delivered
30/10/2017

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

Case Number: A397/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: .....

SIGNATURE: .....

In the matter between:

ROGER SITHOLE — Appellant

and

THE STATE — Respondent

JUDGMENT

NKOSI AJ

[1] The Appellant was convicted in the Regional Court, Pretoria on a charge of housebreaking with the intention to rob and robbery. He was sentenced to 12 years imprisonment. The appeal is against both conviction and sentence.

[2] The complainant testified that he was in his house when he saw a man in his house pointing a firearm at him. The complainant had a firearm with him. He fired five rounds at the attacker. The attacker ran away. He could not identify the attacker. He later discovered that the following items were missing from his house.

[2.1] two cell phones;

[2.2] laptop;

[2.3] Hi-fi music system; and

[2.4] 9mm Glock pistol.

[3] All these items except the pistol were not recovered. The pistol was found in the yard. The police arrived at the scene. The police discovered blood on the floor inside the house and a fragment of a bone in the foyer between the kitchen and the TV room. The police collected blood samples and the piece of bone fragment, sealed and forwarded it to the Forensic Science Laboratory.

[4] The Appellant was found about 500 metres away from the house according to Warrant Office Makau. However, Warrant Officer van Heerden testified that the Appellant was found about one to two kilometres away from the complainant's house. The contradiction in distance is immaterial because the fact is that the Appellant was found in close proximity of the complainant's house.

[5] He was found under a tree without clothes on his upper body. He had a number of bullet wounds and was bleeding. An ambulance was called to the second scene. Doctor Seller took a blood sample which was sent to the Forensic Science Laboratory for testing, in particular to analyse and compare same with the blood samples collected from the complainant's house.

[6] The Appellant testified that he was on his way home when he was robbed by unknown men. He testified that he was robbed of R2 500.00 and was shot only once by his attackers. He denied any knowledge of the housebreaking. It is therefore clear that the Appellant is not in a position to deny that housebreaking with intent to rob and robbery took place at scene one, the complainant's house. In dispute is the question of identity. The complainant testified that he was unable to identity the intruder.

[7] In ***S v Hadebe and Others*** (2) SACR 641 at p 642, it was stated: -

"It was well to recall yet again the well-established principles governing the hearing of appeals against findings of fact, which were, in short, that in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong."

[8] The trial court found the Appellant's version to be so inherently improbable and rejected it as not being reasonably possibly true.

[9] On the other hand, the State's case is based on circumstantial evidence. The proven facts were, firstly, the bone fragment found at the scene as being that of the Appellant, secondly, the Appellant was shot several times at the scene of the housebreaking, thirdly, the person shot ran out of the house, fourthly, blood was found in the house and a sample was taken and fifthly, the Appellant was found not too far from the complainant's house.

[10] The only reasonable inference drawn from the facts mentioned is that the Appellant is the person who was in the complainant's house and was involved in the commission of the offence with which he is charged.

[11] The commission of the offence is not in dispute but the Appellant's identity is. I agree with the trial court that the forensic evidence collected at the scene as well as the other proven facts referred to above the point to only one reasonable inference. I will therefore not interfere with trial court's finding of facts.

[12] In passing sentence, the trial court found that compelling and substantial circumstances existed to impose a lesser sentence. These were the facts that the Appellant had sustained several gunshot wounds, he was a first offender and he had been in custody awaiting trial for two years and eight months as well as his personal circumstances.

[13] The Appellant was convicted of housebreaking with intent to rob and robbery with aggravating circumstances in that he was wielding and pointing a firearm at the complainant. The stolen items except for the pistol were not recovered. The housebreaking happened in the early hours; at 4h00 am when the complainant was in his house.

[14] Taking into account the totality of evidence in mitigation, I am not persuaded that the trial court misdirected itself in passing the sentence of 12 years imprisonment.

[15] In *S v Rabie* 1975 (4) SA 855 (A) at p 857D-E, it was stated:-

"*1 In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –*

(a) Should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and

(b) Should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.

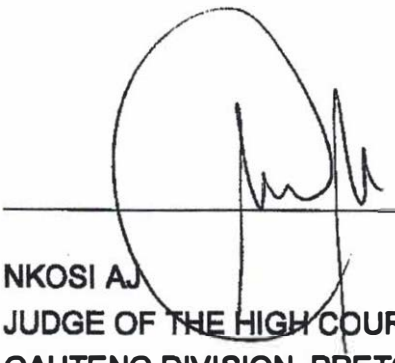
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[16] It is clear that the offence is a serious one and has aggravating circumstances to it. The Appellant did not show any remorse. He had a firearm which he could have used to shoot and kill the complainant. The discretion of the trial court when passing the sentence was exercised judicially and I will therefore not interfere with it.

ORDER

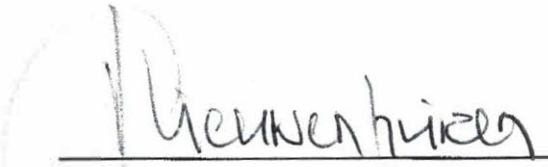
[17] In the result, the following order is proposed:

The appeal against conviction and sentence is dismissed.



NKOSI AJ
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



N JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

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Counsel for the Respondent:	Advocate W.K.K. Mphahlele
Instructed by:	Director of Public Prosecutions
	(PA 50/2013 (22/10/WKKM)