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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

DATE: 08/03/2004

CASE NO: A445/03 or A26/02

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED
DATE 14/7/2005 SIGNATURE

In the matter between

TSHABALALA ISAAC Applicant

and

THE STATE

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JUDGMENT

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WILLIS J: The appellant was charged in the Randfontein Regional Court with robbery with aggravating circumstances and unlawful possession of a firearm and ammunition. He was sentenced to 18 years' imprisonment on the first count, namely robbery with aggravating circumstances; three years' on the count of unlawful possession of a firearm, and one year's imprisonment for unlawful possession of ammunition. The court *a quo* ordered that half of the sentences in respect of counts 2 and 3 be served

concurrently with count 1, making the effective sentence 20 years' imprisonment.

The complainant, one Anne van Zyl testified how she had been robbed in her home in Greenhill, in the presence of her three children on 30 November 1999. There were four armed men who participated in the attack, and she saw three of them. She had the opportunity to observe the appellant on several occasions, and testified that she recognised him by his face. An identification parade was held on 18 February 2000. Inspector Koekemoer was in charge of that identification parade, and it seems to me that it was in all material respects satisfactorily conducted and that the complainant did indeed identify the appellant at that parade.

The complainant was attacked in her home and forced to open safes, and an amount of approximately R250 000 in cash was taken from her in total, together with various other items.

The appellant was apprehended as a result of a routine patrol that took place sometime after this robbery. According to the state witnesses the appellant had been found in possession of a firearm. This firearm was linked to one which was removed from the home of the complainant during the robbery. In other words, the serial number of the firearm found in possession of the appellant tallied with the ownership positively confirmed by the complainant herself.

The appellant said the he had not in fact been in possession of the firearm on the evening of his arrest but that the firearm had been found in the nearby vicinity where he and his girlfriend, one Liena Mokoena had been innocently strolling along. Curiously, in the light of his version of events, was

the fact that his girlfriend, who he alleges was with him, was not arrested at the time.

Counsel for the appellant has made much of the discrepancies in the evidence of the witnesses who testified regarding the arrest of the appellant. It is indeed true that there are discrepancies. These are of a minor nature but clearly some degree of caution must apply. As against this, the evidence of the complainant reads extremely well. She is positive about her identification, and it seems to me to be so remote a possibility as to be altogether discounted, that she would wrongly identify somebody who was in turn wrongly and mistakenly believed to have been in possession of the firearm in completely different circumstances.

The appellant himself performed appallingly in the witness box. His version was that he had not participated in the robbery because he had been doing guard duty. This version was never put to the complainant during the course of cross-examination, and no witnesses were called to support this version. It is common cause that the appellant did not have a license to possess arms and ammunition. In my view, the learned magistrate gave a very careful and detailed judgment in which he correctly convicted the appellant of the crimes in respect of which he was charged.

The appellant, it would seem, was 34 years of age at the time at the time of his arrest and had no previous convictions. The sentence imposed by the learned magistrate is indeed a severe and robust one. On the other hand, effect must be given to the clear intention of the legislature that crimes of this nature be severely punished. This is the kind of crime which outrages the law abiding members of society. A woman was attacked viciously in her

own home, in the presence of her children. She was robbed of substantial assets. It is the kind of crime where we are expected to send out a clear message that it will be severely punished. The learned magistrate did not misdirect himself in any way, and although the sentence is robust, it is not so far removed from that which I would otherwise have imposed, such that this court would be justified in interfering with the sentence.

Accordingly I propose that the appeal against both conviction and sentence in respect of all counts be dismissed.

HOFFMAN J: Yes, I would agree. If I were free to impose a sentence I might have imposed a slightly lesser sentence but I cannot find a basis on which I believe that the magistrate misdirected himself, and nor can I conclude that the sentence is so disproportionately severe that we can interfere with it. I too would dismiss the appeal against both conviction and sentence.

WILLIS J: It is so ordered.