

SOUTH AFRICA / JUDGMENT

Biyase v S (AR51/2020) [2021] ZAKZPHC 56 (27 August 2021)

[2021] ZAKZPHC 56

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi, Mlaba

CASE / FILE NUMBER

AR51/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: AR51/2020

In

the matter between:

MTHOBISI

BIYASE APPELLANT

and

THE

STATE RESPONDENT

ORDER

On

appeal from: Regional Court, Ixopo (Mr.

Squires sitting as a court of first instance)

1. Appeal

against both conviction and sentence is dismissed.

2. The

convictions and sentences imposed by the trial court are confirmed.

JUDGMENT

Mngadi J (Mlaba AJ concurring)

- [1] The appellant with leave of the trial court appeals against both conviction and sentence.
- [2] The appellant was charged before the regional court with three (3) counts of robbery with aggravating circumstances. A legal representative represented the appellant during the trial. When the charges were put to the appellant, he pleaded not guilty to all the charges. The regional magistrate after hearing evidence acquitted the appellant on one count (count 3). The court convicted the appellant of common robbery on one count (count 1) and convicted the appellant as charged on another count (count 2). He sentenced the appellant to three (3) years on common robbery and to fifteen (15) years imprisonment on count 2. The court ordered that the sentences imposed be served concurrently. It resulted in an effective sentence of fifteen (15) years imprisonment.
- [3] The charges against the appellant were as defined in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA), further, they were read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997 (the CLAA). The first charge (count 1) alleged that on or about 6 September 2016 and at or near Hopewell the accused did unlawfully and intentionally assault Nokulunga Silagu and did then and with force take a cellphone her property, the aggravating circumstances being that the complainant was strangled, threatened with a broken bottle and she sustained some injuries. Count 2 alleged that in or about 13 September 2016 and at or near Christ The King Hospital- Ixopo the accused did unlawfully and intentionally assault Philile Ngcobo and did with force take a smart tab 3g, R1200 in cash and a bag her property, aggravating circumstances being the use of firearm to threaten the complainant. Count 3 alleged that upon or about 12 September 2016 and at or near Ixopo the accused did unlawfully and intentionally assault Kefure Molefe and did with force take from her money, cash R1200, a cellphone and denim bag, the aggravating circumstances being use of firearm to threaten the complainant.
- [4] The appellant as basis of defense raised an alibi. It was common cause that the issue in dispute was identification. The State lead evidence of the three complainants, two witnesses Khulekani Mnguni (Mnguni) and Simile Dladla (Dladla) who both claimed to have acquired the stolen cellphones from the appellant and the police captain Zindela Madondo (Madondo) who was involved in the recovery of the cellphone(s) and the arrest of the appellant. The appellant testified for the defense and he did not call any witness. Nokwazi Mkhize who was with the complainant in count 2 during the robbery corroborated the evidence of the complainant and she testified that the perpetrator was the appellant although she was not given an opportunity to do identification in an ID parade.

- [5] The evidence relating to the occurrence of the robbery of the cellphones incidents was not challenged. The appellant denied that those from whom the cellphones were recovered got the cellphones from him and he denied that one cellphone was found on him. The evidence of the complainants that after the recovery of the cellphones, they were called to the police station and they identified the recovered cellphones was not challenged.
- [6] The appellant admitted that the complainants in counts 1 and 3 pointed him out in the ID parade. The evidence of two complainants on the holding of the ID parade establish that it was regularly held.
- [7] The evidence establish that the crimes were committed on 6, 12 and 13 September 2016. The appellant was arrested on 19 September 2016. Within about two weeks from the date of the commission of the crimes, the complainants in count 1 and 3 identified the appellant in the ID parade as the perpetrator. On 14 September 2016, Madondo recovered from the appellant the tablet robbed from the complainant on 13 September 2016 on count 2. Shortly, after the arrest of the appellant cellphones robbed on count 1 and 3 were recovered from Mnguni and Dladla.
- [8] The three complainants were robbed during the day. They were robbed when they were walking alone. The complainants were not robbed in the manner of grab and flee. The perpetrator confronted, held or threatened them. During the incident, the complainant was face to face with the perpetrator. The perpetrator made no attempt to cover or hide himself to make it difficult to be identified. The complainants were young women familiar with young African males. The ID Parades were held soon after the incidents, when the incident was still fresh in the minds of the complainant. The complainant had no difficulty to identify the perpetrator in the ID parade. Both Mnguni and Dladla received the cellphones a few days before police recovered the cellphones from them and they immediately connected the appellant with the cellphones found on them. Madondo recovered the tablet cellphone from the appellant a day after it was robbed from the complainant. He recovered it when he was not aware that the appellant robbed the complainant of it a day prior to its recovery.
- [9] Dladla's evidence was that Sicelo was with the appellant when he sold the cellphone to him. The fact that the appellant was with the person in possession of, selling the cellphone a few hours after the cellphone was robbed from the complainant, and the complainant identified the appellant as a perpetrator and pointed him out in the ID parade is significant.
- [10] The appellant testified that he was in another area from 1 September 2016 to 15 September 2016. He was carrying out building construction in a particular homestead. He was not able to call any persons he worked with as witnesses. He was given an opportunity and the police accompanied him to point out the homestead he was carrying the building construction on but he failed to do so. In my view, there were proper grounds to reject the appellant's alibi as false. The court correctly found him to be a poor witness and he adduced no evidence to support his alibi. In *R v Hlongwane* 1959 (3) SA 337(A) at 340H the court stated that there is no onus on an accused to establish an alibi, if it might be reasonably be true he must be

acquitted. The alibi, held the court, does not have to be considered in isolation, it must be considered in the light of the totality of the evidence in the case and the court's impression of the witnesses.

- [11] The State witnesses gave their evidence in a straightforward manner. The evidence linking the appellant with the robbed goods soon after the incidents corroborated the complainants' evidence relating to the identification of the perpetrator. Evidence relating to identification must be approached with caution. An accused person can easily be mistaken for the perpetrator. The circumstances under which identification took place and other supporting evidence provide the necessary safeguard that the identification can safely be relied upon. See *S v Mthethwa* 1972(3) SA 766(A) at 768A-769A.
- [12] The evidence, in my view, was strong against the appellant in respect of all the counts. The regional magistrate appear to have misconstrued the situation relating to count 3. It is not clear why the complainant's evidence identifying the appellant as the perpetrator was not given any weight. It is also not clear why the fact that the person identified as the perpetrator was with the person selling the robbed cellphone few hours after it was robbed was regarded as irrelevant. He could not have been an innocent companion because in his evidence he denied that he was present. In addition, the complainant, Ms. Molefe identified the appellant in the I.D parade as the perpetrator not long after the incident. The regional magistrate, in my view, wrongly assessed evidence relating to this count in piece-meal fashion instead of considering relationships between pieces of evidence. As individual pieces, it might appear weak but the total effect of all the pieces is important. In *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645i quoting from *Moshephi and Others v R* (1980-1984) LAC 57 AT 59F-H held:
- 'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence.'
- [13] The appellant contends that the regional magistrate erred in finding that there were no substantial and compelling circumstances for a court to impose a sentence less than the prescribed minimum of sentence of fifteen (15) years imprisonment on count 2. The defence argues that the error was occasioned by the failure to take into account properly the following factors, namely; that the appellant was twenty three
- (23) years old at the date of the commission of the crimes, he was a first offender, and he spent three (3) years in custody awaiting trial.

- [14] The record of the previous convictions of the appellant (SAP69) shows that he was not a first offender. He embarked on a road of criminality when he was seventeen (17) years old in 2010. During the period 2010 to 2015, he had been convicted of five (5) crimes. He was convicted of robbery on two occasions, had one conviction of housebreaking, one conviction of assault and one conviction of murder.
- [15] The sentences previously imposed on the appellant show that he was treated with a great degree of leniency. He has not learnt anything from the sentences that were imposed on him. He had, within a short period, committed a number of offences. He was embarking on a crime spree. It indicates that he is a danger to society. He can only blame himself that he could not be released on bail pending trial.
- [16] Sentencing is primarily in the discretion of the trial court. The appellate court can interfere with the sentence imposed on limited circumstances, namely, where the sentence imposed is either disturbingly inappropriate, or it is vitiated by a material misdirection or it is so severe that it induces a sense of shock.
- [18] The law prescribed a prescribed minimum sentence of fifteen (15) years imprisonment for a crime of robbery with aggravated circumstances, if no substantial and compelling circumstances are found to exist for a court to impose a lesser sentence. The substantial and compelling circumstances are factors which have a bearing on the question of sentence. Such factors must bear scrutiny and must have some substance. The prescribed minimum sentence may not be deviated from due to flimsy reasons.
- [19] The court In *S v Malgas* 2001(1) SACR 469 (SCA) at 476 held that the court is required to approach the question of sentence conscious of the fact that the legislature has ordained the particular prescribed period of imprisonment as the sentence which should ordinarily be imposed. This is in order to ensure a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were truly convincing reasons for a different response. In my view, there are no grounds to upset the finding made by the regional magistrate that there were no substantial and compelling circumstances as envisaged in the CLAA.
- [20] The sentencing court determines a sentence that is proportionate, fair and just. A sentence of fifteen (15) years imprisonment is a robust sentence. The sentence must fit the offender, be in the interest of the community and fit the crime. The purposes of punishment are deterrence, prevention, rehabilitation and retribution. A robust sentence depending on the circumstances of the case may be the appropriate sentence. I am unable to find that the trial court misdirected itself in the manner it sentenced the appellant.
- [21] I propose the following order:
1. Appeal against both conviction and sentence is dismissed.
 2. The convictions and sentences imposed by the trial court are confirmed.

Mngadi J

I agree, it is so ordered

Mlaba AJ

APPEARANCES

Case Number: AR

51/2020

For the Appellant: Bongani Mbatha

Instructed by: Legal

Aid South Africa, PIETERMARITZBURG

For the Respondent: S.I. Sokhela

Instructed by: Deputy Director of Public Prosecutions, PIETERMARITZBURG

Date matter argued: 20 August 2021

Judgement

delivered on:

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