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

Coram: LE GRANGE, J *et* SABA, AJ

Case No: **A597/2010**

In the matter between:

THOMAS MAYAMBELA	First Appellant
THEMBA GCANGA	Second appellant

and

THE STATE	Respondent

APPEAL JUDGMENT: DELIVERED WEDNESDAY, 25 MAY 2011

SABA, AJ

[1] In this matter the appellants were convicted on one count of robbery with aggravating circumstances in Parow Regional Court. The first appellant was sentenced to eight years imprisonment and the second appellant to twenty five years imprisonment. The appellants unsuccessfully applied for leave to appeal against conviction and sentence in the court a quo. After a successful petition to this court, the first appellant now appeals against conviction and the second appellant against conviction and sentence.

[2] The appellants attack the conviction of the Court a quo on the grounds that the magistrate erred on the following aspects:

(i) In accepting evidence of identification as reliable;

(ii) In accepting the evidence of the investigating officer regarding the receipt allegedly found in possession of the first appellant;

(iii) In finding that the state proved its case beyond reasonable doubt and not finding the versions of the appellants to be reasonably possibly

true.

The factual matrix underpinning the conviction can briefly be summarized as follows:

[3] Lindile Wellem who was a cash security at Coin Security testified that he and a colleague, Godfrey Lybrand were at Shoprite Checkers to collect cash. He left Godfrey standing at the door while he went to the cash office. At the cash office he was given a mailbag and a money bag containing a large sum of cash. He put the money in a briefcase. When he was on his way out, he saw two men with their backs facing him. They turned around when he was two metres away from them and he saw their faces.

[4] The first appellant who had grey or black dyed hair that time pointed a firearm at him from the back. The second appellant who had a big head, a long chin and a scar on the right eye pointed a firearm at his stomach. His firearm and the bag containing the money was robbed from him and the second appellant ran away. The first appellant also ran away. About four months after this incident, he attended an identification parade at Wynberg where he positively identified the two appellants. He identified the second appellant by his long face but could not see the scar on his face.

[5] Yolanda Cornelius, the assistant manager who handed the monies in the amount of R84 340, 00 to Wellem testified that she did not see the robbers. A day after the robbery, the police dealing with the case brought a slip to her. She identified it as a slip she had signed and put in one of the bags containing money that was robbed.

[6] After receiving information on 13 March 2007 (a day after robbery), Norton Ndabambi, the investigating officer of this case went to Delft Score Supermarket at about twelve noon. He spotted a green Opel Astra with the two appellants inside. After informing them that he was investigating an armed robbery case

committed at Shoprite, he asked for permission to search the vehicle. He searched the car in their presence and found a plastic bag from CNA stores containing a lot of R100, R50 and R20 notes in a packet tied with a rubber band. The first appellant told him that the money belonged to a friend who lived in Delft. Ndabambi could not follow that information up because the first appellant did not know the address of the friend.

[7] He and his colleague took the two appellants to their offices in Bellville South where they searched them. Captain Madikane found, in his presence a slip from Shoprite from the pocket of a golf shirt worn by the first appellant. The money contained in the plastic bag from CNA was counted and it amounted to R9000, 00. He then went to Shoprite in Bishop Lavis and met Yolanda Cornelius who identified the slip found on the first appellant as one of the slips she had put in one of the bags containing the money robbed on 12 March 2007.

[8] Godfrey Lybrand who was with Wellem on the day of robbery did not see the face of the robbers but testified that there were more than two robbers.

[9] The first appellant's version is the following:- He was requested by the second appellant on 13 march 2007 to take him to Delft. While they were making enquiries along the road, the police arrived and arrested them. They were not informed about the reason for the arrest; instead the police just assaulted them with flat hands. They were also searched and a wallet, cellphone and a lip ice were found on him. He denied any knowledge of any money found in the car. He said Ndabambi put a plastic bag in his back pocket and thereafter he and the second appellant were taken to Bellville South Police station. He only saw the money in the plastic bag when Ndabambi took the plastic bag out. He denied that a slip was found on him. He also denied that he robbed Wellem or was at the scene of robbery. He admitted that he used a dye on his hair because it was turning grey. He could not recall whether he had dyed his hair at the time police arrested them.

[10] The second appellant testified that on Monday 12 March 2007, he took his mother to a day hospital for treatment. He denied that he was at a robbery scene in Bishop Lavis. He said on 13 March 2007, he was assaulted and arrested by the police when he was making enquiries about Farook who would fix his mother's car. He said he had no knowledge about the money which the police allegedly found in an ashtray of the car he and the first appellant were travelling in. He only heard about the money when the police screamed and said they had found money. He confirmed that he had a scar on the right eye.

[11] The magistrate critically analyzed the evidence of all the witnesses and gave a well reasoned judgment.

[12] It is trite that the evidence of an identifying witness must be approached with caution. The identifying witness evidence must not only be credible but must also be reliable. In S v Mthethwa 1972 (3) SA 766 (A) at 768, the Court held the following:

> "Because of 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; the 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 results of the identification parades, if any; and of course the evidence by or on behalf of the accused..."

[13] In casu, the evidence reveals that when the robbery took place, it was broad daylight. Wellem had an opportunity to observe the appellants when they robbed him because they were standing one to two metres away from him and were not covering their faces. The identifying features Wellem mentioned, i.e,

black dyed hair on the first appellant and a long chin and a scar on the right eye of the second appellant, were confirmed by the appellants. Wellem further identified both appellants at an identification parade.

[14] The first appellant's legal representative was present at the identification parade and did not see any irregularities in the procedure followed at the identification parade. In my view, the magistrate adopted a cautious approach in evaluating the evidence of Wellem. The identification parade does give credence to Wellem's evidence in correctly identifying the appellants at the time of the robbery. I am satisfied on a conspectus of the evidence that Wellem is a credible and reliable witness and the magistrate was correct in accepting his evidence.

[15] The appellants' versions are the police arrested them for no apparent and planted certain incriminating evidence on them. This conspiracy by the police against the appellants was somewhat debated by Mr Fisher, counsel for the appellants. Mr Fisher did, however, not persist with the conspiracy argument and correctly so. The probabilities in this matter do not lend credence to the notion that the police planted the monies or the receipt on the appellants.

[16] I am satisfied, having regard to all the evidence, that the appellants' versions cannot be reasonably possibly true and the state did prove its case beyond a reasonable doubt. It follows that the appeal against conviction cannot succeed.

[17] With regard to sentence, the crime of robbery, where aggravating circumstances are found to be present, falls within the ambit of Part 11 of Schedule 2 of the Minimum Sentencing Legislation. Part 11 specifically refers to robbery – where there are aggravating circumstances. Section 51 (2)(a) of Act 105 of 1997, dealing with sentences to be imposed provides as follows:

"Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High court shall sentence a person who has been convicted of an offence referred to in-

(a) Part 11 Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years

(ii) a second offender **of any such offence**, to an imprisonment for a period not less than 20 years".

[17] It is not clear from the record on what basis the magistrate decided to impose a sentence of twenty five years imprisonment on the second appellant. The second appellant has a list of previous convictions, i.e, three for theft, one for possession of firearms and ammunition and two for robbery. There is no indication that aggravating circumstances were found to be present on the previous convictions for robbery. The magistrate, in my view, erred in treating the second appellant as a second offender for purposes of the Minimum Sentencing Legislation and misdirected himself when he imposed a sentence of twenty five years imprisonment on the second appellant.

[18] This Court is therefore at liberty to consider the sentence afresh. Having regard to the second appellant's circumstances, the magistrate was correct in finding that there were no compelling and substantial circumstances justifying a deviation from a minimum sentence prescribed. I am of view that the minimum sentence of fifteen years is a just and equitable sentence to impose. In respect of the first appellant, I cannot find any grounds for interfering with the sentence of eight years imprisonment.

[20] In the result, the following order is proposed:

(1) The appeal against conviction is dismissed;

(2) The appeal against sentence in respect of second appellant is upheld;

(3) The sentence imposed by the regional magistrate on the second appellant is set aside and substituted with the following :

(a) Accused 2 is sentenced to fifteen years imprisonment.

SABA, AJ

I agree and it is so ordered.

LE GRANGE, J