IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO.: A517/2009

In the matter between

ZONKE MAKALAZA First Appellant

MANDLA MAMA Second Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 12 MARCH 2010

SAMELA, AJ

[1] The Appellants were convicted on 14 January 2009 by the Bellville Regional Court on two (2) counts each, namely: (i) robbery with aggravating circumstances and (ii) theft.

[2] The Appellants were legally represented throughout their trial, each pleaded not guilty on both counts. After evidence was led, both Appellants were convicted and sentenced as follows:

Ad Count 1 - the Appellants were each sentenced to eighteen (18) years imprisonment; and

Ad Count 2 - the Appellants were each sentenced to three (3) years imprisonment, sentences on both counts ordered to run concurrently, and both declared unfit to possess firearms.

[3] The Appellants brought an appeal against their convictions, which was granted by the court *a quo*.

[4] The State called seven (7) witnesses to give *viva voce* evidence, namely, Mr De Klerk, Mrs De Klerk (Ms Cronje), Inspectors Nel, Meyer, Wentzel, Const Japhta and Ms Gordon.

[5] Mr and Mrs De Klerk gave almost identical evidence. Mrs De Klerk testified that on the day of the incidents they were asleep in their bedroom. They were rudely awoken by two (2) robbers, who tied their feet and arms and ransacked their house, and took away amongst other things their jewellery, binoculars, bank cards, clothes, laptop and their motor vehicle. They were both assaulted by the said robbers repeatedly, though her husband pleaded with them not to assault her as she was pregnant. Her husband was assaulted and stabbed severally. As a result, they were both admitted into hospital. Under cross-examination, she confirmed her evidence in chief, and further confirmed that there were two (2) robbers in the house, because it was dark in the room, she could not identify them. Inspector Nel testified that on the day of the incident he was a Flying Squad SAPS member stationed at Pinelands. He was patrolling together with two colleagues (Insp Meyer and Const Japtha) in the early hours of the morning, in the Khayelitsha area, when they received a radio report that there was an armed house robbery in Bellville. The report was that all stations had to be on the lookout for an Audi vehicle, driven by two black men and a registration number was also furnished. As they were patrolling in the area, they spotted the said car parked at Total Garage. They arrested two black men near the car. On searching the two men, they found the Audi car keys on accused 1, and wallet containing R1 800.00, bank cards and ordinary keys on accused 2. They arrested both men and took them to Bellville Police Station where they handed over the case to the investigating officer. The car was taken to Stikland. Under cross-examination, he confirmed his evidence in chief.

[6] Inspector Meyer, who, at the time of the incident was stationed at Maitland Flying Squad, confirmed Inspector Nel's version as they were together in the police car, and he was the driver. Under cross-examination, he denied that he searched accused 2 and confirmed that he searched

accused 1. Inspector Wentzel was the former investigation officer who confirmed having visited the De Klerk's family after the incident and found them shocked (especially Mrs De Klerk who was pregnant). He also confirmed the list in the SAP13 was the correct list of items that were stolen and recovered from the De Klerks. Under cross-examination, he confirmed his evidence in chief. Constable Japhta confirmed the versions of the two inspectors. Under cross-examination he confirmed his evidence in chief. Ms Gordon, who worked as a cashier at the Total Garage on the day of the incident, testified that she knew accused 1 who used to come frequently to the shop. On the day of the incident, she told the court that Accused 1 bought a car magazine and took out a R50.00 note from a roll of money and paid. Accused 2 stood at the ATM and later bought cooldrink and two pies. She was not certain whether accused 2 in court was the same person who stood at the ATM. The two accused were apprehended by the police after they had left the shop. The two accused were the only customers at the time (after 03h00) at the shop. The previous customer was at the shop two and a half (2½) hours before. Under cross-examination, she confirmed her evidence in chief.

[7] Appellant 1 testified that on the day of the incident, was to meet his co-accused at Khayelitsha Police Station as they were going to Newlands to seek for work. Indeed, they met past three in the morning and both went to the Total Garage to buy food. As they left the garage for the station, they were arrested by police, and accused of stealing a motor vehicle and some items. He denied that he was involved in any armed robbery at the house of the complainants. He accused police of handing them the said items after they were arrested. Under cross-examination he confirmed that Ms Gordon (cashier) knew him and did not know why she implicated him in this case as he never bought anything at the shop on the day in question. Accused 2 confirmed accused 1 version and denied that he was also involved in the armed robbery at the complainants' place. Under cross-examination he told the court that he did not know why Ms Gordon told the court that he also attended to the ATM inside the shop, as he could not operate the machine. Both accused called Ms Nokwanda Makaluza and Nomathemba Jakoti as

alibi witnesses respectively. Both witnesses confirmed the versions of the accused (accused 1 and 2) that they left their respective homes early in the morning at twenty past three and twenty to three respectively.

[8] It was argued on Appellants' behalf that the court *a quo* erred:

(a) for insufficient consideration to the evidence relating to the time of the withdrawals;

(b) for not accepting the alibi evidence adduced by the defence;

(c) for convicting the Appellants on the strength of the circumstantial evidence despite the inference drawn by the court being not the only reasonable one; and

(d) for finding that the State had proved its case beyond a reasonable doubt.

The Appellants requested the appeal to be upheld and the convictions imposed on them be set aside.

[9] It was argued on Respondent's behalf that the Appellants were convicted and sentenced correctly. The court *a quo* took into account the factors which the Appellants' counsel raised.

[10] It is trite law that the court may convict where there was no eyewitness to the crime/s committed, where the court reasoning by inference applied the "two cardinal rules of logic", namely:

(a) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn;

(b) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. See **R v Blom** 1939 AD 188 at 202-3.

The court *a quo* correctly applied the abovementioned "rules" in this matter, and correctly convicted the Appellants.

[11] The imposition of an appropriate sentence falls entirely within the discretion of the trial court. Unless the trial court has misdirected itself, which misdirection should appear *ex facie* the record, a Court of Appeal would not lightly interfere with the sentence imposed by the trial court, see **S v Kibido** 1998 (3) ALL SA 72 (A). The court *a quo* took the following factors into account regarding the First Appellant that:

(a) he was 28 years old;
(b) was unemployed and did casual jobs;
(c) had one dependant (a son) who was 3 years old;
(d) was not a first offender; and
(e) has been in custody for 3 years and 4 months

regarding Second Appellant that:

(i) he was 28 years old;
(ii) was unemployed and did casual job;
(iii) was not a first offender;
(iv) had been in custody for 3 years and 4 months;
(v) most stolen stuff (items) were recovered including the motor vehicle.

[12] The following aggravating factors/circumstances in this matter were:

(a) the Complainants were rudely woken up by merciless intruders, who assaulted both in a cowardly fashion;
(b) the Complainants were tied their feet and hands at the back and assaulted repeatedly;
(c) though Mr De Klerk had pleaded for mercy for the robbers not to assault his wife as she was pregnant, that fell on deaf ears;
(d) Mrs De Klerk (Ms Cronje), who was defenceless and vulnerable, was assaulted and kicked in a cowardly manner;
(e) Mr De Klerk was stabbed severally;
(f) both Complainants landed up in hospital with injuries; and
(g) both Appellants were not remorseful.

[13] In my view, the Magistrate did not misdirect himself as he took all the abovementioned factors into account when convicting and imposing the

sentence. I was not able to detect any misdirection *ex facie* the record. In any event, having considered the circumstances of the issues, the personal circumstances of the Appellants and the interests of the society, I am of the view that the cumulative effect of the sentences imposed by the Magistrate, although heavy, are not shockingly inappropriate. Therefore, in the present matter, there is no basis on which this court can interfere. There is no misdirection and the sentences are not disturbingly inappropriate.

[14] I accordingly propose the following order:

The appeal is dismissed. The convictions and sentences are confirmed.

SAMELA, AJ

I agree and it is so ordered.

BAARTMAN, J