

SOUTH AFRICA / JUDGMENT

Dlamini v S (A14/2021;SHG117/18) [2022] ZAMPMHC 11 (20 September 2022)

[2022] ZAMPMHC 11

COURT

Middelburg High Court, Mpumalanga

BEFORE

M B G Langa, S S Mphahlele

CASE / FILE NUMBER

A14/2021;SHG117/18

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG LOCAL SEAT

CASE

NUMBER: A14/2021

RC

CASE NO: SHG117/18

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

20/09/2022

In

the matter between:

SIHLE

MUSAWENKOSI DLAMINI

APPELLANT

AND

THE

STATE

THE

RESPONDENT

JUDGMENT

Langa AJ (Mphahlele DJP concurring):

Introduction

- [1] On 16 August 2019 the appellant was convicted in the Middelburg Regional Court on two counts of robbery with aggravating circumstances and sentenced to fifteen (15) years imprisonment on each count. The sentences were ordered to run concurrently. The appeal is with the leave of the trial court and is on both convictions and sentences. Although the parties initially dispensed with the hearing of oral submissions, they were however invited by court to make oral submissions on 21 June 2022.

Background

facts

- [2] The undisputed evidence is that on 16th August 2018 the two complainants were robbed while on duty as security guards near Hendrina within the jurisdiction of this court.

In count 1 the State alleges that the appellant and co-perpetrators robbed Mr Sibusiso Mathonsi of a cellphone, a jacket and house keys. In respect of count 2 it is alleged that they robbed Sandile Shelembe of a cellphone. The State alleges that in both instances aggravating circumstances were present in that the robbers, and the appellant in particular, used a knife during the said robbery.

- [3] The two complainant's version is that they were on duty as security guards at a site belonging to the Steve Tshwete Municipality when they were accosted by four men while in the guard house at around 00h30. They were robbed of their properties including cellphones, a security company identification card, company jackets as well as house keys at knifepoint. They testified that the robbers found them inside their guard house where they were sitting around a fire. The house had no light save for the light emitted by the fire. Eventually the robbers took them outside where they tied them with

shoe laces. They were ironically forced to dig up the copper cables they were guarding on the property. The police were later summoned to the scene after the complainant in count 1, Mr Mathonsi, managed to escape and seek help. The appellant was shortly thereafter arrested in the neighbourhood by the police. The complainants also stated that they managed to identify the appellant at the scene during the robbery as there was a high mast light which illuminated the grounds outside the guard house. Mr Mathonsi stated that he recovered his cellphone, the PSIRA security identification card as well as his work jacket and house keys which were taken during the robbery. He said these were brought to the scene together with the appellant by the police who arrested the appellant. They testified further that they identified the appellant, who was in the police vehicle, as one of the robbers and the person who had the knife.

[4] The two police officers who arrested the appellant both testified that after they received the report of the robbery they attended to the scene and thereafter went driving around the area in search of the suspects who had fled the scene. While driving they observed a person laying low trying to hide. When they approach him he unsuccessfully attempted to run away but was apprehended and taken back to the scene where the complainants identified him as one of the robbers and the person in the group who was in possession of a knife. They also testified that the arrested person dropped a knife as he

ran away and that he was found in possession of a Hisense cellphone and PSIRA security identification card belonging to the complainant

in count 1 Mr Mathonsi who identified them as the property he was robbed of earlier. They also testified that the man was found wearing two company jackets one of which was identified by Mr Mathonsi as his.

[5] The appellant's defence is a bare denial of the commission of the offence. Although he admitted that he was arrested by the police in the area, he however, stated that he was on his way home from a local tavern when he was arrested. He also denied having been found in possession of the properties belonging to the complainants.

Common cause issues

[6] From the evidence it is not disputed that the two complainants were accosted by a group of men around midnight on 16/08/2018 in Hendrina on a property belonging to the Steve Tshwete Municipality where they were on guard duties. It is further common cause that during this incident the two complainants were robbed of their belongings, including cellphones, a company identification card, company jacket and house keys at knifepoint. It is further not disputed that after visiting the scene of crime the police went to search for the robbers and eventually arrested the appellant just after midnight around 00h30 and brought him to the scene where he was identified by both complainants as one of the robbers and the man who had a knife in his

possession.

Issues

in dispute

[7] The main issue in dispute is clearly one of identity. While it is not disputed that the appellant was arrested by the police, it is, however, disputed that he was involved in the robbery. Another disputed issue is whether or not the appellant was found in possession of the properties belonging to the complainants as well as a knife as alleged. Although the police officers testified that they found him in possession of the items which were eventually identified by the complainants' as theirs, the appellant however flatly denied that he was found in possession of these properties by the police as alleged by the latter.

Grounds of appeal and the appellant's contentions

- [8] Regarding conviction the appellant challenges the reliability of the evidence of the state witnesses. It is argued that the evidence of the two complainants regarding the identity of the robbers was not satisfactory. The contention in this regard is first that the conditions were not conducive for easy and proper identification of the assailants as it was dark inside the guardhouse. It was further argued that the complainants did not give the police the identification of the robbers when the police went to search for them. It was argued for the appellant therefore that the court erred in finding that the identity of the appellant was proven beyond reasonable doubt as the evidence of the complainants was not satisfactory in all material respects. It was further submitted that the versions of the various state witnesses were contradictory in some respects. It was for instance pointed out that the complainants differed in respect of the trousers worn by the perpetrator. It was therefore submitted that the version of the appellant was reasonably possibly true and that the court therefore erred in rejecting the appellant's version as false.
- [9] The appellant's defence is basically a denial of any involvement in the robbery. Although he admitted having been arrested by the police, he however states that he was only walking along the road hiking when he was confronted by the police who accused him of having robbed the complainants. The appellant also denied having been found in possession of the complainant's properties or a knife as alleged by the police.
- [10] Regarding the sentence, the appellant's contention is that the sentence of 15-year imprisonment term is harsh and disproportionate to the crimes. It was further argued that the trial court erred in concluding that the personal circumstances of the appellant did not amount to substantial and compelling circumstances as envisaged by the Criminal Law Amendment Act 105 of 1997 (the CLA Act). The defence submitted therefore that the court should have found that there were sufficient grounds to deviate from the imposition of the prescribed minimum sentences.

The respondent's contentions

- [11] The State, on the other hand, submitted that the identity of the appellant was proven beyond reasonable doubt. It argued that although the lighting inside the guardhouse was not good, there is however no doubt that there was enough light outside coming from a flood light 50 meters away which sufficiently illuminated the grounds. The State argued further that the complainants had sufficient opportunity to observe their assailants both inside and outside the guardhouse but

especially outside when they were tied up and forced to dig up the ground. The State contends therefore that there could not have been a mistake in the identity of the appellant as one of the assailants.

- [12] The State argued further that the arrest of the appellant shortly after the robbery in possession of the complainants' properties strengthens the identification evidence that he was involved in the robbery. It was argued in this regard that the court should find the evidence of the police and the complainants to be corroboratory and that the appellant was indeed found in possession of the complainants' properties when he was arrested. The State further contended that based on the circumstances of this case and taking into account the doctrine of recent possession, the court should find that the appellant was involved in the robbery and has been correctly identified as one of the robbers.

The Legal principles and evaluation

- [13] It is trite that a court must exercise caution when dealing with evidence of identification. In *Ndimande v The State* (248/2018) [2019] ZASCA 132 (30 September 2019) the Supreme Court of Appeal in dealing with the evidence of a single witness referred to LAWSA Volume 18 para 263, where the authors state the following: 'Judicial experience has shown that evidence of identity should, particularly in criminal cases, be treated with great care. Even an honest witness is capable of identifying the wrong person with confidence. Consequently, the witness should be thoroughly examined about the factors influencing his or her identification, such as the build, features, colouring and clothing of the person identified. An early identification before the trial (which is admissible as an exception to the rule prohibiting previous consistent statements) lends credibility to the evidence. Particular care should be taken if the only evidence connecting the accused with the crime is that of a single identifying witness; then the cautionary rule relating to single witnesses should also be taken into account.'
- [14] The guidance laid down in *S v Mthethwa* (3) SA 766 (A) is also always instructive when dealing with identification and it is therefore necessary to quote the following often quoted paragraph from the judgment which is relevant to this matter.

"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 the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed against the other, in the light of the totality of the evidence, and the probabilities; see cases such as R. v Masemang, 1950 (2) SA 488 (AD); R v Dladla and Others 1962 (1) SA 307 (AD) at p.310C; S v Mehlape, 1963 (2) SA 29 (AD)

- [13] Taking into account the caution sounded in the matters referred to above, the court below had to ensure that the evidence of the identification of the appellant was reliable beyond reasonable doubt. However, the *Ndimande* case above is distinguishable from the current case in which there is corroboratory evidence. In this matter Mr Mathonsi was not a single

witness as his evidence regarding the identity of the appellant as one of the robbers is corroborated by that of his colleague Mr Shilembe who was with him during the robbery. Both witnesses were positive and confident that the appellant is one of the culprits.

- [14] However, over and above this corroboration, there is additional corroboratory evidential material which, in my view, could not be successfully contradicted and is satisfactory. This is the evidence that the appellant was found in possession of the cellphone and Psira work identification card of Mr Mathonsi which the latter was robbed of a short while earlier. This evidence, in my view, is solid and could not be shaken under cross-examination. Save to deny having been found in possession of these items, the appellant could not shake or controvert this evidence. In addition, there is the evidence of the two police officers, who also corroborated each other materially, in particular regarding the cellphone, the card and the knife. Although they differed in some respects, their evidence however remained solid. The police officers corroborated each on material aspects such as how the appellant was found; that he attempted to run away; that the victims identified him on arrival at the scene; that he was found in possession of items taken from the complainants.
- [15] The evidence regarding the stolen items found in the appellant's possession, in my view, directly connects the appellant to the commission of the crime. In addition, the proximity in terms of time between the robbery and the arrest, coupled with the possession of the items, constitute formidable and overwhelming evidence against the appellant. Taking these factors into account, the appellant's version that he was innocently walking along the road cannot stand, particularly if the evidence of the two police officers is accepted. According to them they saw the appellant laying low trying to hide when they found him. They both also said that he attempted to run away when they approached him. This evidence too is solid and could not be shaken by the defence. This behaviour of the appellant was in the circumstances not compatible with that of an innocent man he claims to have been. If he was innocent, he would have had no reason to hide and even attempt to run away from the police. In the absence of a good explanation for this behaviour I am satisfied that the trial court was correct in accepting this evidence as well.
- [16] The appeal against the conviction is based mainly on facts. It is trite that the powers of the appeal court to interfere with the factual findings of a trial court are limited. *S v Francis* 1991 (1) SACR 198 (A) at 240. Consequently, for the appeal court to interfere with the decision of the court a quo on factual findings it has to be established that the trial misdirected itself on the facts. *S v Monyane and Others* 2008 (1) SACR 543 (SCA). I am in this matter of the considered view that no misdirection of the part of the trial court has been established to justify interference with the decision of the trial court in arriving at the conclusion that the identity of the appellant as one of the robbers has been proven beyond reasonable doubt. I therefore find that the conviction of the appellant on both counts should stand.

- [17] Regarding the sentence of 15 years imprisonment on each count, the appellant contends that that the court erred in not finding that the appellant's personal circumstances, cumulatively considered, constitute substantial and compelling circumstances as envisaged in section 51 (3) of the CLA Act.
- [18] It is trite that the CLA Act prescribes specific terms of periods of imprisonment for certain crimes including robbery with aggravating circumstances for which the prescribed minimum sentence is imprisonment for 15 years. It is, however, also trite that a Court may depart from the imposition of such prescribed sentence if there are substantial and compelling circumstances justifying the imposition of a lesser sentence. In assessing whether such sentence is justified the Court will take account all factors including any mitigating and aggravating factors as well as the nature and seriousness of the crime among other things. In appropriate cases the traditional mitigating factors together with personal circumstances may well be enough to constitute substantial and compelling circumstances.
- [19] Mr Muthuvhithivhi submitted on behalf of the appellant that a lesser sentence is justified based mainly on his personal circumstances. He argued that the trial Court should have made a finding that, taken together, the appellant's personal circumstances justified the imposition of a lesser sentence. These circumstances are that the appellant was 31 years old; married with minor children who are dependent on him; he only went to school up standard 9 and has spent 1 year in custody awaiting trial. It was also argued that he is a person of ill-health.
- [20] It is established law that sentencing is primarily a matter falling within the discretion of the trial court. The appeal court will only interfere if this discretion by the trial court was exercised improperly. *S v Rabie* 1975
- (4) SA 855 (A). It should, however, be noted that the sentencing in this case also involves the interpretation of the CLA Act. It is trite that where the CLA Act is involved and the court finds that there are no substantial and compelling circumstances, the court is compelled to impose the sentence ordained by the CLA Act. In the seminal case of the *S v Malgas* 2001
- (1) SACR 469 (SCA) and many other cases thereafter, it was held that the provisions of this Act makes it compulsory for the court to impose the prescribed minimum sentence unless substantial and compelling circumstances are present to justify deviation from the imposition of the prescribed sentence.
- [21] In determining whether or not substantial and compelling circumstances are present, the court will look at all the factors, including the traditional mitigating and aggravating factors. It will in appropriate circumstances also consider the cumulative effect of these factors, if any. If the appeal court concludes that the minimum prescribed sentence is so disproportionate to the sentence which would be appropriate, it would then be entitled to impose a lesser sentence. Such departure, however, should not to be made lightly and for

flimsy reasons as was stated in *Malgas, supra*.

[22] In this case, however, apart from the personal circumstances referred to above, there are no other mitigating

factors relied on by the appellant. Although the time spent in custody awaiting trial is indeed a factor to be considered in this

matrix, it alone cannot, however, be regarded as a substantial and compelling circumstances. Secondly, while it was placed on record

that the appellant is HIV positive, this was merely stated from the bar and there was no proper evidence adduced to prove this aspect. In any event, the fact that a person is ill is not necessarily and automatically a substantial and compelling circumstance even though it may constitute a mitigating factor.

[23] However, on the other hand, it is clear that the crime of robbery with aggravated circumstances is as a serious violent crime and one of the crimes said to be at a pandemic level in this country, hence its inclusion under the CLA Act. It is one of the most prevalent violent crimes in this country. In this case the victims of the robbery are ironically security guards who were responsible for guarding critical infrastructure belonging to the municipality. Although they are not law enforcement officers, they, however, perform a similar function. They were performing their duties when attacked by the robbers and this should be viewed as an aggravating factor.

[24] Mr Phaledi on behalf of the State argued, correctly in my view, that there are no substantial and compelling

circumstances present in this case. On the other hand, Mr Muthuvhithivhi argued that there are and that the trial court should

not have imposed 15 years imprisonment as it did. I, however, have to agree with the trial court that on a proper consideration of the facts of this case, the personal circumstances of the appellant, even if cumulatively considered, do not constitute compelling and substantial circumstances justifying the imposition of a lesser sentence.

[25] It is trite that when dealing with an appeal on sentence whether imposed by a magistrate or judge, the court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and 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. In my judgment, there was no misdirection by the trial court regarding sentence which calls for interference by this court. The trial court was thus within its competence to impose

the prescribed minimum sentence in this case. The appeal on sentence therefore also stands to be dismissed.

Order

[26] In the result I propose the following orders:

1. The appeal on conviction and sentence is dismissed.
2. The convictions and sentences imposed by the trial court are confirmed.

M B G LANGA

JUDGE OF THE HIGH COURT

MIDDELBURG LOCAL SEAT

I agree,

S S MPHAHLELE

DEPUTY JUDGE PRESIDENT

Appearances

For the appellant: Advocate TE Muthivhithivhi

Instructed by: Legal Ai of South Africa, Mbombela

For the State: Advocate C Phaledi

Instructed by: Director of Public Prosecutions, Middelburg

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 20th day of September 2022 at 10h00

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMHC/2022/11.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/dlamini-v-s-unknown-topic-ampmhc-2022>

Prepared on 11 October 2026 · Esheria