IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A116/2020

Date:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

27/11/2020 .....
DATE SIGNATURE

In the matter between:

SYLVESTER CHAUKE **APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] The appellant was charged with robbery with aggravating circumstances and was convicted of the charge on 12 September 2016 in the Regional Court in Pretoria. He was sentenced to 15 years imprisonment. Leave to appeal was granted on both conviction and sentence. The parties agreed that the matter could be determined on the papers.

[2] Ms Kipaya, the complainant testified that on 21 June 2015 at midnight she returned home and entered the lift of the block of apartments where she lived. Two men entered the lift with her. One of the men produced a firearm. He put the firearm in her mouth and told her he wanted money. The other one grabbed her around her neck, pulled out her jacket and searched for money. He found R1 000 that she had hidden in her bra. She was pushed to the ground and was hit on the back of her head, she sustained an open wound to her head. They pulled at her jeans, apparently looking for more money. The one who threatened her with a gun was wearing a striped t-shirt. The other man called the one with the gun "Sylvester", it is common cause that this is the name of the appellant. Ms Kipaya stated that she kept on screaming for help during this whole ordeal. When the lift opened on the ground floor the security guard was there, the man with the striped t-shirt pointed the gun at him. One shot was fired into the floor. The firearm was pressed to the neck of the security guard and he was forced to open the security gate for the

men. He opened the gate with a remote control and the two robbers ran off. The complainant was bleeding and confused at the time.

[3] She said that the lighting in the lift was good, but the lights in the corridors were not bright. She testified that it was not the first time that she saw the man who pointed the gun at her. She saw him on previous occasions at a tavern called Tavener's pub. She said that she saw him clearly, as he was close to her in the lift and she had seen him previously at Taverner's pub. Although she could not point out any distinctive features, she described the man as black, young, not tall and of normal built. The fact that she previously saw him at the tavern gives some support to her being able to identify him in court as her assailant. She could not identify the second assailant, as it was the first time she saw him. According to the complainant the whole ordeal took about an hour and a half. After the incident she went to her apartment and the next day to a pharmacy to get some ointment for the wound on her head. She showed the court the scar at the back of her head and a scar of an injury sustained between two of her fingers.

[4] On 18 July 2015, at 22:00 when returning from work, she went to the shop to buy food. On her way she saw the appellant at Tavener's pub in Jacob Maree street and called the police. The police arrived and she pointed out the appellant to them as one of the robbers who attacked her and he was then arrested.

[5] During cross-examination it was put to her that the appellant knew her brother Martin and her mother. She denied that appellant knew her family. Her mother did not live in South Africa and only came here for treatment, after the robbery. She said her brother's name is Edward and he lived in Johannesburg. It was put to her that Martin, was involved in criminal activities, being in possession of stolen goods and appellant led the police to him. As a result of this, it was put to complainant, there was bad blood between appellant and the complainant's family, which led to her falsely accusing him. It was put to her that the appellant was not arrested at Taverner's pub, but at a place called Blue Room. It was also put to her that the appellant would say that the complainant knew him from the salon where she worked, which she denied.

[6] The appellant's defence was an *alibi*. It was put to the complainant that on 21 June 2015, he was working in Atteridgeville. He would testify that Lucky would come and confirm his evidence about his whereabouts as the appellant worked for him at his home on that night. It was furthermore put to her that appellant would say that the complainant has two children. The complainant denied this, stating that she has four children. Only one child, a boy was staying with her. The other three were in Tanzania.

[7] Constable Mdaga testified that on 18 July 2015 he received a call from the complainant that she had seen one of the men who robbed her. The appellant was subsequently arrested near Taverner's pub at Jacob

Maree and van der Walt streets. After the appellant was arrested he voluntary told Constable Mdaga that he was not the one who was in possession of the firearm during the robbery. It seems that this was a totally unsolicited response by the appellant. The appellant said that David was the one who had been in possession of the firearm. Appellant and Constable Mdaga went to look for David in Saulsville the following day, but could not find him. He denied under cross-examination that he previously arrested the appellant and said his colleagues arrested him. He also denied that the appellant was arrested at the Blue Room.

[8] Mr Mashabela the security guard testified that he was on duty on 21 June 2015 at a block of flats. He said that there were two gates, one was a big one, which was operated with a remote and the one is a pedestrian gate. Around midnight, he was in the process of locking the small gate, when he heard a scream coming from the elevator. He approached, when the door opened he saw a man and woman. The man was armed and fired one shot, and he wore a striped shirt. He did not see where he aimed. The man then pointed the firearm at him and ordered him to open the gate. He opened the big gate with the remote control and the man ran away. When he returned the woman had left. He noticed blood on the floor. The next day he saw the complainant and she told him that the robber put a gun in her mouth. He said the man was of average built and black. He could not identify the man and did not see a second man.

[9] The appellant testified that he had known the complainant and her family since 2002. He even once stayed with her brother, who owned a bottle store. He testified that she has two children, a boy and a girl, the boy is the older one of the two. He once took the police to the complainant's brother as he had stolen goods in his possession. He said that the complainant's brother's name is Martin, but he is called Doc. He also said that Constable Mdaga arrested him on 6 June 2015 in another case. He insisted that he was arrested at the Blue Room at Vermeulen and Schubart streets. He said that there was a person in a red car and he was told that a lady said he robbed her. After his arrest he was taken to the complainant's flat. She was not there. It was never put to Constable Mdaga that the appellant was taken to the complainant's flat. Appellant admitted that he told the Constable about the gun, but said that he was lying at the time. He also testified that he was assaulted by the police, but this was also never put to Constable Mdaga. He said that on the night in question he was working for Lucky, the owner of the house where he lived, until midnight.

[10] The trial was postponed no less than three time to award the appellant the opportunity to call Mr Lucky Makaja to confirm his *alibi*. When Mr Makaja finally attended court, the defence opted not to call him as a witness and the appellant's representative placed on record that he would not corroborate the appellant on certain issues.

[11] It was held in **S v Teixera**[1] that the failure of the state to call a witness to testify, place the court in the position to draw a negative inference from the state's failure to do so. The court may infer that the witness would not have corroborated the version of the complainant. The court may however draw the same inference from the defence's failure to call a defence witness. In this instance the appellant raised an *alibi* as a defence. The witness was at court, but the defence chose not to call him. The court can therefore draw a negative inference that he was not in a position to confirm the appellant's *alibi*.

[12] As the complainant was a single witness her evidence should be approached with caution. The following was held in **S v Mthetwa**[2]:

"*Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation, the extent of his prior knowledge of the accused; the mobility of the scene, corroboration; suggestibility; the accused's face, voice, build, gait and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are*

[1] 1980(3) SA 750 (A)
[2] 1972(3) SA 766 (A) (Mthetwa)

not individually decisive, but must be weighed one against the other, in light of the totality of the evidence, and the probabilities."[3]

[13] In **S v Chabalala**[4] the following of relevance was held:

"... *The correct approach to evaluating evidence is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence ..."*[5]

[14] Despite the fact that the complainant was a single witness in respect of identification, she was a good witness and her evidence was in all important aspects corroborated by the other witnesses. Although the security guard only saw one male, he confirmed that the person was wearing a striped t-shirt and that the visibility was good in the elevator. The mobility of the crime scene, might have contributed to his failure to

[3] Mthetwa p 768 A-C
[4] 2003(1) SACR 134 (SCA)
[5] Chabalala par 15

see, or remember seeing the second man. In evaluating the evidence it is important to note that the perpetrator was close to the complainant and more importantly she confirmed that she knew him from sight. Ironically the appellant insisted that he knew the complainant even better than she testified too. If she knew him that well the chances of her making an error about his identity is unlikely. Furthermore the second assailant called the appellant by his name.

[15] The fact that the security guard did not see a second man, cannot be determinative of the guilt of the appellant. We know for a fact that the complainant was robbed and assaulted that night. Even the security guard was threatened with a firearm. The contradictions in the complainant and the security guard's version, seen against the background of all the evidence, did not impact on the credibility of the evidence of the complainant and this contradiction might be explained by the traumatic incident to which the witnesses were exposed.

[16] Interestingly enough the appellant admitted to have told Constable Mdaga that he was not the one who had the firearm during the robbery and by doing so placed himself on the scene. Appellant's explanation that he lied to the police officer makes no sense at all. Why would he, if he was not even at the scene of the crime, as he testified, found it necessary to place himself on the scene, albeit without a firearm.

[17] It seems that the complainant's estimate of the time that the ordeal took place is unlikely, but there is no doubt that she was robbed and assaulted at gunpoint that night. Without venturing into the realm of speculation it is possible that if felt longer because of the trauma she was exposed too.

[18] On an evaluation of all the evidence, we are satisfied that the state succeeded in proving the case against the appellant beyond a reasonable doubt, and therefore the appeal against the conviction cannot succeed. There is no indication that the trial court misdirected itself on the facts or the law.[6]

SENTENCE

[19] The state proved one previous conviction of possession of drugs in 2011 and the appellant was sentenced to R600-00 or 20 days if imprisonment. This previous conviction is not relevant to this matter.

[20] The appellant was 34 years at the time of his arrest. He was in custody for the duration of the trial. He left school in standard seven. He has two children and at the time of his arrest he was unemployed and earned on income by doing piece jobs.

[21] In terms of section 51(2) of Act 105 of 1997, a minimum sentence of 15 years of imprisonment is prescribed for a first offender of robbery with

[6] S v Prinsloo & Others 2016(2) SACR 25 (SCA) par 183; S v Chinridze 2015(1) SACR 364, GP par 39

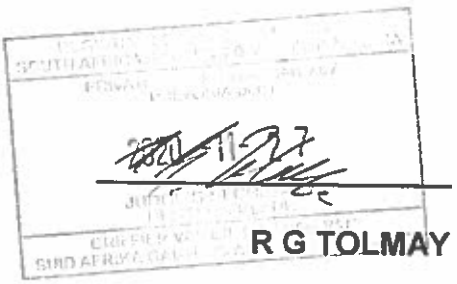
aggravating circumstances. The trial court in our view correctly found that no substantial and compelling circumstances exist to allow for a deviation from the prescribed minimum sentence.

[22] It is trite that sentencing falls within the discretion of the trial court and should only be interfered with if there was a misdirection on the part of the magistrate or if it is shockingly inappropriate.

[23] The argument that the complainant suffered only minor injuries does not have any merit. In this instance a woman returned to her home, which is supposed to be her safe place, only to be attacked by two men. A gun was put in her mouth, she was pushed to the floor and sustained a head injury. It does not require much imagination to infer the trauma that she must have suffered. It is unfortunate that the state seldom leads evidence of experts regarding the trauma that victims suffer in cases like these and the effect that it has on a victim, but a court can and in my view should accept, even without expert evidence, that a victim will be traumatised by an incident like this. These violent attacks on especially woman and children in our society have become so common that we may have become desensitised to the enormity of the crises and the impact that it has on victims. I wholeheartedly agree with the learned magistrate's finding that no compelling and substantial circumstances exist and as a result the prescribed minimum sentence is appropriate.

[24] We make the following order:

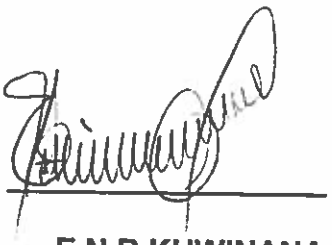
The appeal against conviction and sentence is dismissed.



R G TOLMAY

JUDGE OF THE HIGH COURT

I AGREE:



E N B KHWINANA

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING:	**11 NOVEMBER 2020**
DATE OF JUDGMENT:	**26 NOVEMBER 2020**
ATTORNEY FOR APPELLANT:	**LEGAL AID SA**
ADVOCATE FOR APPPPELLANT:	**ADV L A VAN WYK**
ATTORNEY FOR RESPONDENT:	**NPP**
ADVOCATE FOR RESPONDENT:	**ADV P C B LUYT**