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

CASE NO: A508/2016

DELETE WHICHEVER IS NOT APPLICABLE

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

06/11/17
DATE

SIGNATURE

In the matter between:

VUSIMUZI BETHUEL KUNENE First Appellant

VUSI CCORNELIUS MTSWENI Second Appellant

and

THE STATE Respondent

JUDGMENT

Baqwa J

[1] The appellants were arraigned before the Mdutjana Regional Court on one count of robbery with aggravating circumstances.

[2] They were convicted and sentenced to 15 years imprisonment and they have now appealed to this Court against both conviction and sentence.

[3] A brief background to the incident that took place on 15 August 2014 at about 07h00 is as follows. The complainant, Sylvia Mnguni was in the company of her sister and they were on their way to her aunt's place to take a bath.

[4] They were confronted by the appellants and her sister managed to run away. The complainant also ran away but she could not outrun the second appellant who not only caught up with her but also began assaulting her. The first appellant demanded that she hand over her cell phone but she refused. The first appellant struck her with a bottle on the head.

[5] The second appellant thereupon robbed her of her cell phone and cash in the sum of R120.00. The incident was witnessed by the complainant's aunt, Maria Mabena who testified on behalf of the State.

[6] Ms Mabena testified that she saw the appellants as they assaulted the complainant and she verbally tried to intervene, calling the first appellant by his name. She had known the first appellant prior to the date of the incident.

[7] The third witness called by the State was Solomon Moshime, a policeman who testified that he was on duty when the complainant came to lay a charge.

[8] He told the court **a quo** that the arrest of the first appellant on 5 March 2015 led to the arrest of the second appellant and that at the time of the latter's arrest he requested the second appellant to hand over the phone belonging to the complainant. The second appellant obliged and gave him the complainant's phone. It was a Samsung phone and it was recovered from under a pillow where the second appellant slept.

[9] After the recovery of the cell phone it was handed over to the complainant and the latter identified it with a scratch on the face of the cell phone.

[10] The appellants also testified and pleaded an alibi.

[11] The basis of the appeal is an attack of the evidence presented by the State regarding identity.

[12] In making submissions on behalf of the appellants their counsel has made reference to **locus classicus** on identity, namely, **S v Mthethwa** 1972 (3) SA 766 (AD) in which the "*fallibility of human observation*" is discussed and the need for caution in dealing with evidence of identification. The appellants submit that the court **a quo** erred in its finding that the appellants had been properly and sufficiently identified as the perpetrators of the crime.

[13] The appellants submit that the identification of the appellants was in the form of dock identification which is deprecated in the case of **S v Maradu** 1994 (2) SACR 410 (W).

[14] The appellants further submit that the court **a quo** erred in finding the doctrine of recent possession applicable to justify the finding that the State had proved its case against the second appellant in that the complainant's cell phone was found in his possession.

[15] It is trite that the State bears the onus to prove its case beyond a reasonable doubt and that the doctrine of recent possession ought not be used to undermine or shift that onus to the second appellant.

[16] It is however equally trite that the Court does not approach the evidence on a piece meal basis. It is therefore not the mere finding of the complainant's phone that forms the basis of the conviction. The finding is based on the totality of the evidence presented.

[17] The State established through Moshime that the arrest of the second appellant was through the first appellant, his partner. The second appellant would thus have this Court accept as a coincidence that the complainant's phone was found on him and that he produced same when requested to do so by the police.

[18] The complainant testified that the whole incident took about 45 minutes and that she was left with the second appellant whilst the first appellant was chasing her sister. She was able to observe him during all that time, hence her ability to identify him. When the first appellant returned, it was the second appellant who said, she is still refusing you must hit her with the bottle. This was all taking place on a clear sunny day.

[19] What is even more significant is the explanation which the second appellant gave during the trial regarding the phone. He alleged that the phone belonged to him and that he had informed his attorney accordingly yet this was never put to the witnesses during cross-examination. It is startling, to say the least that the second appellant in his own words told the Court that when he handed the phone over to the police officer he said to him "*here is the phone that belongs to the lady*". It is quite evident from the above that the inconsistencies in the second appellant's own account regarding the phone can only point to one direction namely; his guilt.

[20] Regarding the first appellant the same factors with regard to visibility and opportunity for observation exist but other factors also such as his cooperation with the police which led to the arrest of the second appellant and most importantly his identification by the complainant's aunt put his complicity beyond any shadow of a doubt. In my view, therefore the conviction is well founded.

[21] On the question of sentence, it is equally trite that the sentence falls within the discretion of the trial court and that the Appeal Court's right to interfere is severely circumscribed and limited to cases where a court **a quo** materially misdirects itself or commits a serious irregularity in evaluating the relevant factors.

[22] I fully concur with the dictum in **S v Pillay** 1977 (4) SA 531 (A) at 535 E – F where Trollip JA remarks:

"*As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence.*"

[23] **In casu**, the court **a quo** found that cumulatively, the personal circumstances of the appellants did not amount to substantial and compelling circumstances.

[24] In light of that finding, the court **a quo** was not empowered to deviate from the prescribed minimum sentence.

[25] In the circumstances, I propose that the following order be made:

25.1 The conviction and sentence of the appellants is confirmed.

25.2 The appeal is dismissed.

It is so ordered.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.

P. PHAHLANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:	06 November 2017
Delivered on:	06 November 2017
For the Applicant:	Advocate M. M. P. Masete
Instructed by:	Legal Aid
For the First Respondent:	Advocate M. J. Nethononda
Instructed by:	The Director of Public Prosecutions, Pretoria