IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) **REPORTABLE: YES / ~~NO~~**
(2) **OF INTEREST TO OTHER JUDGES: ~~YES~~ / ~~NO~~**
(3) **REVISED**

31/8/2017 SMMahlangu

**DATE** **SIGNATURE**

CASE NUMBER: A498/16

DATE: 31 August 2017

STHEMBISO SOLOMON MAHLANGU Appellant

*V*

THE STATE Respondent

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JUDGMENT

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MABUSE J: (Potterill J concurring)

[1] This is an appeal against both conviction and sentence, leave so to appeal having been granted by the trial court on 1 July 2016.

[2] The appellant, Mr. Sthembiso Solomon Mahlangu ("Mahlangu"), appeared as accused 2 before a regional court magistrate at Benoni where he was charged with three counts as follows:

Count 1 robbery with aggravating circumstances read with the provisions of s 51(2) of the Criminal Law Amendment Act No. 105 of 1997 ("the Minimum Sentence Act");

Count 2 possession of a firearm without the necessary licence; and

Count 3 possession of ammunition without being in possession of a firearm licence.

The first offence was committed on the 17 February 2015 while the last two offences were committed on 20 February 2015 in Daveyton.

[3] The appellant, who enjoyed legal representation throughout the entire trial, pleaded not guilty to all the three counts. According to the plea explanation that he made in terms of s 115 of the Criminal Procedure Act ("the CPA") he denied that he was involved in the commission of the robbery and furthermore that on the said date he had in his possession a firearm and ammunition. Despite his plea of not guilty to all the three counts the trial court convicted him accordingly and upon conviction sentenced him as follows:

3.1 Count 1 he was sentenced to twenty years' imprisonment;

3.2 Count 2 he was sentenced to fifteen years' imprisonment; and

3.3 Count 3 he was sentenced to five years' imprisonment.

The court *a quo* ordered that the sentences it had imposed on the appellant in respect of counts 2 and 3 should be served concurrently with the sentence imposed on him in respect of count 1. Accordingly the appellant was sentenced to an effective term of imprisonment of twenty years. In addition the appellant was declared, in terms of the provisions of s 103 of the Firearms Control Act ("the Firearms Control Act"), unfit to possess a firearm.

[4] The appellant, who obviously was disgruntled with both the conviction and the sentences imposed on him, approached the court *a quo* on 1 July 2016 with an application for leave to appeal against both the conviction and the sentences. He had, in such an application for leave to appeal, set out fully the reasons for his unhappiness with both the conviction and the sentences. In brief the appellant's main gripe against his conviction is that the court *a quo* erred materially in finding that the State had proved its case beyond reasonable doubt. The appellant set out four reasons why in his view the State failed to prove that he had committed the offence of robbery he was charged with. With regard to the sentences, he opined that the sentences imposed on him were disturbingly inappropriate and induced a sense of shock. He stated furthermore that the court *a quo* erred in failing to adequately take into account the fact that he was serving a sentence of nine years imprisonment already at the time the it sentenced him. As already pointed out, the application for leave to appeal was successful.

## THE BACKGROUND

[5] The charges against the appellant arose from the following circumstances. The complainant, Demeche Demore Danicho, conducts business of a shopkeeper in Etwatwa West. On Tuesday, 17 February 2015 and at 15h30, he was working in his shop when three men bought a cold drink and sat outside the shop to drink it. Two other men arrived at the shop. One of these two men was the appellant. While Accused 1, a certain Mr Michael Mafalo, was buying cigarettes from him, the appellant was pointing a firearm at the three men who were drinking cold drink outside the shop. When he tried to move from where he was the appellant ordered him not to but to remain standing. He obliged.

[6] The appellant then ordered the three men who were drinking cold drink outside the shop to get into the shop and to lie down on the floor. While accused 1 pointed his firearm at the three men who were lying on the floor, the appellant approached him, pointed a firearm at him and ordered him to give him the money which he had in his pocket. Thereupon he took out the money that was in his pocket, a sum of R10,000.00 cash, and handed it to the appellant. The appellant thereafter ordered him to hand over his cell phones. The complainant put his hands inside his pockets, fished out his cell phones, a Lumia Nokia model and an X2 Nokia model and gave them to the appellant who in turn put them in a bag he was carrying. The appellant asked him where the other money was. He told him that it was in the counter.

[7] The appellant then told accused 1 to go and collect the money from the counter. Accused 1 obliged. He collected not only the money from the counter but also cigarettes. Accused 1 took cigarettes, among them Courtleigh and Stuyvesant, R800.00 cash, R300.00 cash consisting of coins and airtime to the value of R960.00. He gave the cigarettes and airtime to the appellant.

[8] The appellant then ordered accused 1 to tie him with a black cable tie. Accused 1 approached him. He objected to being tied. The appellant then threatened to kill him. When he told the appellant that he was prepared to die, the appellant and accused 1 closed the door of the tuck shop and left.

[9] He followed them out of the shop and ran after them. He screamed "robbers, robbers"! They started to run. He followed them and when they reached a certain bottle store accused 1 threw away the loose cigarettes and airtime to members of the public. Members

of the community who had heard his screams came out and gave chase. The appellant got into a taxi which drove him away, while accused 1 ran into a different direction. He continued chasing accused 1 until he caught up with him. After he had grabbed him, accused 1 hit him with a bottle on the head and inflicted him severe bodily injuries. Members of the public came, surrounded accused 1, helped the complainant to grab him and assaulted him before handing him over to the police.

[10] As accused 1 and the appellant were fleeing and were being chased by the complainant, someone else noticed it. It was Ndumiso Perseverence Mkhize ("Mkhize") who on the said date and at 15h30 had gone and sat at the corner of a First Street Etwatwa which is the street in which the complainant's tuck shop was situated. He saw the complainant whom he called Obama emerge from the shop screaming. He told the court that as he was chasing accused 1 and the appellant, Obama, was screaming "stop, stop, stop"! He ran after them and one of them, the appellant, stopped a taxi, got into it and it drove away with him.

[11] He knew the appellant's face. He used to see him often in Daveyton. He was not used to him.

[12] After the appellant had driven away in a taxi, he assisted the complainant to chase accused 1 until they caught him. The accused hit the complainant with a bottle on the head as a result of which the complainant sustained some injury. Accused 1 was assaulted by the members of the public. He was taken to the police station together with a firearm that he had dropped while he was fleeing which had been picked up by a member of the public, one Sibusiso. At the police station the firearm was handed over to Masha Joseph Mameja.

[13] The appellant was arrested on 20 February 2015 by warrant officer Goodman Ketego Zulu ("Zulu"), who at the time was in the company of a colleague of his, one constable Maluleke. The appellant was arrested as a result of intelligent information that Zulu had received. The arrest took place at the appellant's house. The appellant led Zulu and Maluleke to the main house where he, the appellant, ordered a certain woman to give a "parcel" to Zulu. The woman then handed a green cooler bag to Zulu. Zulu opened it and inside found a black Norinco semi-automatic pistol, three live rounds, one live round inside the chamber of the pistol and two plastic tie cables. The serial number of the pistol had been erased. It was at this stage that the appellant was informed of his arrest. He took the appellant and the items he had found in the green cooler bag to Etwatwa Police Station. At the police station he handed the items to warrant officer Mameja who received them and recorded them in the SAPS 13.

[14] On 28 April 2015 Zulu requested warrant officer Masha, a retired police officer to hold an identification parade. One 29 April 2015 Masha was in charge of the identification parade. During this parade he was assisted by constable Maco Steven Monyathabeng who had brought the witnesses, Dimeche, Demore, Danicho and one Mongisa Mzimele from Etwatwa Police Station and whose role was to keep an eye on the witnesses before they were singly taken into the identification room; sergeant Koos April Skosana, who played the same role at the identification parade as Monyathabeng and some prison officials whose duty was to take the witnesses from the room in which they were kept to the identification room where they were handed to warrant officer Masha. The identification parade was conducted at Modderbee Prison. The complainant pointed out the appellant as one of the suspects who robbed him on 17 February 2015. Warrant Officer Masha captured the events that took place in the identification room in a document called SAPS 369. The evidence of Zulu

insofar as it relates to the appellant's arrest and the discovery of the firearm and ammunition was confirmed by Maluleka.

[15] Constable Matometja James Biya testified that he separated the items that were supposed to be taken to forensic laboratory from those items which were not supposed to be taken there and put each group of items in its own exhibit bag. The firearm, ammunition, and magazine were put inside forensic bag PW4000537575 while the others were put inside forensic bag PW000538508. Forensic bag PW4000537575 was sent to the forensic laboratory for analysis. According to exhibit "H", which is an affidavit in terms of section 212 of the Criminal Procedure Act 1977 made by Cindi Maria Silva de Caires on 19 March 2015 during the performance of her official duties, she received a sealed evidence bag number PW4000537575 from Case Administration of the Ballistic Section containing the following exhibits:

1 x 9mm parabellum calibre Norinco pistol 201C semi-automatic pistol with serial number obliterated and marked and she marked it as 58503/15A and one magazine;

3 x 9mm parabellum calibre cartridges unmarked; and

3 x 9mm parabellum calibre cartridges and marked them as 585031/15 B1 to B3 respectively.

The intention and scope of the forensic examination comprised the following:

examination and identification of ammunition; the firearm mechanism examination and techniques associated with the recovery and restoration process of obliterated alpha-numeric figures or metal. She visually inspected the cartridges mentioned above and found that they consisted of a primer, cartridge case, bullet and propellant and were designed and manufactured to be fired by a centre-fire firearm. She examined and tested the pistol mentioned above and found that the pistol mentioned functioned normally without any

obvious defects and the ammunition used for a test purpose was marked 503ATC1 and 503ATC2 on the cartridges and 503ATP1 and 503ATP2 on the bullets and was fired in the pistol mentioned above. After she examined and tested the mechanism of the pistol and she found it to be self-loading but not capable of discharging more than one shot with the single depression of the trigger. She found furthermore that the device had been manufactured or designed to discharge centre fire ammunition. She was also able to identify the number of the firearm as 46008526.

[16] During the conduct of the State case, the State, with the consent of the defence, read and placed on record a statement by constable Malatji in which the reason for the police failure to obtain the statement of a certain Sibongile was disclosed. This statement was handed in as exhibit 'K'. The State also explained to the Court the reason for its inability to tender the evidence of Sibusiso. It will be recalled that Sibusiso is the person who picked up the firearm that accused 1 had dropped while he was fleeing.

[17] The appellant testified in his defence but called no witness in support of his case. In his evidence the appellant told the court that he did not know anything about the offence of robbery he had been charged with. He did not remember where he was on the day the offence was committed because he is a haberdasher.

[18] There was no dispute about the fact that on 17 February 2017 the complainant was robbed of cell phones, an amount of cash, cigarettes and airtime vouchers by two strange men who were each wielding a firearm. It was not in dispute furthermore that the incident took place around 15h30. The only issue that the court *a quo* had to decide was the identity of the

perpetrators. The duty to do so lay on the State. As early as 1883 in **R v Benjamin 3 EDC 337 at 338** Buchanan J, noted that:

*"But in a criminal trial there is a presumption of innocence in favour of the accused, which might be rebutted. Therefore there should not be a conviction unless the crime charged has been proved to have been committed by the accused. Where the evidence is not reasonably inconsistent with the prisoner's innocence, or where reasonable doubt as to his guilt exists, there should be an acquittal."*

Authoritative support for the above rule as a fundamental principle of our law was given by the Appellate Division in **R v Ndhlovu 1945 AD 369**. Davis AJA, as he then was, held that the presumption of innocence which had been endorsed by **the House of Lords in Woolmington v DPP (1935) AC 462 (HL)([1935 [E] /ALL ER Rep 1)** was not consistent with Roman Dutch Law but was indeed a fundamental principle of our law. He held accordingly that:

*"In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the crown to prove all the averments necessary to establish his guilt."*

The duty of the State to prove its case beyond reasonable doubt includes the duty to prove the identity of the perpetrators.

[19] The crucial question that the court *a quo* had to determine was whether the appellant had been reliably identified as one of the two men who on 17 February 2015 robbed the complainant. The incident in question took place in broad daylight when visibility in the circumstances was very good. The appellant spoke to the complainant. His face was not covered. Nothing prevented the complainant from seeing the appellant's face. The complainant had enough time to observe the appellant. He saw the appellant from close

quarters. The strength of the evidence of identity depends on several factors such as the period of observation, visibility, the proximity of the witnesses to the person who has to be identified, the angle of observation, the circumstances under which the observation took place and the ability of the witness to accurately narrate his or her observations. It is, in my view, of paramount importance to point out that the complainant did not identify the appellant by his clothes or marks but by his face. He was able to point him out at the subsequent identification parade. The court *a quo* was satisfied that the identity parade was conducted correctly. The appellant's concerns about the manner in which the identity parade was conducted were exposed by cross-examination to be lacking any foundation. The court *a quo* was accordingly satisfied that there was not reasonable possibility of the complainant making a mistake in identity.

[20] Finally, the evidence of the complainant about the identity of the appellant was corroborated by Mkhize who saw the appellant emerge from the complainant's shop; who knew the complainant by sight even before the date in question; who on that particular day saw the complainant's face from close range of supreme importance saw the appellant get into a taxi that drove him away. With regard to the evidence of Mkhize, I am bound to follow the law as set out in **R v Dladla and Others 1962(1) SA 307 AD at 310 B-E**, which quoted with approval the following passage by James J; in the **State v Dlamini**

*"One of the factors which is of great importance in the case of identification, is the witness' previous knowledge of the person sought to be identified. If the witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased ... and questions of identification marks, of facial characteristics, and of clothing are of much less importance. What is important is to test the degree of*

*previous knowledge and the opportunity for a correct identification, regard being had to the circumstances in which it was made."*

In my view the identity of the appellant as the one of the two men who robbed the complainant was positively established by the evidence of both the complainant and Mkhize. Accordingly the court *a quo* was correct in finding that the appellant robbed the complainant on 17 February 2017.

[21] The court *a quo* was satisfied with the evidence of the state witnesses. It made no adverse remarks about their evidence. It must be recalled, with regard to the court a quo's findings of fact, that this court of appeal takes into account the fact that the court a quo was in a more favourable position to form a judgment because it was able to observe the witnesses and was absorbed in the atmosphere of the trial court from the start to the finish "see **R v Dhlumayo 1948 (2) SA 677 A at page 705 paragraph 6**.

[22] The court *a quo* was aware about the contradictions in the state witnesses. Having noted such contradictions it remarked, and in my view quite correctly so, that such contradictions were immaterial and did not eviscerate the core of the witnesses' evidence. The court supported its findings about the contradictions with reference to authorities. It referred to **S v Mkohle 1990 (1) SACR 95 AD at p. 98** where the court cited with approval the following passage by Nicholas J, as he then was, in **S v Oosthuizen 1982 (3) SA 571 D at p. 576 B-C**:

*"Contradictions per se do not lead to the rejection of a witness's evidence, they may simply be indicative of an error. And it is stated that not every error made by a witness affects his credibility; in each case a trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence."*

[23] The court *a quo* was satisfied that the Norinco pistol was indeed found in the possession of the appellant. It made a finding that the woman who handed the cooler bag to the police possessed it on behalf of the appellant. According to the court *a quo* the woman might not even have been aware what the bag contained. The court *a quo* rejected the appellant's version. It found that the state had proved its case against the appellant beyond reasonable doubt. In our unanimous view the appeal against conviction cannot succeed.

[24] I now turn my attention to the appeal against sentence. The appellant's complaints against the sentence were that firstly, the sentences imposed on him by the court *a quo* were disturbingly inappropriate and induced a sense of shock and secondly that the court *a quo* failed to adequately take into account that at the time it imposed the current sentences on him, he was already serving an imprisonment term of nine (9) years. The approach of the appeal tribunal with regard to an appeal against sentence by a lower court is as set out in R v Maphumulo and Others 1920 AD 56 at page 57 where the court had the following to say:

*"The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or a light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."*

[25] In R v S 1958 (3) SA 102 at p. 104 the Court set out the circumstances in which the appeal court may interfere with the sentence imposed by the trial court. The grounds were set out as follows:

*"There are well recognised grounds on which a Court of Appeal will interfere with a sentence: where the trial judge - or magistrate, as the case may be, has misdirected himself*

*on the law or facts, or has exercises his discretion capriciously or upon a wrong principle or so unreasonably as to induce a sense of shock."*

Can it be said that in the instant case the court *a quo* exercised its discretion capriciously or upon a wrong principle, or that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons?

[26] It is, in my view, very crucial that I revisit the roles of the public prosecutor and the presiding officer at the sentencing stage of the criminal trial. The duty of the public prosecutor during the sentencing stage is to put all the relevant information before the court to enable it to assess a proper sentence that a court must impose on the accused person. It is the duty of the public prosecutor to provide the court with all the information at its disposal that may influence the sentence. In this regard see S v Shirindi 1974(1) SA 481 (T), 482B-C, where the Court had the following to say about the role of the presiding officer at the sentencing state:

*" Dit is die plig van die strafopleggende verhoorhof om hom van alle tersaaklike faktore te vergewis en om in die' opsig nie 'n passiewe rol te vervul nie."*

See also S v P 1989 (1) SA 760 C at page 762 F-H, see also S v Nakasal 1984(1) SA 392 (SWA) at 396 B-C. The public prosecutor has a particular duty to provide the court with all the relevant information, known to him or in his possession, about the accused whether favourable or not. The duty does not end there. Where, like in the present case, information about the accused comes to him and that information, though relevant seems to be insufficient but can be investigated, the public prosecutor must follow it up until he obtains the true picture. He must verify it and if it is confirmed he must take the necessary steps in order to have the information placed before Court. Section 274 of the CPA provides as follows:

*"(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be assessed."*

In S v Olivier 2010 (2) SACR 178 (SCA) at par. 8 the Court quoted that:

*It is trite that, during the sentencing phase, formalism takes back seat and a more inquisitorial approach, aimed at collating all relevant information, is adopted. The object of the exercise is to place before the court as much information as possible regarding the perpetrator, the circumstances of the commission of the offence, and the victim's circumstances, including the impact which the commission of the offence had on the victim. The prosecutor, defence counsel and the presiding officer all have a duty to complete the picture as far as possible at sentencing stage. Material factual averments made during this phase of the trial ought, as a general proposition, to be proved on oath."*

The relevant information referred to above will include information relating to, among others, the convictions of the accused.

[27] The appellant testified in mitigation. He testified, among others, that during July 2015 he was sentenced to nine years' imprisonment after he had been convicted of housebreaking, certainly with intent to steal and theft. This particular conviction was not among the appellant's previous convictions in the SAP69.

[28] Despite the appellant's testimony that he had been sentenced to nine years' imprisonment for housebreaking with intent to steal and theft, despite the fact furthermore that the said sentence was not contained in the SAP69, the public prosecutor did nothing to verify the information. In this case, he should have obtained sufficient information about that sentence of nine years either from the appellant himself or from his legal representative. If the

information was correct he was obliged to obtain the J14 from the clerk of the criminal court and to place it before the court.

[29] The presiding officer, having been made aware of the appellant's sentence of nine years imprisonment simply remarked as follows:

*"So we don't know when that particular offence was committed."*

This remark convincingly indicates the fact that there was a paucity of relevant details about the nine years sentence that the appellant had testified about in mitigation of sentence. The court *a quo* should have obtained more information from the appellant or from his legal representative if need be, should have ordered the public prosecutor to obtain a J14 in respect of the said sentence as he was obliged to take it into account in the assessment of an appropriate sentence to be imposed on the appellant. He simply adopted a passive role.

[30] The magistrate has a discretion when it comes to the imposition of sentence. That discretion though must be exercised judicially and on the basis of all the relevant information. Failure to obtain all the information about the sentence of nine years that the appellant testified about constituted a miscarriage of justice and a misdirection that justify this appeal court to interfere with the sentence imposed by the court *a quo*.

[31] As the matter stands now the appellant's sentence of nine years imprisonment and the twenty years imprisonment imposed in the instant matter must be served cumulatively. The effect thereof is that the appellant's effective sentence is twenty nine years' imprisonment. The cumulative effect of sentences may have the undesirable effect that the combination of the sentences may be disturbingly inappropriate and shocking. The court *a quo* should have considered the nine years' imprisonment in order to impose on the appellant a fair and

adequate sentence. The court *a quo* therefore did not exercise its discretion properly as it failed to take relevant consideration into account. Again this constitutes a ground that entitles this Court to interfere with the sentence imposed by the court *a quo* on the appellant.

In the result we make the following order:

[1]. The appeal against conviction is hereby dismissed.

[2]. The appeal against sentence is hereby upheld. The sentence imposed by the court *a quo* on the appellant is hereby set aside and the case is referred back to the regional court for the State to verify the evidence of the appellant that he was sentenced to nine (9) years in July 2015 and, if that evidence is confirmed, to obtain a J14 and place it before Court so that the magistrate may sentence the appellant afresh.

P.M. MABUSE
JUDGE OF THE HIGH COURT

S. POTTERILL
JUDGE OF THE HIGH COURT

*Appearances:*

| | |
|---|---|
| *Counsel for the appellant:* | *Adv. MMP Masete* |
| *Instructed by:* | *Messrs T Morotolo Attorneys* |
| *Counsel for the 1st and 2nd respondents:* | *Adv. JJ Jacobs* |
| *Instructed by:* | *Director of Public Prosecutions Pretoria* |
| *Date Heard:* | *14 August 2017* |
| *Date of Judgment:* | *31 August 2017* |