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

CASE NO: **A351/10**

In the matter between:

CHRIS PIYOOS 1st Appellant

THEODORE LOUW 2nd Appellant

And

THE STATE Respondent

JUDGMENT DELIVERED ON 4 FEBRUARY 2011

CLOETE, AJ

[1] The appellants were tried and subsequently convicted in the regional court on charges of robbery with aggravating circumstances (as defined in s1 of the Criminal Procedure Act, No 51 of 1977) as well as the unlawful possession of a firearm and ammunition of unknown calibre and origin. First appellant was also tried and convicted on a charge of attempted murder.

[2] First appellant was sentenced to an effective term of twenty years imprisonment and the second appellant to an effective term of fifteen years imprisonment. The first appellant appeals against both his conviction and sentence and the second appellant against his conviction for unlawful possession of a firearm and ammunition as well as his sentence.

[3] Both appellants had legal representation almost throughout the proceedings.

[4] In his judgment, the presiding regional magistrate summarised the evidence given during the trial in some detail. I do not believe it necessary to repeat this level of detail; suffice it to highlight certain aspects thereof.

[5] At approximately 16h10 on 13 March 2003 an armed robbery took place at AJ Brick Sales in the industrial area of Blackheath. Two persons, one of whom was armed, took part in the robbery. The firearm was used to threaten certain employees and other persons at the premises to hand over cash in an amount of R15 553 as well as two cellphones. Immediately after the robbers had left the building some of the employees, together with one Dawid van Wyk, followed them in a bakkie. The robbers were spotted and after an altercation in which a shot was fired by first appellant at the driver of the bakkie (Donovan Zimmery), second appellant was arrested and handed over to the SA Police. The second appellant was found in possession of the missing cash and cellphones and these were handed over to the SA Police, and in turn to the owners thereof. First appellant was arrested by the SA Police shortly thereafter. Approximately

45 minutes later both appellants were brought to the premises of AJ Brick Sales by the SA Police where two of the employees identified them through the window of the police vehicle as the robbers.

[6] The state called five witnesses, two of whom were employees of AJ Brick Sales, the third, the aforementioned Van Wyk, the fourth a forensic analyst and the fifth a police photographer. The appellants testified in their own defence and called no other witnesses.

[7] The appellants' defence was that they were not the persons responsible for the robbery. The first appellant claimed that he had simply been walking through bushes near where the altercation after the robbery took place and had run away out of fear. The second appellant claimed that he was walking along a path near the place where such altercation took place when he was suddenly assaulted by persons unknown to him and rendered unconscious. He further claimed that he only regained consciousness later when he found himself in the police cells.

[8] It was not seriously placed in issue by the appellants that the robbery had taken place as described by the state witnesses. The only real issue in dispute was identification by the state witnesses of the appellants. The magistrate found that although none of the state witnesses could describe the appellants in detail, they were all consistent in their identification of the faces of the appellants. In respect of the first appellant, all of the witnesses made mention of his 'ronde gesig', a description which

the presiding magistrate found to be correct based on his own observations. They also testified about his dark jacket which was also identified in the police photograph taken of him at the time. In respect of second appellant, none of the witnesses called by the state identified a particular facial detail but all were consistent in their identification of him, in particular, because they had all seen the two appellants shortly after the robbery (albeit under different circumstances) and had identified them. It is also noted that the second appellant's face was swollen and bloody. This was no doubt as a result of the assault on him as mentioned above.

[9] In his judgment, the presiding regional magistrate considered and evaluated the evidence, accepted that of the state witnesses, rejected that of the appellants, and convicted them as set above.

[10] On appeal before this court, appellants' counsel submitted the following:

[10.1.] In respect of first appellant, the state witnesses' identification should not be accepted as reliable because:

[10.1.1.] They had been traumatised by the events prior to identifying the first appellant who was in the back of a police van when the identification took place, which could have affected their ability to make a reliable identification;

[10.1.2.] In the circumstances they could have been mistaken in respect of the identification.

[10.2.] In respect of second appellant:

[10.2.1.] The evidence of the state witnesses was that only the first appellant was in possession of the firearm (and thus the ammunition). There was no direct evidence that the second appellant was ever in possession of, or shared possession with first appellant, of the firearm and ammunition;

[10.2.2.] The presiding magistrate misdirected himself in convicting the second appellant on theses charges by virtue of 'joint possession' as provided in the Arms & Ammunition Act, 60 of 2000.

[11] The presiding magistrate considered the applicable law relating to identification. This test was concisely set out in *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C as follows:

> *"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 light of the totality of the evidence, and the probabilities."*

[12] To my mind, the presiding magistrate was correct in finding that it was unrealistic that the state witnesses who followed the fleeing robbers would identify and confront two complete strangers, unless those people were indeed the ones who had just robbed them. The presiding magistrate was also correct in finding that it was highly unlikely that the recovered cash and cellphones would have been in the possession of a complete stranger so shortly after the robbery.

[13] Regarding the second appellant's appeal against his conviction for unlawful possession of a firearm and ammunition, the following is pertinent. Although a firearm was not found on either of the appellants at the time of their arrest, the state witnesses all testified, and it was never disputed, that the one assailant (whom they identified as first appellant) was in possession of a firearm during the commission of the offence. He not only pointed the firearm at at least one of the witnesses whilst still on the premises, but also shot at another when the witness and his workers, together with Van Wyk, found the appellants walking next to the road. The fact that there was no evidence that the second appellant was ever in physical possession of, or physically shared possession of, the firearm and ammunition, is not the issue. In *S v Mbuli* 2003 (1) SACR 97 at 115b-e the legal principle of 'joint possession' was summarised by Nugent JA as follows:

> *'In my respectful view, Marais J set out the correct legal position … when he said the following in S v Nkosi 1998 (1) SACR 284 (W) at 286h-i:*

The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the state has established facts from which it can properly be inferred by a court that:

(a) the group had the intention (animus) to exercise possession of the guns through the actual detentor: and

(b) the actual detentor had the intention to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole …'

[14] To my mind, the only reasonable inference to be drawn from the evidence is that the second appellant possessed the firearm and ammunition jointly with the first appellant. The evidence of the state witnesses was that the first appellant pointed the firearm at them in the presence of second appellant. It was the pointing of the firearm which enabled the second appellant to collect the cash and cellphones without resistance from the state witnesses, and there was certainly no evidence to indicate that second appellant was not acting in concert with first appellant to rob the complainants for the financial benefit of both appellants, who thereafter fled the scene together. It might well not have been joint possession if, for example, first appellant had used the firearm to subdue and rob the complainants on his own, whilst second appellant had waited outside. But in this matter the second appellant, although not in direct physical possession of the firearm, was clearly in joint possession as envisaged in the principle set forth in *S v Mbuli* supra. First and second appellants had the intention to exercise

possession of the firearm through first appellant; and first appellant had the intention to hold the firearm on behalf of both of them in the commission of the offence.

[15] It should be borne in mind that it is a well-established principle governing the hearing of appeals against finding of fact that, in the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong: See *S v Hadebe & Others* 1997 (2) SACR 641 (SCA) at 645e-f. In this matter, I cannot find any such misdirection on the part of the magistrate. In my view therefore the convictions of the appellants were based on a proper consideration of the whole body of evidence, and I am satisfied that the magistrate evaluated the evidence correctly and arrived at the correct conclusion.

[16] I would therefore dismiss the appeals of the appellants against their convictions.

[17] Regarding sentence, it was submitted by counsel on behalf of the appellants that the presiding magistrate did not exercise his discretion judicially and misdirected himself by finding that no substantial and compelling circumstances existed in order to depart from the obligatory minimum sentence of 15 years imprisonment for the convictions of robbery with aggravating circumstances. In support hereof, appellants' counsel submitted that the presiding magistrate failed, in addition to the personal circumstances of the appellants, to give due consideration to the following:

[17.1.] That all of the stolen property had been recovered and returned to the lawful owners / possessors;

[17.2.] That apart from the second appellant, no one sustained any injuries;

[17.3.] That although the appellants were on bail, the matter was unduly prolonged (from 2003 to 2010) whilst the appellants' lives were held in abeyance pending the outcome of the trial.

[18] My view on these submissions is as follows:

[18.1.] The fact that the stolen property was recovered was not as a result of any actions on the part of the appellants.

[18.2.] That no one apart from the second appellant sustained any injuries should more correctly be attributed to good fortune, particularly bearing in mind that the first appellant fired a shot directly at the persons following the appellants and could thus have killed or injured any one of them.

[18.3.] Neither of the appellants was incarcerated during the seven years which it took for the matter to come to trial and, whilst it may be that their lives were placed on hold during this period, both were on bail and continued to have freedom of movement.

[19] To my mind, none of these factors, nor for that matter the personal circumstances of the appellants, lead me to conclude that there are truly convincing reasons for a different response to that of the magistrate when he imposed the sentences which he did. It was as a reaction to the high level of crime in South Africa

that s 51 of the Criminal Law Amendment Act,105 of 1997 was enacted: see Snyman: *Criminal Law (5th Edition)* at p368.

[20] The circumstances entitling a court of appeal to intervene in a sentence which another court has passed are limited, and these circumstances were summarised in *S v Malgas* 2001 (1) SACR 469 (SCA) at 478d-g as follows:

> *"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was a trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be 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 ... 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', 'startling' or 'disturbingly in appropriate'."*

[21] To put this test further into perspective, the court in *S v Malgas* supra at 481i put it thus:

'Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.'

[22] Taking into account all of the circumstances I am not persuaded that the sentences which the magistrate imposed can properly be described as *'shocking, startling or disturbingly inappropriate'*.

[23] I would therefore also dismiss the appeals against sentence.

J I Cloete

I agree. It is so ordered.

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