REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

[redacted] 28/02/2017

28/2/2017.

CASE NUMBER:A206/2011

In the matter between:

ZITHO SITHOLE **APPELLANT**

And

THE STATE **RESPONDENT**

J U D G M E N T

KUBUSHI, J

[1] The appellant was convicted of one count of robbery with aggravating circumstances read with the provisions of s 51 (2) of the Criminal Law Amendment Act 105 of 1997 ("the Act"); and one count of kidnapping. He was subsequently sentenced, in respect of count 1, to fifteen (15) years imprisonment and in respect of count 2, to five (5) years imprisonment. Both sentences were ordered to run concurrently.

[2] The appellant is before us having been granted leave to appeal both convictions and sentence by the trial court.

[3] The factual matrix is that on 22 January 2007, the complainants – Mr Ernest Van der Merwe senior ("Mr Van der Merwe snr"), Mrs Betty Van der Merwe ("Mrs Van der Merwe") and Mr Ernest Van der Merwe junior ("Mr Van der Merwe jnr") were attacked by four male persons in their house. They were assaulted and robbed of their property valued at approximately R54 000 at gun point. Among the property that was stolen was a cell phone which belonged to Mr Van der Merwe jnr. That cell phone was found in the possession of the appellant four days after the robbery. Warrant Office Magathla ("Mr Magathla"), the policeman who found the cell phone in the possession of the appellant arrested the appellant and with the assistance of the appellant was able to arrest one other suspect, Mr Antonio Khoza ("Mr Khoza").

[4] At the time of the hearing of this matter Mr Khoza had already been convicted and sentenced of the offences in this case. He was therefore called as a witness by the respondent to testify against the appellant. The evidence of Mr Khoza was the only evidence that tied the appellant to the commission of the offences as to identity, the other two witnesses, Mr Van der Merwe snr and Mrs Van der Merwe could not positively identify the appellant as one of their assailants on that night. Mr Khoza's evidence is that during the robbery one of the three cell phones they had taken from the complainants went missing. An argument ensued amongst them (the suspects) as to who could have taken the cell phone. Three days after the robbery he saw the appellant using that cell phone and a day after that they were arrested together with the appellant. According to Mr Khoza that cell phone is what led to their arrest when it was found in the appellant's possession.

[5] After the robbery Mr Van der Merwe jnr was forced to drive the four assailants with his motor vehicle to a place in Daveyton where the stolen property was offloaded. He was then allowed to go home without being hurt. This complainant did not testify at the trial, it was said that he was in hospital.

AD CONVICTION

[6] The issue that the trial court had to grapple with was whether the appellant was one of the culprits who committed the crimes and whether the appellant borrowed Mr Khoza R400 and whether Mr Khoza gave a cell phone as security to the appellant.

[7] It is common cause that the two state witnesses, Mr Van der Merwe snr and Mrs Van der Merwe could not identify the appellant as one of their assailants. As such the respondent had to rely on the evidence of Mr Khoza to prove that the appellant was one of the culprits in this instance.

[8] In convicting the appellant, the trial court rejected his evidence as being not reasonably possibly true. The trial court found that the appellant's version on how he happened to be in possession of a recently robbed item (the cell phone) was full of improbabilities in that:

8.1 It was improbable that 'just a day after making a loot valued at about R54 000, 00 Mr Khoza somehow found himself penniless that he had to borrow R400, 00 from the appellant'. According to the trial court it would have made sense for the appellant to be borrowing money from Mr Khoza.

8.2 It made little or no logic at all for a person to borrow another person so much money while they are not friends, they hardly knew each other. They only knew each other by meeting at a tavern.

8.3 It made no sense that the appellant would make use of the cell phone which was given to him as security for the money he had borrowed Mr Khoza. It made less sense that Mr Khoza would put up a stolen cell phone as security rather than sell it and make use of the proceeds.

[9] I am inclined to agree with the trial court's findings that the appellant's version is not reasonably possibly true and was correctly rejected. When reading the record it became quite clear that the appellant's evidence should not have been accepted as a true version of how come the stolen cell phone was found in his possession. His evidence is contradictory and kept developing as and when it suited him when he was giving evidence.

[10] For instance, in regard to the cell phone that was found in the appellant's possession by Warrant Officer Magathla, the evidence of Mr Magathla is that when he first asked the appellant about the phone the appellant said it was his phone, the appellant only told Mr Magathla that the cell phone belonged to Mr Khoza much later when he was informed that the cell phone was stolen. The appellant's testimony, on the other hand, is that he told Mr Magathla '*there and then*' that the cell phone belonged to Mr Khoza. This, however, was never said in evidence in chief or put to Mr Magathla when he was testifying. I should also add that in evidence in chief the appellant testified that he borrowed Mr Khoza money this was never put to Mr Khoza to admit or deny. Mr Khoza denied in his evidence ever having borrowed money from the appellant.

[11] Again, under cross examination the appellant first testified that he does not know where Mr Khoza stays, but when it was put to him that it was odd that he would give R400 to someone he did not even know where he stays, he changed his testimony. He first said he knows the area where Mr Khoza stays and when it was getting difficult for him changed and said that he knows the house where Mr Khoza

stays. Later again he testified that he did not know where Mr Khoza stayed but Izaia showed him the place on the same day that he borrowed Mr Khoza the money.

[12] When the appellant was asked why he used the cell phone which was given to him as security, he first answered by saying it is because he did not have a cell phone and when pressed for an answer he said he used the cell phone after Mr Khoza had allowed him to do so.

[13] The appellant's contention is that the trial court wrongly convicted the appellant through the evidence of Mr Khoza, an accomplice in the commission of the offence, by failing to apply the cautionary rules. In failing to apply the cautionary rules the trial court failed to satisfy itself that the story told by Mr Khoza was essentially true, so it is argued.

[14] It is established judicial practice for trial courts to apply cautionary rules when evaluating the testimony of an accomplice. The purpose of the cautionary rules is said to be to assist the court in deciding whether or not guilt has been proved beyond reasonable doubt.[1] The cautionary rule does not require that triers of fact should be told, or should warn themselves about the application of the rules. What is required is for a court to look for a safeguard which would reduce the risk of wrongful conviction.[2]

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[1] See S v Snyman 1968 (2) SA 582 (A) at585C-G.
[2] See R v Mpompotshe & another 1958 (4) SA 471 (A) at 476E-F.

[15] In this instance, the trial court, in reducing the risk of wrongful conviction, found safeguards in other independent evidence and the truthfulness of Mr Khoza's testimony. Firstly, Mr Khoza's explanation of how the cell phone came to be in the possession of the appellant is borne out by the evidence of Mr Van der Merwe snr. Mr Van der Merwe snr testified that at some stage their assailants argued amongst themselves as they could not account to all the three cell phones taken from them. Secondly, a cell phone, which was found to belong to Mr Van der Merwe jnr, was indeed found in the possession of the appellant. Mr Khoza's testimony that the appellant had hidden one of the cell phones and saw it in the possession of the appellant three days later was never denied by the appellant. Lastly, when evaluating Mr Khoza's evidence the trial court found him, correctly so in my view, to be '*a credible and reliable witness who stood firm and intact in his evidence even under lengthy cross examination*'.

[16] In argument before us, the appellant's counsel submitted that the trial court erred in concluding that there were five suspects who attacked the complainants instead of four as it was testified. Counsel referred to a passage in the trial court's judgment where the trial court referred to five suspects. The version of the respondent as testified by Mr Van der Merwe snr, Mrs Van der Merwe and Mr Khoza is that there were four assailants. It is clear from the reading of that passage that there was an error by the trial court when analysing the evidence of Mr Khoza. The trial court, mistakenly so, referred to five suspects, when in fact Mr Khoza has been talking about four suspects. But, this does not mean that there was misdirection by the trial court in rejecting the version of the appellant.

[17] A further submission by the appellant's counsel is that the offence of kidnapping has not been proven. Counsel's basis of contention is that the person who was kidnapped, Mr Van der Merwe jnr, did not testify. Whilst it is so that the person who was kidnapped did not give evidence at the trial, there is, however, unchallenged evidence presented at the trial by the respondent which proves that Mr Van der Merwe jnr was kidnapped. This evidence was tendered by Mr Van der Merwe snr, Mrs Van der Merwe and Mr Khoza. The evidence remains uncontested.

[18] The other argument by the appellant's counsel that the trial court erred in that it expected that only the appellant should tell the truth is unsubstantiated. Counsel was at pains to show evidence in the record where the trial court indicated that only the appellant was expected to tell the truth.

[19] I could find no evidence that the trial court misdirected itself in any way in convicting the appellant as it did. The appeal on both convictions ought to be dismissed.

AD SENTENCE

[20] As regards sentence, the appellant's grounds of appeal at set out in his heads of argument are that:

20.1 The trial court misdirected itself in failing to exercise its sentencing discretion properly and reasonably and the sentence induced a sense of shock.

20.2 The trial court's sentence of the appellant to direct imprisonment for fifteen (15) years and five (5) years induced a sense of shock.

[21] In argument before us, the appellant's counsel only argued the second ground that the sentence imposed induces a sense of shock and should be reduced to a period of eight (8) years imprisonment. The submission by counsel being that the trial court failed to take into account that the appellant had already spent a period of about twelve months in custody awaiting trial.

[22] It is not in dispute that initially the trial court had sentenced the appellant to fifteen (15) years imprisonment on count 1 and five (5) years imprisonment on count 2. The said sentences were ordered to run concurrently, as such, the appellant is to serve a period of fifteen (15) years only.

[23] Having perused the trial court's judgment on sentence I could find no misdirection on the part of the trial court when it imposed the sentence it imposed. The trial court considered all the traditional factors required to be taken into account when passing sentence.

[24] The personal circumstances of the appellant as set out by his legal representative were first considered. The appellant was 26 years old at the time of sentencing; he was unmarried and had one child aged eleven years; he did not have any direct family in South Africa – most of his family, his parents as well as the mother of his child resided in Mozambique; he came from Mozambique and has been in the country since 2003 due to economic hardships in that country and the difficulty to procure employment there; since his time of arrival in this country he worked as a builder on an *ad hoc* basis; approximately a year or so before his arrest he had been receiving employment from East Rand Walling on a contractual basis earning a salary of about R40 *per* day; he was in custody awaiting trial for well over a year and was a first offender.

[25] The trial court took into account the nature and seriousness of the offences. The circumstances surrounding the commission of the offences were considered: the cruel manner in which the robbery was committed - the whole house was ransacked and items (valued at approximately R54 000) that took years to gather, were taken away never to be recovered except one cell phone; the complainants were traumatised – the whole ordeal took three hours; one of the complainants (Mr Van der Merwe snr) was injured when he was hit with the butt of a firearm on the head even though it is said he complied with all the orders given to him; the humiliation suffered by Mr Van der Merwe snr – as head of the family being subjected to the bad treatment in the presence of his wife and son; and the prevalence of the type of offences.

[26] The interest of society was not left out. The moral outrage of the society against offences of this nature and their frequency and the fact that such offences violate the dignity and self-esteem of members of society. The trial court then opted for a sentence that will deter others from committing similar offences as well as other offences in general.

[27] In this regard it is my view that there is no misdirection on the part of the trial court, it considered all the factors.

[28] Count 1 was read with the provisions of s 51 (2) of the Act which means that the application of the minimum sentences' regime comes into play. In terms of the legislation governing the minimum sentences' regime, where a convicted person is a first offender the trial court is entitled to impose a sentence of fifteen (15) years imprisonment unless there are substantial and compelling circumstances warranting deviation from that sentence. The trial court was entitled therefore, to impose the sentence of fifteen (15) years imprisonment (the appellant was a first offender) unless there were substantial and compelling circumstances warranting deviation from such a sentence.

[29] The appellant's counsel submitted that due to the relative youth of the appellant at 26 years, the fact that he was a first offender and capable of rehabilitation, the trial court should have considered such factors as substantial and compelling circumstances and deviated from the minimum sentence. However, the

trial court, correctly so, was not convinced that such factors warranted deviation from the minimum sentence and as such proceeded to impose the minimum sentence of fifteen (15) years imprisonment.

[30] It is not correct that the trial court did not consider the period in custody the appellant spent awaiting trial when passing sentence. It is apparent from the personal circumstances of the appellant that the trial court considered that fact but did not find it to have more weight than the other factors it had to consider. Sight should also not be lost that the sentence imposed by the trial court was supposed to have been twenty (20) years imprisonment but the trial court ordered the two sentences to run concurrently. It can as well be said that this covers the period the appellant spent in custody awaiting trial.

[31] The sentence imposed is appropriate. In the circumstances of this matter the personal factors of the appellant are by far outweighed by the aggravating factors. There is nothing shocking, startling or disturbingly inappropriate with the sentence imposed by the trial court. It must stand.

ORDER

[32] In the premises, the appellant's appeal on both convictions and sentence should be dismissed.

[33] I would propose the following order:

33.1 The appeal on both convictions and sentence is dismissed.

33.2 The convictions and sentence imposed by the trial court are confirmed.

E. M. KUBUSHI,

JUDGE OF THE HIGH COURT

I concur and it is so ordered

N. KOLLAPEN

JUDGE OF THE HIGH COURT

Appearances:

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