IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A13/2012

DATE: 16 MARCH 2012

In the matter between:

JEROME FRENSKY Appellant

and

THE STATE Respondent

J U D G M E N T

SALDANHA, J:

The appellant, Mr Jerome Frensky, was convicted on 16 October 2009 in the Regional Court, Somerset West on two charges of robbery with aggravating circumstances. He was sentenced to an effective term of imprisonment of seven years. The first charge arises out of an incident on 16 August 2008 where he, together with a co-accused, Mr André Jacobs, were alleged to have robbed Mr John Booysen in Macassar of an amount of R750,00 cash and a cellphone, with the use of a knife.

The second charge arose out of an incident on 22 January 2009, also in Macassar, where the appellant was alleged to have robbed a Mr Jermaine Booysen of a cellphone with the use of a knife. The appellant was legally represented at the trial, pleaded not guilty and placed all the elements of the offence in dispute.

It was common cause in respect of the first count that the appellant and Jacobs had on the day of the incident gambled for money with the complainant and two others with the use of dice near an open field in Macassar. After the complainant had rolled the dice, a dispute broke out between the complainant and Jacobs. The complainant, for his part, believes that he had won the round, while Jacobs was of a different view and believed that the complainant was mistaken. An altercation broke out between the two of them and the complainant claimed that the appellant intervened by grabbing him from behind and stabbed him with a knife in his back.

The appellant thereafter threw him on to the ground and both he and Jacobs tore open the pockets of his trousers and removed his cell phone and the money that he had on him. He estimated the amount to have been R750,00, but he was not entirely sure thereof. The complainant thereafter ran home. He later reported the matter to the police and was taken to the

Helderberg Hospital, where he was attended to by a doctor. He received four stitches, and at the trial showed the magistrate the scar that was left on his back by the wound.

The following day a friend of his, Mr Kevin Martin, approached him and wanted to hand the cellphone back to him, which Martin claimed he found in a room in which the appellant and Jacobs had occupied the previous night. The complainant insisted that Martin hand the cell phone to the police, from whom the complainant subsequently retrieved it.

The appellant and Jacobs, for their part, claimed that in the altercation with the complainant, they had merely pushed him over and that he fell on his back. They denied that they had robbed him of his cell phone and money and that the appellant had stabbed him with a knife. They claimed that the appellant was under the influence of alcohol and Jacobs claimed that it was a common occurrence during such gambling sessions, that disagreements amongst the players arose, tempers flared and that physical fights often broke out with the use of knives. They, however, denied that such was the instance in respect of their disagreement with the appellant.

In respect of the second count, the complainant claimed that on 22 January 2009 while walking with a friend, Elton, in

Macassar, they were confronted by three men, one of whom was the appellant who grabbed him from behind. One of the others, known to him as Fluitjie, asked him for a cigarette, to which he replied that he did not have any. He claimed that the appellant then put his hand into his pockets and removed R3,00 in small change and his cigarettes. The complainant reached for his cell phone in his back pocket and the appellant demanded it from him with the threat of a knife. The complainant, out of fear, handed the cell phone to him.

The complainant claimed that at that stage a policeman arrived on the scene and all three of the men ran away. His cellphone was handed back to him the following day by the police. The complainant claimed that he had never seen the appellant before and that he overheard from the other two that the appellant was referred to as Justin.

Constable Ricardo Charles Absolom testified that at the time of the incident, he and a colleague were on patrol duty near Chris Hani Park in Macassar when they received a report that a person had been robbed of a cellphone. They responded, and a member of the public indicated to them where three men had run into a house in Small Street, Chris Hani Park. The owner of the house informed him that three men, who were unknown to him, simply ran into his house. The appellant and Fluitjie

were found by the police sitting in the front room watching television. Absolom found the other person, who was known to him as Justin Julies, hiding in the toilet and found on his possession an MTN SIM card. Absolom claimed that Justin subsequently pointed out to him the cellphone, which he found hidden behind the toilet seat. All three of them were arrested.

The appellant, for his part, admitted that he was with both Fluitjie and Justin and claimed that they were on their way to a pawnshop to trade in a face of a tape recorder and a silicon gun applicator. They came upon the complainant, from whom Fluitjie asked for a cigarette. The complainant willingly gave both him and Fluitjie cigarettes and while they lit it, Justin suddenly demanded that the complainant hand over his cell phone to him. Justin thereafter grabbed the complainant's cellphone from him and fled.

He and Fluitjie ran after Justin, as he claimed Justin had the face of the tape recorder on him and they wanted it to take to the pawnshop. They followed Justin to a house, where they waited for him while he was busy in the toilet. The policeman Absolom arrived and they were arrested. In his testimony, the appellant denied that he had held up the complainant with a knife and maintained that it was Justin who grabbed the cellphone from the complainant.

The magistrate, in an evaluation of the evidence, on both counts, found that the complainants were good witnesses and was impressed by the manner in which they had testified. She found them to be honest and readily accepted their versions. She found corroboration for the complainant's version on the first count in the testimony of both Martin and in the medical report of the injury recorded on the complainant's back. In respect of the second count, the magistrate found that the complainant had merely been mistaken about the name of the person who had robbed him as being Justin.

In contrast, she found that the appellant, on both counts, and Jacob on the first, were particularly poor witnesses and rejected their versions. She also found that on the second count there was no plausible explanation given by the appellant as to why he ran after Justin, if, as the appellant claimed, Justin had just committed a robbery. She also found that the appellant had failed to disassociate himself from the conduct of Justin and nor had he informed the police when he was found at the house that Justin was in the toilet and that it was Justin who had robbed the complainant.

It is trite principle that the state bore the onus of proving the appellant's guilt beyond reasonable. It is not incumbent on a court to believe the version of an accused person and he/she

is entitled to the benefit of the doubt if their version is reasonably possibly true. In this regard, the court is required to consider all of the evidence in its totality, together with the probabilities of the versions of the respective witnesses.

In respect of count 1, the magistrate appears to have failed to take into account the context in which the offence was committed, where the complainant and the appellant and others participated in the vagaries of an illicit gambling game with the use of dice. As Jacobs testified, it often occurred that tempers flared, disagreements arose, fights broke out and that the losing parties were often aggrieved and disgruntled. It also appeared that participants would very often be under the influence of alcohol and that exacerbated the excitement of their wager.

The evidence of the complainant as a single witness, had to be treated with the necessary caution and had to be considered in the context of what appears to have been his own unhappiness about his winnings having been disputed. The magistrate appears not to have done so and uncritically accepted the evidence of the complainant. The appellant and Jacobs, however, admitted that they had forcefully pushed the complainant and that he had fallen on his back. They had not disputed the injury to his back and the medical doctor was not

able to unequivocally record that the injury had been caused by a knife. In the circumstances it is reasonably probable that the injury could have been caused during the complainant's fall.

Martin, in his evidence about the return of the cell phone to the complainant, conceded that the place in which it was found, was not the residence of either the appellant or Jacobs. Apart from his claim that the appellant had expressed his regret to him about the incident with the complainant, which claim the appellant denied, Martin was not able to offer an explanation as to how exactly the cellphone got on to the premises at which it was found.

I am of the view that the magistrate incorrectly approached the evaluation of the evidence of the state witnesses by simply contrasting it against that of the appellant and Jacobs and without considering the inherent probability of the appellant's version. In the circumstances I am unable to sustain the conviction by the magistrate of the robbery on the first count, but that it is apparent that on the appellant's own version and Jacobs' version, he and Jacobs had committed the offence of assault with the intent to do grievous bodily harm by forcefully pushing the complainant over on to his back.

In respect of the second count, it appears that on the evidence there is a reasonable uncertainty as to whether it was the appellant or the person known as Justin who had actually grabbed the complainant from behind. The complainant admitted that he had not known either the appellant nor Justin prior to the incident, but that he had heard the name Justin used in reference to the person who appeared to have grabbed him from behind. It is not improbable that in such circumstances the complainant could have been mistaken about the identify of the person who grabbed him from behind and robbed him of his cell phone.

However, on the appellant's own version he was in the company of both Fluitjie and Justin and that he immediately ran after Justin, who had just brazenly robbed the complainant of his cellphone. The appellant, having witnessed the attack on the complainant by Justin, did nothing to stop it and so too, when confronted by the police at the house, he failed to point out that Justin was in the toilet and that it was Justin who had robbed the complainant of the cell phone.

In S v Mgedezi 1989 (1) SA 687 at 705, the following is instructively stated by Botha, J, with regard to the requirements of proving common purpose in the commission of an offence, albeit with reference to the offence of murder:

"The decision in S v Safatsa & Others 1998 (1) 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. (As to the first four requirements, see Whiting 1986 SA LJ 38 at 39)."

On the evidence it is clear that the appellant had associated himself with the conduct of Justin and it remains an inescapable conclusion that both he and Fluitjie would have participated in the proceeds of the disposal of the cell phone that Justin had robbed the complainant of. The appellant's

conduct also revealed an unmistaken common purpose with that of Justin. I am, therefore, of the view that the magistrate correctly convicted the appellant of the robbery albeit on a different basis.

In the light of my view with regard to the appropriate conviction of assault with the intention to commit grievous bodily harm and the basis of the conviction on the robbery, this court, on appeal, is at liberty to reconsider the question of sentence. In consideration of an appropriate sentence on the finding of assault with the intent to do grievous bodily harm and that of the robbery, the court must take into account the personal circumstances of the appellant, the nature and seriousness of the offence and the interest of society.

At the time of the sentencing, the appellant was 30 years old, lived in Macassar all his life, was single, with one child and appeared to live with his mother. He was employed as a builder and had earned R400,00 per week and his highest education qualification was that of Standard 6. The appellant, however, appears to have had four previous convictions of housebreaking and a theft.

In what was no more than a gratuitous assault on the complainant in count 1, the appellant and Jacobs displayed a

complete lack of respect for the complainant. It would appear that when gambling with dice, heated arguments and violent disagreements are often settled with force and at times with knives, such conduct remains both legally had socially inexcusable. Needless to say it could inevitably have led to serious injury and if not appropriately discouraged with the intervention of the courts, would and could lead to fatal injuries.

Moreover, the community in which the appellant lives, has increasingly become intolerant of the use of violence in the settling of scores and, if anything, such conduct only reinforces the prevalent culture of violence and impunity that afflicts so many desperate communities. The complainant suffered an injury to his back, which required medical attention and the seriousness of the assault on him cannot be over-emphasised.

In respect of the conviction on the robbery, the magistrate appropriately took into account the extreme prevalence of the offence in the jurisdiction of the court and the interest of the community in their demand for better protection against such blatant and indiscriminate acts of robbery. Cellphones are a common item in the possession of many members of society. The conduct of the appellant demonstrates how ordinary

people are extremely vulnerable and easy targets for such violent attack and the robbery of their cellphones. The magistrate correctly sought to send an appropriate message with the imposition of the sentence of five years imprisonment. However, that sentence was appropriately tempered with an element of mercy as two years thereof were meant to run concurrently with the sentence on the first count of robbery.

For the same considerations, and given the circumstances under which the appellant had been found guilty of the robbery on the second count, I am of the view that the sentence of four years imprisonment would be both just and equitable. In the result, I propose the following order:

Count 1:

(i) The conviction of the appellant of the offence of robbery with aggravating circumstances is set aside and substituted with that of assault with the intent to do grievous bodily harm.

(ii) A sentence of **TWO (2) YEARS OF IMPRISONMENT IS IMPOSED**.

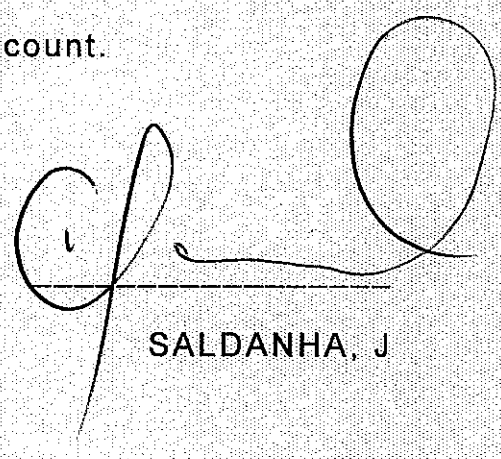
Count 2:

(i) The appeal against the conviction of the robbery with aggravating circumstances is dismissed and the

conviction is confirmed.

(ii) A sentence of **FOUR (4) YEARS IMPRISONMENT** is imposed.

It is also ordered that the sentence in respect of the first count run concurrently with that on the second count.



SALDANHA, J

I agree and it is so ordered:

LE GRANGE, J