Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[REPORTABLE]

CASE NO: A102/14

In the matter between:

SHERABEEN FRANCIS Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 28 MAY 2014

Henney, J:

[1] The Appellant was convicted on 14 October 2013 on one count of robbery with aggravating circumstances (count 1) and one count of possession of a firearm in contravention of Section 3 of Act 60 of 2000 (count 2).

The Appellant in respect of count 2 was convicted on the basis of a plea that he tendered in terms of the provisions of Section 112 (2) of the Criminal Procedure Act 51 of 1977. In his plea he admits that he was in possession of a firearm. He explained that he received the firearm from a friend of his by the name of Elton. He took the firearm in his possession knowing that he did not have a licence to possess such firearm.

[2] He was ultimately sentenced to a period of 12 years imprisonment, being ten (10) years on the first count and an additional five (5) years on the firearm possession charge. The court ordered that three (3) years of the five (5) years be served concurrently with the sentence imposed on count 1. With the leave of the court a quo the Appellant appeals against his conviction and sentence.

[3] The Evidence

On 11 June 2008 at or near Paris Road, Wynberg the complainant, Astrid Clements whose maiden name was Astrid Warren, at about 17h30 went to visit her mother at the above address. As she parked her car in the driveway, another vehicle with two unknown assailants therein, pulled up next to her car. The occupants wanted some directions. As she was about to get out of her car, one of the assailants pulled out a gun, pressed it against her head and robbed her of her handbag, containing her

wallet, bank and other cards as well as her wedding rings. They also requested her to hand over her car keys that she refused and they did not persist any further.

[4] It is further common cause that a few hours after that during the early hours of the 12 June 2008 at about 00h50, Warrant Officer Timmy ("Timmy") accompanied by her colleague Captain Petersen of the South African Police Services, Grassy Park, on the strength of a search warrant went to Sandpiper Mansions in Grassy Park, where they were also on the lookout for the Appellant who was wanted on a different unrelated charge. As they entered the flat that was identified to be searched, Warrant Officer Timmy immediately observed the Appellant. He was handcuffed and arrested. She immediately observed some suspicious behaviour on the part of the Appellant when he moved into the direction of a television cabinet and pressed his left leg against it.

[5] She had a look at his left leg and found two rings inside his left sock. Thereafter he moved with his right leg towards the same television cabinet. This also made her suspicious. She also looked at his right leg and found a firearm in the inside of his right sock. When he was requested by Timmy to give an explanation for the possession of the items, he said that he picked up the firearm at a water channel in Sixth Avenue, Grassy Park about three weeks prior to that.

[6] The firearm was a Pietro Beretta. According to her it was a semi-automatic firearm. She also found a black purse in the back pocket of his trousers. Inside the purse she found an identity document and driver's licence and several bank cards, a discovery health card and other store credit or loyalty cards.

[7] All these items were later handed in at the police station for safekeeping. At a later stage it was determined that the purse with the cards, identity document, licence and rings belonged to the complainant, Astrid Clements, which she at a later stage identified as her property.

[8] The Appellant denied any involvement in the robbery of the complainant. On 11 June 2008 he was at Tygervalley. He was with a friend of his, Galiep. They spent the whole day at Tygervalley and returned to Sandpiper Mansions at 11h00 that evening. Then he met a person by the name of Elton who requested him to keep the items as well as the firearm the police found on him. He went to sleep and he was handcuffed. This item was then found on him.

[9] Later after his arrest, he attended an identity parade and was not identified. He further testified that he kept the rings in his sock to keep it safe because he had a hole in the pocket of his trousers. He did this because he was afraid that someone will steal it while he was asleep. Elton did not tell him who these items belonged to.

He thought that it belonged to his friend. According to the Appellant, Elton had since passed away.

[10] The Appellant's friend Galiep Basadien ("Basadien") testified and said that the Appellant was in his company the whole day. The Appellant accompanied him and a lady friend to Tygervalley, where she went to have her hair done. They arrived at Tygervalley between four and five in the afternoon and only came back to the place where the police found him later after 10h00 that night. They waited there between 6 – 7 hours. He later became aware of the fact that the Appellant was arrested. He later testified that they went to Tygervalley between 15h00 and 16h00 on 11 June 2007. They arrived back from Tygervalley between 10h00 – 11h00 that night and he dropped the Appellant at Sandpiper Mansions. According to him this happened during the week and not over a weekend. He could not say what the name of the place is where she had her hair done.

[11] In cross-examination he said the day before 11 June 2008 was a Monday. He cannot however say why he specifically remembers whether it was a Monday. He later said that he remembers this because the 12th was on a Tuesday. He remembers it because it was the day that the Appellant was arrested. He later conceded that he made a mistake when he mentioned that it was on a Tuesday instead of a Wednesday when he was with the Appellant. When it was pointed out to him that the day that the Appellant was talking about was on 11 June 2008 and not 2007 he also conceded that he made a mistake. He later testified he cannot

remember when it was when the Appellant accompanied him and his girlfriend to Tygervalley.

[12] He also testified that he does not know where the Appellant stays. Later on he testified that he assumed that the Appellant stayed at Sandpiper Mansions because the Appellant's grandmother stays there. He later on again testified he cannot say whether he stays at Sandpiper Mansions, but he dropped him off their everyday. When he was asked why the Appellant gave his address to the police, the witness gave various explanations. These are that the Appellant comes to his house every day, stays around the corner from where he stays and that the Appellant sometimes sleeps at his house.

[13] The Grounds of Appeal

The Appellant argued that the court *a quo* was incorrect to find that the only reasonable inference to be drawn from this set of facts was that the Appellant was the person who committed the robbery. He further contended that the court after having accepted his version based upon his plea of guilty in respect of how he came into the possession of the firearm, when he said he received it from Elton, should also on that basis not have rejected his similar explanation for the possession of the items which was found to have been taken from the complainant during the robbery.

On the basis of this argument, he said the court should have found that his explanation is reasonably possibly true.

The Appellant further contends that the court *a quo* when it imposed an effective sentence of twelve (12) years, it was disproportionate to the gravity of the offence. The court *a quo* also overemphasized the retributive aspects whilst not giving sufficient consideration to the aspects of deterrence and reformation.

[14] Analysis

I do not agree with the contention of the Appellant that the court *a quo* whilst accepting the Appellant's version in respect of the count 2 (firearm possession) was wrong in rejecting the Appellant's version on the count 1 (Robbery). I disagree with it for the following reasons:

[15] The factual basis upon which he was convicted on the robbery charge was entirely different to that of the possession of firearm charge. The court found that he was involved in the commission of the robbery albeit by means of circumstantial evidence, on 11 June 2008 in Wynberg where he and another assailant used a firearm to rob the complainant of her possessions.

[16] In respect of the second charge, the State alleged that he was in the unlawful possession of a firearm on 12 June 2008. The factual basis upon which the State alleged that he committed the offence was later shown to be that he was found in possession of the firearm during the time of his arrest without him having a licence to possess such firearm. The factual basis upon which the Appellant admitted his guilt is not inconsistent with what the State had alleged and was enough to sustain a conviction based on essential elements to prove the charge.

[17] This is entirely different to the elements and set of facts upon which the State relied to prove the robbery charge. When the Appellant pleaded guilty to the unlawful possession of a firearm charge there was no dispute against him and the State in respect of this charge. In this instance, the State accepted a plea on the Appellant's version, including in regard to facts which are not relevant to the guilt of the Appellant, although they were included in the Plea explanation in terms of Section 112(2).

[18] In respect of the second charge (ie. unlawful possession of firearm) the explanation that was given by the Appellant although it was related to the defence on the first charge, was not related to the substance of his admission of guilt on the second charge (unlawful possession of firearm). It does therefore not follow when it was accepted as part of the facts surrounding his plea on the second charge that the court should have accorded such explanation the same weight in evidence in respect of the first charge (robbery).

[19] It is trite that where an accused pleads guilty to a charge and gives certain answers or states a certain exculpatory fact in his plea such a fact or answer can count against such an accused, but it cannot be used as evidence in favour of such an accused in a later trial.

[20] This court in *S v Adams en 'n ander 1993 (1) SACR 33 (C)* at 337 H – I per *Williamson J* held:

> "*By 'n art 112(1)(b)*[1] *ondervraging tel 'n beskuldigde se antwoorde teen hom, maar is nie getuienis in sy guns nie. Die ontkenning van 'n beskuldigdes dat hulle nie geweet het dat die afhaal van klipmossels onwettig was, is dus nie in hulle guns toelaatbaar nie."* See also *S v Slabbert 1985 (4) SA 248 (C)*.

[21] Similarly, an exculpatory fact or answer mentioned in a Section 112 (2) plea in a separate charge cannot be used as evidence to bolster a defence based on the same fact or answer proffered as part of a defence in a separate unrelated charge. It also is of no or limited evidential value because it would be nothing more than a previous consistent statement (self corroborative statement) which would only be admissible as evidence in certain exceptional circumstances.

[1] "A Section 112(2) Statement serves the same purpose a questioning in terms of S112(1)(b) …" See Du Toit et al Commentary of Criminal Procedure at 17-24

[22] The further reason why this argument in my view cannot be accepted as correct is that whilst a direct link was established between the stolen items that were found in possession of the Appellant and the robbery, no such link has found to exist between the unlawful possession of the firearm by the Appellant and the robbery. The trial court made no finding that the specific firearm which was found in the Appellant's possession had been used in the robbery; nor did it find that Elton had been involved in the robbery.

[23] The Regional Magistrate in convicting the accused relied on circumstantial evidence in concluding that the only reasonable inference to be drawn was that the Appellant was one of the persons who committed the robbery. The court *a quo* also relied on the so-called doctrine of recent possession. The court *a quo* relied on the decision of *S v Parrow 1973 (1) SA 603 (A)* where it was held that:

> "*On proof of possession by the accused of recently stolen property, the court may convict him of theft in the absence of an innocent explanation which might reasonably and possibly be true. i.e. the Court should think its way through the totality of the facts of each particular case, and must acquit the Accused unless it can infer, as the only reasonable inference that he stole the money.*"

[24] The Court rejected the explanation the Appellant had proffered that he had received the stolen items as well as the firearm from Elton. I agree with the reasoning and conclusions of the court *a quo*. On the uncontested evidence of

Timmy, it appeared that the behaviour of the Appellant was indeed suspicious during the time of his arrest. He was clearly trying to conceal the stolen property and the firearm that he was supposed to keep for his friend Elton, which was kept in his socks.

[25] His explanation as to why he hid it in his sock does not accord with that of a person who innocently possessed the items on behalf of someone else. He was further unable to give a satisfactory explanation as to why he would on behalf of Elton hold the identity document and other cards whereon the name of the complainant appeared, without enquiring from Elton whose possessions it was.

[26] He suspiciously moved his legs and stood against a television cabinet when the police came to him before he was searched. The evidence about his alibi is unconvincing and improbable. He was also contradicted by his witness, Basadien on this aspect. It is difficult to accept why he would accompany his friend Basadien who went with his girlfriend to Tygervalley to have her hair done. It is further improbable that they would have stayed there and have waited for her between 6 to 7 hours.

[27] The court *a quo* was therefore correct to reject his evidence about his whereabouts on the night of the robbery. His evidence about this is unconvincing and unsatisfactory. He was also unable to give a satisfactory account of how he

came to possess the property that was stolen from the complainant a few hours before the police found it in his possession. It is further strange that all the property that was stolen during the robbery was found in his possession.

[28] It is unlikely that if someone else other than the Appellant had also committed the robbery that he (Appellant) would be in possession of all the stolen property in such a short time space, between the time the robbery was committed and the police finding Appellant in possession thereof. The coincidence of something like this happening is highly unlikely. The Regional Magistrate was therefore correct in applying the two cardinal rules of logic in *R v Blom 1939 AD 188* in dealing with circumstantial evidence, where it was held:

> *"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*
>
> *"(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."*

The Regional Magistrate therefore was correct to hold that the only reasonable inference that could be drawn from this was that the Appellant was involved in the commission of the robbery.

[29] In respect of sentence, I do not agree that the sentence imposed is disproportionate. In respect of the first count the Appellant faced a minimum sentence of 15 years in terms of Section 51 of the Criminal Law Amendment Act 105 of 1997. The Regional Magistrate in my view correctly found that there were substantial and compelling circumstances to deviate from the prescribed sentence.

[30] The court *a quo* followed a correct approach by cumulatively considering all the circumstances in determining whether there are substantial and compelling circumstances. In this regard the court *a quo* had regard to the fact that the Appellant was a first offender, his relative youthful age of 21 years, the fact that his youthfulness may have been a factor which contributed to him committing the offence. These factors weighed heavy in favour of the Appellant.

[31] Against this the court *a quo* had regard to the circumstances under which the offence was committed. In particular, that a firearm was pressed against the head of a defenceless young woman who seemed to be easy prey for the Appellant and his associate. This left the complainant particularly vulnerable and it was a very traumatic experience that she encountered.

[32] The mere fact that she did not sustain any injuries can in my view not be regarded as a factor in favour of the Appellant. The firearm that was used was enough to instil fear and overcome any resistance she might have offered. If she

did in fact sustain injuries it would have justified a more harsher sentence. When firearms are used, there is always the possibility of serious injury or even death occurring as so often happens in the violent crime-ridden society we live in.

[33] A robbery of this nature usually implies a measure of planning and premeditation, where defenceless, vulnerable victims are singled out and preyed upon. The prevalence of these kinds of robberies as the Regional Magistrate correctly pointed out is on the increase. It is where unsuspecting members of the public are attacked in their driveways when the assailants either force them into their homes or where they are dispossessed by violent means of their vehicles and other possessions whilst they are in and around their homes. What is particularly aggravating is when it happens at their homes where they are supposed to feel safe and are usually unguarded.

[34] It is in the interest of society that the courts in the sentences that it imposes, express their strong disapproval and abhorrence to this kind of behaviour. The further two (2) years imprisonment for the unlawful possession of a firearm that was imposed on the Appellant in this case is in my view, also an appropriate sentence.

[35] Order

In the result therefore I make the following order:

"*The Appeal against conviction and sentence is dismissed*".

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HENNEY, J

Judge of the High Court

I agree.

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CLOETE, J

Judge of the High Court