant Elizabeth Nodau together with her niece, Suzan were on 3 October 2016 in a steel container tuck-shop where they were attacked by a group of 4 – 5 men who doused Suzan who was seated at the counter of the shop with petrol and pointed her with a firearm through an opening of a grill which separates customers from the shop assistant and through which customers are served. This group of men was at the same time demanding money, airtime vouchers and cigarettes. The screams from Suzan and woke up the complainant and she and Suzan gave them an amount of R600, as well as airtime and cigarettes.

[4] The complainant testified that she was able to identify two of her assailants who were not amongst the three appellants. She went on further to say the one she was able to identify, ~~was~~ used to visit her shop to buy cigarettes.

[5] She was also not able to point out who was carrying the firearm which was pointed at Suzan. In an identification parade that was held, she

was able to point out only one person whereas Suzan was able to point out more persons. She stated that Suzan has left for Mozambique out of fear for her life and will not be returning to South Africa.

[6] She also testified that after they had succumbed to the demands of their robbers, they left the shop and walked away. As they left, she was screaming, and she saw Jabulani Sibanyoni ("Sibanyoni") to whom she related their ordeal. Sibanyoni confirmed to her that he saw the robbers particularly Sipho Dungani ("Sipho") and he knows the names and addresses of the others.

[7] During cross examination, she conceded that at the identification parade she only pointed out the one who had demanded her cellphone.

[8] Sipho who was convicted following a separation of trials and foreshadowed his testimony in the trial of the appellants by making an apology to the appellants for what he was about to say, because he had no choice but to tell the truth.

[9] He continued and testified that the appellants before court are his friends. On 31 October 2016 he went to a place he refers to as a surgery to get some money. Whilst he was there, the first and second appellants arrived. After their arrival, they planned how to get money but whilst planning, they were joined by the third appellant who had alighted from a taxi in possession of petrol and a firearm. He also joined in their plan to get money by robbing a shop.

[10] Thereafter they left for Extension 21 and on their way they shared the petrol amongst themselves by pouring it into small containers.

[11] Upon their arrival at Extension 21 they went to the container shop of the complainant and they saw a lady who was serving customers. They stood outside the shop and after a while the second appellant poured petrol on that lady and whilst at the same time, she was pointed with a firearm by the third appellant. The screams by the said lady caused another who was sleeping in the shop behind hampers/parcels to wake up.

[12] After they demanded money from the ladies, they were given R6 00. 00, cigarettes and airtime vouchers. Their demand for more money was not successful. They left and boarded a taxi to the place of the second appellant. At second appellant's place, they shared their spoils by dividing the money amongst them and sold some of the airtime and cigarettes.

[13] Later that day he went to the shop and he met a certain Motsepe who told him that they were being sought after. He thereafter informed the appellants of his encounter with Motsepe as a result of which he fled to Mpumalanga in order to hide from the police.

[14] Whilst at Mpumalanga he was arrested by the police who asked him for the whereabouts of his friends. He then led the police to Daveyton to the place of second appellant where both the first and second appellant were arrested. He thereafter led them to third appellant who was found in possession of firearms.

[15] During cross examination he stated that he grew up with the first appellant and they were friends. The second appellant is his casual friend from the street with whom he clubs when they need money. He also

knows where he stays and he grew up with his siblings Nkele and Mpho albeit not certain about the number of the section of their residential area.

[16] He further stated that on the day of the incident they needed money in order to buy drugs since all of them were smoking drugs. However, some of the money was for the exclusive use by the third appellant to buy drugs who in return sells them. He further confirmed that he used to see the complainant whenever he is a patron in her shop.

[17] When it was put to him by the legal representative of the first appellant that the reason for him to plead guilty was because he had been seen by Jabu Sibanyoni, he said, the only reason that caused him to plead guilty is because he has a previous conviction of robbery and he had lied in that matter, however, he has now decided to be truthful. He further stated that he apologized to the appellants before the commencement of his testimony because he was about to tell the truth and would not deviate from his police statement.

[18] When it was put to him that the first appellant was not part of the robbery, he said he was now prepared to reveal the secrets. However the legal representation of the appellant did not have the appetite to pursue his threat of revealing the secrets.

[19] When he was pressed further by the legal representative of the third appellant to explain his apology to the appellants, he responded and said what they had discussed amongst themselves did not happen as it was supposed to. He explained that according to their discussion the appellants told him to exonerate them in the commission of the offence

and instead, must say he was with other people. They further suggested that he must implicate a certain Tshepo.

[20] He further said that he had an intention to plead guilty as early as at his bail application. Notwithstanding his intention to plead the matter dragged on for six to seven months.

[21] When it was put to him that the complainant said she had seen five people, he responded and said the complainant may not have seen properly because she was inside the shop. And he maintained that they were four in number.

[22] He also testified that initially their arrangement was he, the first and second appellants were going to plead guilty. The instruction for the three of them to plead guilty was from a prison gang called Air Force 3, to which the third appellant belongs. Following that instruction he indicated to the first and second appellants of his decision to plead guilty. However, they discouraged him from admitting anything that has to do with the crime. He also denied that he implicated the third appellant as a result of a fight over a territory to sell drugs, since he could not afford the money to buy and sell drugs.

[23] Barry James Kruger a member of the South African Police Service testified that based on information at their disposal they went to the place of the third appellant and met him on his way out carrying a bag in which they found 2 firearms as well as rounds of live ammunition for which he had no license. They arrested the third appellant. An examination and laboratory testing of the firearms proved that they were not real firearms.

[24] Sergeant Lawrence Maluleke from the ballistics division confirmed that the firearms were not authentic.

[25] Sergeant Christian Bopela who held the identification parade testified that Suzan Mahlangu pointed out the first appellant as well as another person who was not amongst the appellants. Whereas the complainant did not point out anyone.

[26] Jabulani Thabang Sibanyoni testified that on 31 October 2016 whilst he was walking past the complainant's shop, he was called by the complainant who informed him that they had been robbed and was pointing at three men. When he looked, he saw 4-5 people who were running across the soccer field and one of them was Sipho.

[27] Following the witnesses of the state, all the appellants testified in their defense. Their testimony was ostensibly a bare denial.

[28] The first appellant testified that he does not know Sipho and they were not friends. He was implicated because of a fight he had with him in prison following their arrest in this matter.

[29] According to his understanding both himself and the second appellant were arrested for being suspected of stealing book covers that were found at the second appellant's place and which the police believed that they belonged to ~~the~~ some Indians people. During cross examination he said that he knew Sipho only by sight.

[30] When he was asked his whereabouts on the day of the incident, he said he does not remember. When further asked by the prosecutor what

they fought about in the holding cell, he said Sipho was involving him in his issues.

[31] The second appellant confirmed that he was arrested with the first appellant for book covers and firecrackers that belonged to his brother, but which the police allege to belong to ~~the~~ some Indians people. He also testified that he knows Sipho only by sight and that he was implicating him because he was afraid of the people he had committed the crime with. He also said he cannot recall his whereabouts on 31 October 2016.

[32] The third appellant confirmed that on 3 November 2016 he was arrested by police for being in possession of firearms and for robbery. He also testified that he and Sipho were enemies emanating from their fight over a territory to sell drugs. He denies that he was part of the plan to rob the complainant's shop. He had last seen Sipho in 2014. He further confirmed that the firearms were toys which he had fetched from his aunt in order to give them to his nephew. He also confirmed his knowledge about the Air Force 3, prison gang but denies that he belongs to it. He said it is Sipho who is a member thereof.

[33] Sergeant Vikesh Valgubin of the South African Police Service who was called to testify for the third appellant confirmed that he arrested Sipho and informed him that during the commission of the offence he was together with the first and second appellant. Sipho further led him to where he would find the first and second appellants.

[34] During cross examination by the prosecutor, he did not dispute that W/O Kruger received information about the third appellant which ultimately led to his arrest. In clarification by the court, he confirmed that

he only arrested Sipho whilst the other appellants were arrested by members of his team.

[35] Captain Zulu of the South African Police Services who was called to testify on behalf of the third appellant refuted the claim that the third appellant was arrested for possession of an unlicensed firearm only. He stated that he informed the third appellant that he was arrested for robbery with aggravating circumstances and possession of unlicensed firearm.

[36] The appellants attack their conviction on the grounds that the magistrate erred in finding that the state has proved its case beyond a reasonable doubt. The judgement is further assailed on the basis that the court erred in not exercising the necessary caution when dealing with the evidence of Sipho who was an accomplice, and its rejection of the appellant's version as not reasonably possibly true.

[37] In argument before us, *Ms Moloi* for the appellants maintained the appellant's submissions which are set out in their heads of argument and had nothing further to add, save that the violence against the victims and the pre-trial detention of the first appellant warrants a lesser sentence than the sentence of 12 years imprisonment that was imposed by the magistrate.

[38] *Ms Cronje* for the state also maintained the state's submission set out in the state's heads of argument that the evidence of Sipho was corroborated by the evidence of other witnesses of the state. She further submitted that the evidence of the state witnesses contain no inherent improbabilities or material contradictions. Whilst on the other hand the version proffered by the appellants' amount to bare denials, riddled with

contradictions and improbabilities. In addition, she submitted that the aggravating factors in the matter do not render the sentence disproportionate to the crime.

[39] The proper approach when it comes to the assessment of the factual findings of the trial court is found in the principles as laid down in the well-known case of **R v Dhlumayo and Another**[1] where it was said, a court of appeal will not disturb the factual findings of the trial court, unless the latter had comitted a misdirection. Where there has been no misdirection on fact, the presumption is that the trial court's conclusion is correct **(see also S v Hadebe and Others)**[2]. Similarly, a court of appeal will be slow to interfere with the credibility findings of the trial court. In the absence of factual error or misdirection on the part of the trial judge that judge's findings are presumed to be correct[3]

[40] In assessing the evidence of the state, the following facts are worthy to note. That it is common cause that the complainant was attacked in her tuck-shop by a group of 4 – 5 men that poured petrol on Suzan and pointed her with a firearm. Complainant's evidence is corroborated by Sibanyoni who confirmed seeing a group of 4 – 5 men running away from the shop of the complainant crossing the soccer field. From that group, he identified Sipho Ndungani. -

[41] Sipho who had admitted his guilt and was convicted in a separate trial, laid bare in his testimony their plan which led to the robbery of the complainant. He also corroborated the evidence of the complainant that

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[1] 1948 (2) SA 677 (A) at 705
[2] S v Hadebe and others 1997 (2) SACR 641 (SCA))
[3] S v Mlumbi en ander 1991 (1) SACR 235 (A)

when they attacked the complainant's shop, they were in possession of petrol which was poured on Suzan by one of them. He further corroborated the complainant that one of them carried a firearm with which he pointed at Suzan.

[42] Sipho's co-operation with the police led to the arrest of the first and second appellants who were found at the second appellant's place. And it further led to the arrest of the third appellant who was found with firearms.

[43] In accepting the evidence of Sipho who is an accomplice, the magistrate appears to have taken cognisance of the caution in **Hlapezula and Others**[4] where Holmes JA stated that:

> "First, the accomplice is a self confessed criminal. Second, various consideration may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his single knowledge, he has a deceptive facility convincing description his only fiction being the substitution of the accused for the culprit."

[44] In this matter the appellants had little to show in order to impugn the credibility of Sipho. Before us counsel for the appellants was at pains to point out any dishonesty on the part of Sipho so as to render him an unreliable witness.

[45] That Sipho had proffered his testimony following an apology cannot in my view constitute a ground to jettison his evidence as a lie nor to disqualify him as a credible witness.

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[4] 1965 (4) SA 439 (A) at 440 D – H.

[46] The magistrate relying on various authorities including **S v Isaac and Another**[5] came to the conclusion that ~~Ndungani~~ Sipho was together with all the accused (appellants) during the commission of the offence[6]. I can find no misdirection on the findings of the magistrate.

[47] Turning to the evidence of the appellants it is trite that a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version[7].

[48] As alluded earlier the defense of the appellants is a bare denial. None of them had presented a story that is reasonably possibly true. The magistrate can therefore not be faulted for rejecting their version as not reasonably and possibly true.

[49] It is also trite that in order to establish whether the state has proved the guilt of the accused beyond a reasonable doubt, the evidence must be viewed holistically. This is what the magistrate appears to have done in this matter. He was astute as to how the evidential material before him related to each other, and which in turn completed the puzzle that pointed to the guilt of the appellants.

[50] It is therefore my view under the circumstances of the facts in this matter that the appeal against the conviction by the appellants ought to fail.

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[5] 2007 (1) SACR 43c
[6] Transcribed record vol 2 paginated page 281 para 20
[7] Shackell v S 2001 (4) All SA 279 SCA

[51] I now turn to deal with the appeal against sentence in respect of the first appellant. In **S v AR**[8] it was stated:

> "It is trite that the sentence in a matter for the discretion of the court burdened with the task of imposing the sentence. The court of appeal may only interfere if the reasoning by the court a quo is vitiated by misdirection or when the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock, or when there or when there is a strikingly disparity between the sentence imposed and the sentence the court of appeal would have imposed".

[52] In **S v Malgas**[9] the court said:

> 'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startingly" or "disturbingly inappropriate".

[53] The first appellant's personal circumstances which were considered by the magistrate are that he was 28 years old at the time of the sentence. He was unmarried, he attended school until grade 8, he has two children aged 12, years old and 8 years old respectively. The 12-year-old child

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[8] 2017 (2) SACR 402 (WCC)

[9] 2001 (1) SACR 469 (SCA) par 12

resides with the appellant's father and the 8-year-old resides with his mother. During his arrest he was employed at a car wash, earning R1 250 per month. He has spent 4 years' incarceration awaiting trial.

[54] The appellant further contends that notwithstanding the deviation by the magistrate from the prescribed minimum sentence of 15 years to a lesser sentence of 12 years, the magistrate failed to take into account the length of time he/appellant spent awaiting trial. Counsel for the appellant submitted that the degree of violence perpetrated in the commission of the crime was not excessive. And regard being had to these factors, so the argument went, the magistrate ought to have been more lenient.

[55] However, she was asked about the petrol that was doused on Suzan, the fear it must have instilled and the trauma it may have brought to bear on the victims, and whether that should not be considered as an aggravating factor. She offered no reply.

[56] In sentencing the appellants, the magistrate took into account all the traditional factors that ought to have been taken into account as propounded in **S v Zinn**[10]. He also appears to have been mindful of the objectives of sentence as laid down in **S v Rabie**[11].

[57] It is my view that if regard is had to the seriousness of the offence for which the appellant has been convicted it ordinarily attracts the minimum sentence prescribed in section 51 (2) of the Criminal Law Amendment Act 105 of 1997. The damage and the effect the crime has caused on its victims albeit not physical, taken together with the deviation

[10] S v Zinn 1969 (2) SA 537 (AD)
[11] S v Rabie 1975 (4) SA 855 (AD)

of the magistrate from the prescribed minimum sentence, I find that the sentence imposed by the magistrate is well balanced and sufficiently proportional to the crime. It therefore warrants no interference by this court. In the result the appeal against sentence falls to be dismissed.

[58] Accordingly, the following order is made:

1. The appeal against the conviction in respect of all the appellants is dismissed.
2. The appeal against sentence in respect of the first appellant is also dismissed.

V NQUMSE AJ

ACTING JUDGE OF THE HIGH COURT

I agree

N DAVIS

JUDGE OF THE HIGH COURT

It is so ordered

For the Appellants : Ms Moloi

Instructed by : Legal Aid South Africa

For the Respondent : Adv Cronje

For the Respondent : Adv Cronje

Instructed by : National Director of Public Prosecution

Heard on : 20 January 2022

Judgement handed down on : 08 February 2022