√√ delivered 30/11/17

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

APPEAL NO: A811/2016

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

3 November 2017
DATE

SIGNATURE

In the appeal of:

KAGISO JOHANNESBURG PULE — **1ST APPELLANT**
DANIEL MOEBE MOKOENA — **2ND APPELLANT**

and

THE STATE

JUDGMENT

VUMA, AJ

INTRODUCTION AND BACKGROUND

[1] This is an appeal against both conviction and sentence by both appellants. On 30 July 2014 both appellants were convicted in the North West Regional Court on one count of robbery with aggravating circumstances where the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentence Regime Act) were applicable. Each appellant was sentenced to fifteen (15) years direct imprisonment.

[2] The appellants applied to the trial court for leave to appeal against their conviction and sentence, which was granted on 9 December 2014.

[3] Both appellants were legally represented and pleaded not guilty to the charge mentioned above.

POINTS IN LIMINE RAISED BY THE APPELLANTS

[4] Appellants' Counsel submits that the appellants were denied a fair trial in that the trial court entered the arena and that her questions to the appellants amounted to cross-examination. It was further submitted that her conduct bordered on bias. On these bases it was then submitted that this court was therefore entitled to declare the court proceedings to be invalid.

[5] In resisting the above, the Respondent submits that the issues that were being raised as points *in limine* were never stated in the appellants' grounds and/ or reasons for the appeal. The Respondent further submits that it was trite that the appellants or litigants are bound by their papers and that *in casu*, the appellants are limited to the reasons for appeal as stated in their Notice of appeal. It was further submitted that if the issues raised in the appellants' points *in limine* were to be considered by the appeal court, same would constitute an irregularity which would result in an injustice upon the learned magistrate

who was never given the right to reply. The respondent submits that the court dismiss the points *in limine*.

[6] I am inclined to agree with the respondent that, *inter alia*, the failure by the appellants to inform the learned magistrate of the serious allegations that are now being raised against her in her personal capacity in itself unjustifiably denies her to exercise her right to be heard. Furthermore, the fact that the issues which the appellants raised in their points *in limine* never formed part of their reasons to appeal in their Notice to appeal, on its own, constitute an irregularity and they cannot now be considered at this appeal stage.

[7] In the result, the appellants' points *in limine* are dismissed.

THE APPEAL

[8] The issues before this court are the questions of both conviction and sentence imposed on each appellant.

AD CONVICTION

[9] On behalf of both appellants it was submitted that the trial court erroneously convicted the appellants as a result of the following misdirections:

- In finding that the state proved the identity of the appellants beyond a reasonable doubt.
- In not finding that the versions of the appellants were reasonably possibly true.

[9.1] The brief facts of the case are as follows:

On 4 August 2013 at about 18:30 the complainant was walking home alone when he was accosted by two men who were armed. The two robbed him of his two cellphones valued at R1000-00 and R600-00 respectively. He alleged that both assailants were known to him prior the date of the incident and he identified them as the first and second appellants. Whilst fighting off the appellants, the complainant bit the first appellant on his forearm. In response thereto the second appellant, on the first appellant's instruction, stabbed the complainant. During this scuffle the complainant dropped his phones and upon raising his head he saw the faces of his assailants and identified them as the first and the second respondent. Both respondents picked the complainant's cellphones each for himself.

[10] It was further argued that the state has failed to prove its case beyond reasonable doubt as relates to the finding that the appellants were indeed the complainant's assailants, also considering the fact that the complainant was a single witness.

[11] With regard to the issue of identification, the appellants referred to the matter *S v Mthetwa* 1972 (3) SA 766 (A) where a comprehensive guideline is discussed, including the reliability of the identifying witness, which reliability must also be tested against factors such as lighting, visibility, the proximity of the such witness, his opportunity for observation, both as to the time and situation, the extent of the witness's prior knowledge of the accused, and of course, the evidence by or on behalf of the accused.

[12] On behalf of the Respondent it was submitted that as was held in the matter of *R v Dhlumayo 1948 (2) SA 677(A)*, this court cannot interfere with the trial court's conclusions except where it is convinced that the trial court's assessment of the evidence was wrong.

[13] With regard to the question of identity the respondent submitted that the complainant knew the appellants before the date of the incident. In respect of the first appellant and his family, it was further submitted that the complainant knew them from his youth and that he even played soccer with the first appellant. With regard to the second appellant, the submission was that the complainant had seen him on a previous occasion before the incident although he did not know him by name. It was further argued that the fact that the scene was lit is sufficient to support the trial court's conclusion that the complainant was able to identify his assailants.

[14] With regard to the court not finding that the appellants' versions were not reasonably possibly true, the state submitted that the fact that both appellants changed their *alibi* with regard to their whereabouts on the day of the incident countermands the argument that their version could be reasonably possibly true.

ANALYSIS

[15] Neither party dispute that the complainant was robbed of two cellphones by two males who were armed and that he was assaulted in the process.

[16] It is trite that for a conviction to follow, the state must prove its case beyond a reasonable doubt and that there is no duty on the accused to prove his innocence but to proffer a version which is reasonably possibly true. It is further trite that where the complainant is a single witness, a cautionary approach ought to be followed.

[17] From the record it is clear that the trial court made an adverse credibility finding against both appellants, especially with regard to how they changed their *alibi* on the night of the incident. The trial court was satisfied with the complainant's credibility despite him being a single witness and in its assessment of his evidence, did apply the cautionary rule. In this regard, it is trite that the appeal court will not lightly interfere with the trial court's credibility findings given the fact that the latter would have had the benefit to make first hand observations during the trial.

[18] With regard to the question whether the version proffered by the appellants is reasonably possibly true, what cannot be disputed is the fact that both appellants changed their *alibis* on the night of the incident. Regarding the question whether the complainant's identification of the appellants is reliable, from the evidence, it is clear that since the lights provided sufficient visibility at the scene of the incident and the fact that both the appellants were known to him prior to the incident, the court's approach in following the cautionary rule was correct and can thus not be faulted.

[19] I find that the trial court's conclusion and assessment of the evidence was correct and that accordingly, as per the general principles laid down in the matter of *R v Dhlumayo 1948 (2) SA SA 677 (A)*, this appeal court ought not to interfere with the conviction of the appellants.

AD SENTENCE

[20] It was submitted on behalf of both appellants that the sentence of 15 years imprisonment imposed by the trial court is shockingly harsh and inappropriate and that the following are the misdirections made by the trial court:

- In taking into account as aggravating circumstances that there were numerous violent crimes on the trial court's roll, it being submitted that the trial court failed to comply with the court's duty as laid down in the matter of *S v H 1977 (2) SA 954 (a) AT 960G-H* that in the event the court was intent on bringing its jurisdiction's specific offence's statistics to bear, it should first inform an accused person of same, thereby affording an accused person an opportunity to deal with such facts; and
- In finding that there are no substantial and compelling circumstances to deviate from the prescribed minimum sentence, submitting that the trial court failed to take into account the personal circumstances of the appellants.

[21] The respondent argued that there was no misdirection made by the trial court and that the sentence in respect of each appellant was appropriate under the circumstances, taking into account also the fact that the complainant was hospitalized for two days following the assault by the appellants.

[22] Regarding the appellants' personal circumstances, the first appellant was 25 years old at the time of sentencing and a first offender whereas the second appellant was 26 years old with one previous conviction of assault with intent to do grievous bodily harm.

[23] In the matter of *S v Obisi 2005 (2) SACR 350 (W)* para 8 it was held that the enquiry regarding the imposition of sentence on appeal is not whether the sentence is right or wrong but whether the court acted reasonably or properly in the exercise of its discretion. The question whether the trial court exercised its discretion reasonably depends on whether, considering all the circumstances of the case, the trial court could have reasonably imposed the sentence which it did.

[24] Also, the question is whether the general principle held in the matter of S v Malgas 2001 (1) SACR 469 (SCA) where it was held at paragraph 25 that '*If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of the society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.*', was considered and applied by the trial court.

[25] In addition to the above, it is now established law that a court of appeal will interfere with a sentence of a trial court in a matter where the sentence imposed was disturbingly inappropriate or when the court, when imposing the sentence, committed a misdirection (see *S v Salzwedel and Another 1999 (2) SACR 685 (SCA)* para 10). Since *S v Rabie 1975 (4) SA 855 (A)* at 865B-C it has consistently been held that the discretion to impose a sentence is pre-eminently that of the court imposing the sentence and that an appeal court should be careful not to erode such a discretion. The test then is whether the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate (see *S v Rabie* at 857D-F).

[26] In *S v Salzwedel* at 591G the Supreme Court of Appeal held that an appeal court can only interfere with a sentence of a trial court in a case where the sentence is disturbingly inappropriate or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.

[27] I am inclined to agree with the submissions made on behalf of the appellants that the trial court erred in finding that there are no substantial and compelling circumstances to deviate from the prescribed minimum sentence. I find that such a misdirection by the trial court calls for this court to interfere with the sentence it imposed.

CONCLUSION

[28] I conclude that in light of all the circumstances of this case, both appellants' appeal in respect of sentence must succeed.

[29] In the result I propose that the following order be made:

Order:

1. *The appeal is in respect of conviction is dismissed.*
2. *The appeal in respect of sentence is upheld.*
3. *The sentence imposed by the Wynberg Regional Court is set aside and substituted with the following:*

   'Each accused is sentenced to thirteen (13) years imprisonment antedated to 9 December 2014'.

L VUMA
Acting Judge of the High Court
Gauteng Division, Pretoria

I agree and it is so ordered.

S BAQWA
Judge of the High Court
Gauteng Division, Pretoria

Heard on: 29 August 2017
Judgment delivered on: November 2017

Appearances:

For Appellants: Adv F. Van As
Instructed by: Pretoria Justice Centre

For Respondent: Adv C.P. Harmzen
Instructed by: Office of the DPP