



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
JUDGMENT

NOT REPORTABLE
CASE NO: AR126/2016

In the matter between:

NTUTHUKO MAGIC ZINCUME

APPELLANT

And

THE STATE

RESPONDENT

Coram : Seegobin J et Radebe J
Heard : 23 August 2016
Delivered : 01 September 2016

ORDER

On appeal from the Regional Court, Ngwelezane, (sitting as a court of first instance):

The appeal against conviction and sentence is dismissed.

JUDGMENT

SEEGOBIN J (Radebe J concurring):

[1] The appellant, who was legally represented, was arraigned in the Regional Court at Ngwelezane on a charge of robbery with aggravating circumstances read with the provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1977. At the conclusion of all the evidence the appellant was duly convicted. No substantial and compelling circumstances having been found, he was sentenced to 15 years imprisonment. The present appeal, with leave of the court *a quo*, is against conviction and sentence.

[2] The State's case rested on the evidence of the complainant who was a single witness to the offence in question. It also called the evidence of *Constable Cele*, the investigating officer who arrested the appellant and recovered a plastic toy gun from him. Apart from pleading not guilty to the charge the appellant averred that the complainant was mistaken about his identity as he was not involved in robbing her on the day in question.

[3] There was no dispute that the offence occurred at about 18h00 on 20 October 2012 in broad daylight. The complainant was accosted by two males as she proceeded to her homestead after leaving her place of employment. One of the males approached her from the front. He produced a firearm and pointed it at her. The complainant was dispossessed of her bag which contained her cellphone, cash and certain medication. The complainant was warned not to take the same direction she was proceeding in but to take another instead.

[4] The complainant testified that she immediately knew who the assailant in front of her was and that she would be able to identify him if she saw him again. It seems that she did not know his name at the time. A few days later the same person came to the tuck-shop where she was employed. She recognized him as the person who robbed her on the day in question. She telephoned the investigating officer at once and informed him as such. She was told by the investigating officer that if she saw the person again she should call him. As it turned out, a few days later in early November 2012, she saw the person walk past the tuck-shop. She then requested one *Mandla*, whom she knew, to accompany her as she wanted to follow the culprit in order to see where he resided. They followed the appellant until he entered the Mavimbela homestead. Mandla then informed her that the assailant's name was Magic. She telephoned the investigating officer and gave him this information. The appellant was arrested on the following day.

[5] The investigating officer, Constable Cele, confirmed that he arrested the appellant based on information provided by the complainant. He also recovered a plastic toy gun from the appellant which he entered into the exhibit register. Constable Cele testified that inasmuch as the complainant had identified the appellant as the assailant, he nonetheless held an identification parade to satisfy himself that she had identified the right person. This was more so because the appellant's surname was actually Mavimbela whereas the appellant used the surname Zincume.

[6] While the appellant disputed the complainant's evidence of his identification throughout, he surprisingly testified that he knew the complainant for about 10 years as they resided in the same area prior to 20 October 2012. He eventually conceded under cross-examination that there could be no

question of a mistaken identity on the part of the complainant. This was contrary to his defence pleaded at the commencement of the trial.

[7] In the circumstances, the court *a quo* was correct in finding that the identity of the appellant had been established beyond a reasonable doubt. In my view, the findings of the trial court cannot be assailed in any way and the appellant was correctly convicted. It follows that the appeal against conviction must fail.

[8] As far as the appeal against sentence is concerned, it is trite that an appeal court will only interfere with a sentence of the trial court in circumstances where it finds that the court *a quo* either misdirected itself or that the sentence imposed is shockingly inappropriate or is unduly harsh.

[9] The appellant was convicted of a very serious offence in which a firearm was used. The trial court was correct in finding that there were no substantial and compelling circumstances present which would have justified the imposition of a lesser sentence. I can find nothing wrong in the trial court's findings in this regard. In my view, the appeal against sentence as well must fail.

ORDER

[10] The order I make is the following:

The appeal against conviction and sentence is dismissed.

RADEBE J I agree

Date of Hearing	:	23 August 2016
Date of Judgment	:	01 September 2016
Counsel for Appellant	:	Mr Marimuthu
Instructed by	:	Durban Justice Centre
Counsel for Respondent	:	Mr Mthembu
Instructed by	:	Director of Public Prosecutions Pietermaritzburg