IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DATE: 11 November 2013
CASE NO: A590/13

In the matter between:

XOLANIMATEWANE Applicant

And

THE STATE Respondent

JUDGMENT

TWALA, AJ

1. The Appellant appeared with 4 others before the Regional Court Magistrate, Oberholzer on the 18 July 2012 and was convicted of one count of robbery with aggravating circumstances and sentenced to three years imprisonment.

2. The Appellant is now appealing against both the conviction and sentence.

3. The respondent did not file or I have not seen or received the heads of argument of the respondent - hence I will deal with the matter as though the respondent never filed any heads of argument.

4. It is commom cause that the Complainant, Mr Sehole, was attacked and robbed of his cellphone, running shoes, takkies and wallet by a group of five (5) yourng men.

5. The evidence on record is that the complainant accompanied his girlfriend to her home and spent sometime with her on the street before returning to his home at about 20H50 in the evening. There were street lights eluminating the street at the time.

6. At the time when he was accompanying his girlfriend, some youngsters were playing football at an open veld but he did not take much note of them except that he recognised two of them as people who grew up in his area. On his way back from accompanying his girlfriend, he was stopped by the appellant who asked him for cigarette. He told him that he did not have any cigarette and as he was talking to appellant he was knocked down by a bicycle and fell to the ground. Whilst on the ground five people started searching him whilst assaulting him at the same time. When he managed to stand up they threatened to stab him. At the time he realised that he had lost his cellphone and wallet, his running shoes and takkies were also gone. He told these people that they have taken everything he had and why would they want to stab him now.
7. His assailants started fighting amongst themselves and they stabbed one of them. At that point he managed to run away from the scene but fell unconscious a distance

from the scene and only regained consciouness later on. When he regained consciousness he saw a policman known as Cheeks and the policeman had apprehended one person on whom the wallet and bank cards of the complainant were found. The complainant was then taken to the clinic by this policeman. Whilst at the clininc, a call came in that someone has been stabbed at the scene where the complainant was robbed. He attended at the scene with the police and found the appellant with stabbed wounds.

8. The appellant was taken to the police station where when he was searched by the police, they found two cellphones on him and one was found in his underwear in his buttocks. The complainant identified one of the cellphone as his at that time. Under cross examination the complainant also mentioned that the sister of the appellant gave the appellant a cellphone, when he was taken by ambulance from the scene to the clinic, so that he can call them when he is finished or to tell where he was.

9. Another witness for the state, a constable Nkomo testified that he saw suspicious people on the street and when he stopped next to them, they ran away but he managed to catch one of them and that was accused number 4 on whom he found a wallet and bank cards and a knife. This accused decided to come clean when confronted that he was not alone but with accused number 1 and Search. When the appellant came at the police station with the

ambulance, he searched the appellant and found two cellphones on him, one in his underwear in his buttocks.

10. The appellant testified in his defence that he was himself stabbed at the scene on the day in question by unknown assailants. He had two cellphones on him one of which belonged to his sister.

11. It is a principle in our law that the evidence of identification should be approached by our courts with caution. The court must look at the totality of the evidence and the probabilities in the particular case before making a decision, (see S vs Mthetwa 1972 (3) SA (A)).

12. On the evidence on record, the complainant saw the appellant when he stopped him and asked for cigarette, when he was assaulted by his accomplices immediately after robbing him, when they fetched him at the scene and travelled with him in an ambulance to the police station and when his cellphone was found on him in his underwear in his buttocks.

13. The appellant was further pointed out by accused number 4 who said he was with Senjel and he gave the cellphone of the complainant to Senjel. The other name of the appellant is Search and the cellphone of the complainant was found on him at the police station. His possession of the complainant's cellphone was immediate after the robbery on the complainant took place. Moreover, why would somebody put a cellphone in his underwear and in his buttocks, for that matter?

14. Having regard to the above, It is my view that the Court a quo did not err or misdirected itself in finding that the state has proved it’s case beyond reasonable

doubt against the appellant and correctly returned a verdict of guilt on robbery with aggravating circumstances.

15.1 now turn to deal with the sentence of three (3) years imprisonment imposed by the Court a quo.

16.It is trite that sentencing is pre eminently the domain of the trial court. The appellant was convicted of very seriuos crime for which Secton 51 of Act 105 of 1997 prescribes a minimum sentence of fifteen (15) years direct imprisonment.

17. The appeal court can interfere with the sentence of the court a quo if it is inappropriately severe to the extent that it induces a sense of shock.

18.It appears from the record that a pre-sentencing report of the appellant was requested and it could not be finalised as the family of the appellant refused to sign the address for him. It was mentioned that, according to the family the appellant is not co-operative when given community based sentence and the family feels that he is better of in prison. It was placed before the court a quo that the appellant was unemployed and did not have money to pay a fine.

19. The courts have been warned not to accept flimsy excuses to justify deviating from the prescribed minimum sentence. There should be substantial and compelling factors in existence to justify deviation from the prescribed minimum sentence by the court. However, the legislature has limited but not

eliminated the discretion of the court in terms of Section 51 of Act 105 of 1997.

20. It is therefore my view that the court a quo did not misdirect itself in sentencing the appellant to three (3) year imprisonment.

21. In the light of the above, I therefore propose the following:

"The appeal is dismissed".

TWALA. AJ "ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree and it is so ordered

FABRICIUS
JUDGE OF THE NORTH GAUTENG
HIGH COURT