IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
PRETORIA

CASE NO: A1406/2001
DATE: 30 May 2008

In the matter between:

SIPHIWE DANIEL NZAMA Appellant

vs

THE STATE Respondent

JUDGMENT

MAKHAFOLA, AJ:

INTRODUCTION:

[1] Five accuseds stood trial in the Regional Court of the Division of the Northern Transvaal sitting in Louis Trichard for attempted murder, four counts of unlawful possession of firearms and one count of unlawful possession of ammunition. In addition the Appellant who was accused 3 faced count one alone that of robbery with aggravating circumstances. In all the Appellant faced seven charges.

[2] The Appellant was represented by counsel throughout the trial. At the close of the State case there was an application for acquittal in terms of Section 174 of the Act. All the accused were acquitted on counts 2-7, leaving the Appellant in court to face count 1 alone. The charge he faced was that of robbing Auto Zone of the amount of R6430=00. The Appellant testified raising an ***alibi*** that on 18 June 2000 he never went near Auto Zone. He was busy at his wife's place taking fruit and vegetables to the place, and slaughtering a sheep. The trial court rejected his defence and convicted him as charged and sentenced him to 15 years imprisonment after finding the absence of compelling and substantial circumstances.

[3] The Appellant appeals against both the conviction and sentence. For the purposes of this appeal it is not necessary to repeat the grounds of appeal as they form part of the record.

[4] The main thrust of challenge to conviction is the question of identity whereas the sentenced is mainly challenged on the basis that the Appellant was not warned at the commencement of the trial that the Minimum Sentence Act would be applicable if the Appellant were convicted.

[5] The charge-sheet does not reflect that Section 51 (2) of Act 105 of 1997 is applicable to the charge against the Appellant. It is also a fact that it does not appear on record that the Appellant was ever warned of the applicability of the Minimum Sentence Act. It appears from the 31 lined judgment that the Minimum Sentence was referred to for the first time during sentencing.

[6] The record also lacks the contents of the previous convictions read by the Prosecution to the Appellant and confirmed by him. This court can hardly decide whether they are relevant or not to the present conviction of the Appellant. The court a ***quo*** does not refer to the two previous convictions in its judgment. There is not even any SAP 69 documents attached to the record.

[7] The complainant had identified the Appellant at the identification parade who had been unknown to him prior to the incident.

[8] The State must prove the identity of the perpetrator to place him at the scene of the crime, and because of the fallibility of human observation such evidence is to be approached with some caution.
Vide: SV MTHETWA 1972 (3) SA 766 (A)
SV SHEKELELE 1953 (1) SA 636 (T) at 638

[9] Section 208 of Act 51 of 1977 which embodies the principle of a single witness requires that such evidence must be satisfactory in all material respects.
The cautionary rule being a matter of common sense must be applied to the evidence of a single witness.
Vide: also RV MOKOENA 1932 OPD 79 of 81

[10] The ***onus*** of disproving the accused's alibi rests on the State because the accused bears no ***onus*** of proving his ***alibi***.
Vide: RV BIYA 1952 (4) SA 514 (A)
SV KHUMALO en Andere 1991 (4) SA 310 (A) at 327 H

[11] In ***casu*** the evidence of the complainant was corroborated by the pointing-out of the Appellant at the identification parade. This has ensured that the evidence of the complainant as a single witness is without doubt. The trial court was correct in accepting the state case and rejecting the Appellant's version.

[12] As far as the sentence is concerned it is clear that the charge-sheet does not warn the accused at the plea stage about the applicability of the Minimum Sentence. It is also clear that both the Appellant and his counsel did not know that it would be applied. Apart from the charge-sheet the trial court has a duty to bring that fact to the attention of the accused in some other form.
Vide: IN SV DLAMINI 2000 (2) SACR 266 (TPD) the court held that there was an obligation on the magistrate even where the accused was legally represented (as in the present case) to ask questions and call witnesses to establish the existence of those substantial and compelling circumstances if at all possible.

[13] In SV NDLOVU 2003 (1) SACR 331 (SCA) at 337 paragraph [14] the court states: "In the circumstances of this case it cannot be said that the Appellant suffered no prejudice from the magistrate's failure to warn him of the consequences of his finding, should he make such a finding, that the weapon found on him was a semi-automatic firearm. By invoking the provisions of the Act without it having been brought pertinently to the Appellant's attention that this would be done rendered the trial in that respect substantially unfair. That, in my view, constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed". In this case, the Appellant was 21 years of age which the trial court should have considered as compelling and substantial. Without going to consider the other aspects relating to sentence the fact that the applicability of the minimum sentence came for the first during sentencing is a ground enough indicating the Magistrate's failure to warn the accused at the onset of the case if the charge-sheet did not do so.

[14] In the circumstances, this Court is entitled to interfere in the sentence. I suggest that the appeal should fail as far as conviction is concerned and succeed in regard to sentence.

I propose the following order:

(1) The appeal on conviction is dismissed

(2) The appeal on sentence is upheld

(3) The sentence of the court a ***quo*** is set aside an substituted with the following:

3.1 The Appellant is sentenced to 8 years imprisonment which, is antedated in terms of Section 282 of Act 51 of 1977 to 07 August 2001.

_____

MAKHAFOLA K
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

_____

SERITI WL
JUDGE OF THE HIGH COURT

-oOo-