**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG, PRETORIA**

Case No: A98/2019

Thabang Charles Mabona — Appellant

And

The State — Respondent

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JUDGMENT

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Hughes, J

[1] This appeal is with the leave of the court *a quo*, the presiding office having granted the appellant leave to appeal both the conviction and sentence imposed. The appellant is Thabang Charles Mabona, who was convicted of five counts of robbery with aggravating circumstances in terms of section 1 of the Criminal Procedure Act 51 of 1977(the CPA). In terms of section 51 (2), Part 2 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 the appellant was sentenced on each count to 15 years' imprisonment. Notably the court *a quo* ordered that the sentence in court 1 run concurrently with count 2, whilst 10 years imposed in counts 3,4, and 5 run concurrently with the sentence in count 2. Cumulatively, the appellant was ordered to serve 30 years' imprisonment.

[2] Even though the court *a quo* granted leave to appeal against the convictions, the appellant only pursued his appeal in respect of counts 1 and 5, both counts being robbery with aggravating circumstances. In respect of count 1 the appellant contended that the State had failed to identify him as the perpetrator beyond reasonable doubt. Whilst in count 5 the State had failed to prove that the offence committed by the appellant amounted to robbery with aggravating circumstances. He contends that the offence amounts to robbery or theft in the prevailing circumstances of count 5.

[3] The robberies in all five counts were perpetrated against the appellant's family member. The issue of identification was pivotal to the conviction of the appellant. However, I must hasten to add that in respect of count 1 the complainant testified that she could not identify the assailants. That being said the conviction of the appellant in count 1 was premised on the court *a quo* applying the doctrine of similar facts.

[4] The court *a quo* reasoned that the *modus operandi* in count 2 was similar to that adopted in count 1, hence the perpetrator in count 2 was the perpetrator in count 1. The complainant in count 1 and 2 are one and the same person, Esther Mampuru. In respect of count 1 the complainant testified that the offense took place on 21 June 2016, there were a number of assailants who used weapons and assaulted her thereafter, removing the following items: Two plasma TV sets, Sony home theatre, Samsang J1S cellphone, a Mobicel Herox tablet, house keys and a Hyundai Getz vehicle.

[5] Her evidence is that the assailants gained entry to her home during the early hours of the morning by breaking a window. She testified that she did not see her assailants at all as one of them instructed her not to look at him. Her life was threatened and she was tied up with the bed sheet. She testified that from the items taken on that day only the vehicle was recovered, though damaged. She testified that it was eventually repaired by a panel beater.

[6] Her testimony is that after the incident above she installed a home alarm system. However, three months later on 18 September 2016 in the early hours of the morning she heard the sound of glass breaking and the alarm was triggered. The assailant entered the house and called out 'where is Mtswake'. Whilst she was locked in her bedroom the assailant

broke the bedroom door opened and to her surprise it was the appellant before her, as she is his aunt.

[7] During the course of the robbery the appellant ripped off the alarm and said to the complainant '...are you calling the police for me, are you calling the police, are you calling the police.' The appellant had a knife and an iron bar in his possession and was alone. Whilst he ransacked the drawers he threatened to kill the complainant. The appellant requested the keys for her vehicle and she threw them under the bed, which he retrieved. During this incident the same vehicle was taken, some cellphones, a computer and a travelling bag. This time she did not recover any of the goods taken.

[8] The court *a quo* place reliance in respect of count 1 and 2 that the same window was broken to gain entry, that the same vehicle was stolen and that cellphones were taken. Pertinently, the court *a quo* stated the following: 'Of importance is that when accused arrived on the 18th of September the accused asked her, 'why did you report me to the police?'

[9] The court *a quo* reasoned that in the circumstances of count 1 and 2 the doctrine of similar facts could be employed once one had established the relevance to admit the evidence against the appellant. Notably the court *a quo* placed much reliance on the fact that the appellant had stated to the complainant that she had reported him to the police.

[10] Before us counsel for the appellant acknowledged that the issue in court 1 was identification and argued that the appellant was not identified by the complainant as one of the perpetrators. The State was wrong to compare the two offences in count 1 and 2, concluding that same *modus operandi* was employed, purely on the basis that the same window was used to gain entry and the same vehicle was stolen in both instances, so the argument goes. To this end, I agree with this argument as it is trite that each offence and the facts thereof must be assessed on their own merit and not collectively.

[11] More importantly, appellant's counsel argues that the presiding officer placed reliance on incorrect evidence to reach her conclusion in respect of the conviction on count 1. In that, she formulated the evidence against the appellant that he had said 'why did you report me to the police.' Instead of what actually appeared in the record, being '...are you calling the police

for me, are you calling the police, are you calling the police.' Notably the State did not address this aspect. This is so, in my mind, as it is evident from the record that the presiding officer erred as regards this specific evidence.

[12] Counsel for the state argued that the evidence relied upon to convict the appellant in count 1 and 2 had a high probative value. However, when questioned by this court of such evidence, counsel made the concession that the correct manner to analyse the evidence relied upon to convict the appellant in count 1 was in fact circumstantial evidence as opposed to similar fact evidence.

[13] Addressing the aforesaid concession, it must be acknowledged that the tests for the reliance of the two different evidence regimes mentioned in the aforesaid paragraph differ like chalk and cheese. In the instance of similar fact evidence, this evidence is admitted in exceptional circumstances as it requires a strong degree of probative force, there must be a logical connection and the relevance of the evidence sought to be admitted is paramount.[1] Is there a sufficient link between *probans* and *probandum* to make such a reasonable inference? As stated in *Duna*:

'[17] It is settled law that whilst similar fact evidence is admissible to prove the identity of an accused person as the perpetrator of an offence, it cannot be used to prove the commission of the crime itself. This legal principle operates, in addition, to exclude such similar fact evidence from being confirmatory material on another count.'

[14] On the other hand, the test to be applied in the case of circumstantial evidence is evidence of circumstances surrounding an offence from which a court may infer a fact in issue. The *proviso* being that the evidence if believed should point to no other reasonable conclusion, anything less and the evidence cannot be admitted.[2]

[15] In the aforesaid circumstances, in both instances, the evidence does not influence the result of a conviction and likewise from the facts it is not the only reasonable conclusion that can be inferred. To this end I refer to the following passage:

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[1] *Duna v State* 2011 (1) SACR 115 (SCA).
[2] *R v Blom* 1939 AD 202.

'It is clear that each count brought against an accused person must be considered separately and that the admissibility of evidence on each count must be tested as if that count had been the only count against such accused – *R v Buthelezi* **1944 TPD 254** But this does not prevent material, which could be admissible under the rules relating to similar fact evidence, from being received merely because a plurality of counts is involved in a case.'[3]

[16] Thus, the presiding officer committed a misdirection on evaluation of the evidence as being similar evidence to confirm a conviction in count 1. The appellant identification was not proved hence an acquittal on count 1 ought to have been pronounced.

[17] Turning to count 5 robbery with aggravating circumstances, the appellant's counsel argued that the fact surrounding this robbery only amount to either a charge of theft or that of robbery and not that of robbery with aggravating circumstances as the appellant was convicted of. I must point out that when pressed by this court there was a concession that came forward from counsel for the appellant. This is so as it was pointed out to both counsel for the appellant and to that of the State that the threat made to the complainant as regards this count, to open the window or be shot, was an ongoing threat that induced her to open the window and allow the appellant to take the goods. The threat had not dissipated merely because she was not threatened immediately before the goods were taken.

[18] As stated in section 1(1) of the CPA aggravating circumstances is described as '... (iii) a threat to inflict grievous bodily harm...whether before or during the commission of the offence'. Hence the presiding officer was correct to find that the offence committed by the appellant was one of robbery with aggravating circumstances and thus there was no misdirection to interfere.

[19] In respect of sentence it is evident that this court ought to revisit the issue of sentence based on the premise of the misdirection in respect of count 1. That being said the term of fifteen years' imprisonment imposed for count 1 will fall away and the concurrency there of with count 2 will fall away.

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[3] *S v Gokool* 1965 (3) SA 465 NPD at 475D-F.

[20] Hence, the sentence would be that count 2 will retain its fifteen years' status with ten years in count 3,4 and 5 to run concurrent with count 2. Effectively, the sentence remains thirty years. Are there factors substantial and compelling that the court *a quo* failed to take into account that warrants this court to interfere, in my view there are none. The presiding officer took into account the general mitigating factor and favoured them for the appellant in not increasing the sentence per count as is required in terms of the Criminal Amendment Act. The court *a quo* treated the appellant as a first offender for each count. There is no need for this court to interfere with the sentence imposed as there is no misdirection on the part of the court *a quo*.

[21] Consequently, the appeal succeeds in respect of the conviction in count 1, however, fails in respect of count 5. Even so the sentence remains a period of thirty years with the concurrency of count 1 and 2 falling away. The appellant failed to demonstrate that the court erred when it dealt with sentencing. In fact, it is evident from the sentence imposed that the court *a quo* was lenient in sentencing the appellant. As there was no misdirection this court has got no business interfering with the sentence imposed.

**Order**

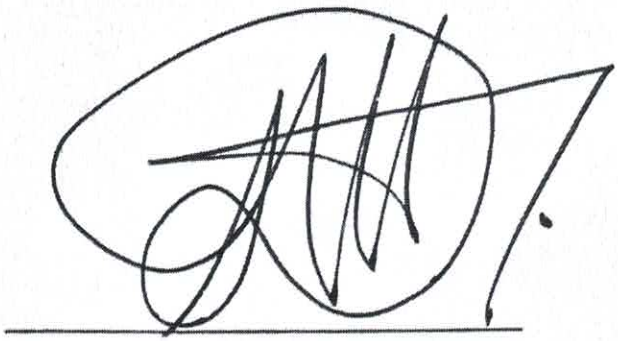
[1] The appeal is upheld in respect of count 1 and the order of the court *a quo* is replaced with the following order:

'In respect of count 1 robbery with aggravating circumstances, the accused Thabang Charles Mabona, is acquitted.'

[2] The appeal in respect of count 5 robbery with aggravating circumstances is dismissed.

W Hughes
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

I concur.



D MAKHOBA

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

Appearance:

For the Appellant: MMP Masete

For the Respondent: Adv JJ Kotze