

SOUTH AFRICA / JUDGMENT

Kenku v S (A65/2015) [2016] ZAFSHC 201 (10 November 2016) [2016] ZAFSHC 201

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Mokoena

CASE / FILE NUMBER

A65/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE

DIVISION,

BLOEMFONTEIN

Appeal

number: A65/2015

In

the appeal between:

KABELO

JOHN

KENKU

Appellant

and

THE

STATE

Respondent

CORAM:

VAN ZYL, et MOKOENA, AJ

JUDGMENT

BY: VAN ZYL, J

DELIVERED ON: 10 NOVEMBER 2016

[1] The appellant was charged in the Regional Court, Bloemfontein, on 9 counts. He was acquitted on counts 2, 3, 5 and 9. He was convicted on the followings charges: robbery with aggravating circumstances (count 1), robbery with aggravating circumstances (count 4), attempted robbery with aggravating circumstances (count 6), attempted murder (count 7) and resisting arrest (count 8).

[2] The appellant was sentenced as follows:

1. Counts 1 and 4: 10 (ten) year's imprisonment on each count. It was ordered that 5 (five) years imprisonment of count 4 are to run concurrently with the sentence on count 1.

that both sentences are to run concurrently.

2. Count 6: 10 (ten) year's imprisonment.

Count 7: 12 (twelve) years' imprisonment. It was ordered

3. Count 8: 18 (eighteen) months' imprisonment. It was ordered that it is to run concurrently with the sentences on counts 1 and 4.

The appellant was therefore sentenced to an effective term of imprisonment of 27 years.

[3] The appellant was represented in the court a quo by Ms Easthorpe. He pleaded not guilty, based on a total denial and in effect an alibi.

[4] The appellant was granted leave to appeal against the convictions and sentences by the court a quo.

COUNT 1:

[5] Count 1 relates to a robbery which took place on 17 November 2008 at the convenience store of the Sasol garage in Dr Belcher Road, Bloemfontein. The first witness, Ms SLM Lamunu was on duty on the day of the robbery working as a cashier. Shortly after 20h00 a short man entered the shop, went behind the counter and ordered her to put money into a white bag he was carrying. After she obliged, the short man moved to Chaka's till and gave him the same orders regarding the money in his till. When she looked at Chaka's till, she saw a tall slim man who was pointing Chaka with a firearm. The tall man was wearing a red hat and dark glasses. After they received the money from Chaka, the two men left. At that stage Ms Lamunu pretended to be falling down behind the counter and pressed the panic button underneath the till. The whole incident took between 5 to 6 minutes. On 24 March 2009 Ms Lamunu attended an identity parade at Mangaung Police Station where she pointed the appellant as being the tall slim man who pointed the firearm at Chaka. She again confirmed

this identification in open court.

- [6] Daniel Matlala was on duty the particular night together with Ms Lamunu. Shortly before the incident, he was called outside as somebody was looking for him. He requested Chaka to manage his till in his absence. He did not see the robbery taking place and was only advised about the robbery by Chaka a couple of minutes later.
- [7] Mr TM Ramakhanthane was also called as a witness. The prosecutor requested that the hearsay evidence he was about to present be provisionally allowed. Although Mr Ramakhanthane was on duty on the night of the incident, he did not see the robbery. At some stage he entered the shop, when Ms Lamunu advised him that they had just been robbed. They then phoned Bloemsec Security and also the manager of the garage. Mr Ramakhanthane then, inter alia, testified as follows regarding a video recording from the security cameras:

"... then the manager showed us the people who robbed the place through the camera.

Could you clearly see the people when you watch the security footage?

Yes they managed even to zoom in the footage for us.

Did you recognize any of the people in the footage? --- Yes

... het u een of meer mense herken? --- I only recognised one.

Die person wat u herken het op die beeldmateriaal, van waar af ken u die persoon? --- He is one of our customers, the one who used to come regularly to buy some stuff.

Sien u die persoon vandag in die hof? --- Yes."

The witness then pointed the appellant as being the person he recognised on the video recording. His evidence then continued:

"Wat was die persoon besig om te doen, die beskuldigde toe u na die beeld materiaal sien? --- What I saw on this video footage, I saw the accused and his companion entered the shop. So the other one went behind the tills ordering Mavis that they must put the money inside a bag, they are in a hurry. The accused person was having a firearm.

And where was he? --- At that stage the accused person was now with Chaka, facing Chaka, the other cashier who was helping Daniel."

- [8] Mr Ramakhanthane attended the identity parade held on 24 March 2009, during which he pointed the appellant as the person who pointed the firearm at Chaka during the robbery.

- [9] During cross examination Mr Ramakhanthane testified as follows:

"At the time your employer showed you this video footage, is that correct that the other employees were there with you as well? --- Yes all of us were in the office.

Including Mavis Lamunu? --- Yes."

[10] The identity of the appellant is the crucial point of dispute in this matter. However, the video footage, although it was handed over to members of SAPS immediately after the incident, could not be traced and placed before court. The court a quo made the following findings in her judgment regarding the issue of identity and the absence of the video recording:

"Alhoewel die beeldmateriaal nie voor die hof geplaas kon word nie beskryf Ramakhanthane die gebeure wat hy op die video gesien het en het hy dan toe ook aan die bestuurder te kenne gegee dat hy die persoon ken wat die rooftog gepleeg het en wat die vuurwapen hanteer het.

Me Easthorpe het ernstige beswaar gemaak teen die uitkenning deur hierdie getuie. Sy is van mening dat dit die uitkennings parade ontoelaatbaar maak. Ek is egter van mening dat daar geen fout te vind is met uitkenning op 'n video beeld nie. Die getuie het onmiddellik toe hy die beeld sien gese dat hy die persoon herken wat die rooftog pleeg. En sy getuienis bied belangrike bestawing vir Me Lamunu se getuienis. Ek is tevrede dat die uitkenning van beskuldigde as die rower wat aanklag 1 aanbetref het bo redelike twyfel bewys is."

[11] The appellant's notice of appeal inter alia states that the court a quo erred in making the following findings:

"1.2 That the video tape evidence to which witnesses in count 1 and 4 had access did not flaw the identity parade which was subsequently held.

1.3 That it was not necessary for court to have access to the video tape evidence to make its own finding relating to identity of the perpetrators in count 1 and 4."

[12] Regarding the identification of the appellant by Ms Lamunu, Mr Kambi, appearing on behalf of the appellant in the appeal, submitted that although she was a credible witness, her identification of the appellant is not reliable as she was in a state of shock and did not have sufficient opportunity to observe the appellant. He pointed out that she was unable to give a detailed description of the appellant, neither at the police station, nor during the trial. She only identified the two assailants as being a tall man and a short man. Mr Kambi furthermore submitted that the witness was unable to see the complete face of the tall assailant, as she specifically testified on page 16 of the record that he was wearing dark glasses which partially blocked the upper part of his face, as well as a red hat. He contended that she pointed the appellant at the identification parade as the alleged tall assailant on the basis of his height and not because she could actually identify him. In this regard he referred to the following evidence during her cross examination:

"At this ID parade, is it correct that you identified this person not by his face but how tall he was? --- Yes it is.

Could you see the short person at the ID parade? --- I did not.

Was my client the tallest one on the ID parade? --- There were others who were also tall, but not the same height as he is.

So he was the tallest? --- Yes."

[13] The aforesaid aspects raised by Mr Kambi are all valid concerns considering the applicable rules of caution when dealing with a single witness who is moreover an identifying witness. However, in view of my conclusions hereinafter it will not be necessary to make any finding on the aforesaid issues.

[14] The following principles enunciated in *S v Moti* 1998 (2) SACR 245 (SCA) at 254 H and 255 I - 256 B are relevant to the present appeal:

"...Oat 'n foto van die appellant vooraf aan die ooggetuies getoon is, kon denkbaar 'n uitwerking gehad het op die betroubaarheid van die uitkenning van die appellant in die beskuldigdebank ...

...Ten slotte is daar die moontlikheid dat die vroeëre identifikasie by wyse van 'n foto afbreuk kan doen aan die ooggetuie se latere

identifikasie by wyse van 'n uitkenningsparade of getuienis in die hof. (Vgl *S v Shandu* 1990 (1) SACR 80 (N); *S v Nkomo* 1990 (1) SACR 682 (ZL.) Die ooggetuie se identifikasie van die verdagte mag dermate deur die foto wat hy vroeër gesien het beïnvloed kon gewees het dat hy oor die foto eerder as oor die gebeurte getuig. Ongetwyfeld skep hierdie oorweging vir die polisie 'n dilemma: die foto-identifikasie mag 'n essensiele stap in die ondersoek van die misdaad wees; maar as dit uiteindelik tot 'n inhegtenisname lei, mag dit enersyds nie afdoende getuienis wees om op sigself 'n skuldigbevinding te fundeer nie en andersyds enige later getuienis van identifikasie belemmer. (Vgl ook Kriegler Hiemstra Suid - Afrikaanse Strafproses 5de uitg op 80; Hoffmann en Zeffertt *The South African Law of Evidence* 4de uitg op 618.) Om na so 'n foto-identifikasie en nadat die verdagte gearresteer is 'n uitkenningsparade te hou, mag raadsaam wees, maar dit bied ook nie 'n volkome antwoord nie, want 'n hof mag allig bevind dat sodanige identifikasie steeds deur die foto geïnspireer is. Of dit so 'n teespoedige uitwerking sal he, sal telkens van die besondere omstandighede van die geval afhang."

[15] Ms Lamunu has unfortunately seen the video footage. It is therefore impossible to know whether she pointed the appellant at the identity parade on the basis of her own observations during the robbery or on the basis of observations she made when she viewed the video footage. Even if she had made her own observations regarding the features of the tall assailant during the robbery, those observations might subsequently have been influenced by what she saw on the video footage.

[16] This brings me to the issue of the video recording as such. In Hiemstra's *Criminal Procedure*, A Kruger, the relevant principles are summarised as follows at p. 24-83:

"Video recordings taken during theft, robbery or commission of other offence-These days there are cameras in some shops, shopping centres and streets which continuously make video recordings. Video

material obtained in this manner can show what happened during the commission of the offence and that the accused was on the scene. Such video material is real evidence. The court must record its observations (S v Mohase 1998 (1) SACR 185 (0) at 191A- B). The manner in which the video material is placed before the court is that a witness, for instance a security

guard or someone working in the shop, looks at the video images and says what he or she sees. Just as a fingerprint expert in his or her evidence compares the prints found on the scene with prints obtained from the accused, and the prints are then handed in as exhibits so that the court and the legal representatives can themselves determine whether the witness's observations are correct, in video recordings, the images are shown to the court and the legal representatives to give them the opportunity to question the witness's observations (Newell v Cronje and Another 1985

- (4) SA 692 (EC) at 698A-B). The presiding officer's observations of the real evidence can assist in understanding the evidence and can also provide a more direct and satisfactory source of proof (Newell 6971-J).

In S v Mdlongwa 2010 (2) SACR 419 (SCA) the state presented the expert evidence of a police official who had been stationed in the Facial Identification Unit of the Criminal Record Centre for 18 years, who compared the facial features of the accused with the facial features of the person on the video footage (pars [18]-[21]).

See also S v Kotze 2014 JDR 2713 (FB)

- [17] A court needs to be able to assess evidence itself. This is for instance the reason why hearsay evidence is generally inadmissible,

as a court is not in a position to assess the credibility and reliability of such evidence. In this instance, as already mentioned

earlier, the video footage went missing and could not be placed in evidence before court. The court was therefore unable to assess the quality of the images, the clearness and sharpness of which play a crucial role in determining the reliability of any identification

made on the basis thereof. If the images were, for example, distorted, it would obviously have negatively impacted upon the reliability of Ms Lemunu's pointing out of the appellant. Even if it is to be accepted that the images were clear and of a high quality, any identification based thereon constitutes inadmissible hearsay evidence in the circumstances where it was impossible for the court

and the defence to also watch the footage and make their own observations. Any evidence regarding what Ms Lamumu allegedly saw on the video footage should therefore have been disregarded by the court a quo.

- [18] The aforesaid principles are in my view even more applicable to Mr Ramakhanthane's pointing out of the appellant subsequent to him having seen the video footage.

- [19] Consequently Ms Lamunu's and Mr Ramakhanthane's identification of the appellant subsequent to them having seen the video footage, and which video recording was not placed in evidence before court, should be considered to have tainted their pointing out of the appellant at the identity parade. In addition their evidence regarding what they allegedly saw on the video footage, constituted inadmissible evidence in the circumstances.
- [20] Allow me to mention that it is completely deplorable and unacceptable that members of SAPS, who were responsible for the safe-keeping of the video footage, lost it. The two witnesses were good witnesses. Had that video footage been available during the trial, it would probably have constituted very reliable evidence regarding the identity of the assailant.
- [21] Consequently the appeal against the conviction on count 1, should succeed.

COUNT 4:

- [22] Count 4 relates to an armed robbery which took place on 25 February 2009 at the very same convenience store and garage referred to in count 1. Mr MP Makoena was the only state witness on this count. He was working night shift the evening of 24/25 February 2009. Shortly before 05h00 the morning whilst Mr Makoena was standing outside, a man approached him, pointed him with a firearm, whilst demanding money and a cellphone. He was standing very close to Mr Makoena during this incident. He handed his cellphone, worth approximately R1800, over to the perpetrator. The man then forced Mr Makoena into the shop with the demand that he wants money. He then instructed Mr Makoena to go behind the counter and to give him money and cigarettes. Mr Makoena handed approximately R1000 and several packets of cigarettes to the perpetrator. Thereafter the man forced Mr Makoena to walk with him to the township. Whilst walking, he threatened the witness that should he tell the police about the incident, he will fetch him from his home and kill him. In the meantime one of Mr Makoena's co-employees, Mojalefa, alerted the security company. Whilst the perpetrator and Mr Makoena were still walking, the security guards, accompanied by Mojalefa, appeared and tried to stop the two of them, but the perpetrator ran away. The security guards fired at the perpetrator, but they missed. During an identity parade held on 24 March 2009, Mr Makoena pointed the appellant as the perpetrator.
- [23] Although the appellant in his notice of appeal also referred to this count when the issue regarding the video footage was dealt with, it is in my view evident that the video footage did not play any role in Mr Makoena's pointing out of the appellant. His evidence was clear that that evening was the first time he ever saw the appellant and he had not seen any video footage of the previous robberies at the said garage. There was also no evidence that he watched any video footage of the events of that particular evening. This aspect is therefore in my view not relevant to count 4.

[24] With the rules of caution in mind when dealing with a single witness, especially so when such a witness is also an identifying witness, the question to be considered is whether Mr Makoena's identification of the appellant can be considered to be reliable. He explained that he spent quite a long time in the presence of the appellant:

"You know your worship, considering this last case I saw this person for a long time. I saw him when we were outside from, from outside the shop into the shop and out of the shop and we walked together with him to where we were going.

Your worship, I would not be able to specify how long it took but I saw him for a long time. We were from the outside went into the shop and in the shop he demanded he wanted me to give him some money and cigarettes, took them. We went out I was in his company. We walked together to the location, your worship. So I would not be able to specify how long that took."

The appellant's face was also not covered.

[25] Mr Makoena also explained that inside the shop the appellant was standing in front of him when he demanded money and after that he also looked at the appellant's face several times. He explained to the police that it was a tall person. On a question regarding any identifying features on the appellant's face, Mr Makoena responded as follows:

"There was not any identifying feature in his face but after, shortly after the incident you see you still have the picture of the person normally. So if you see them again you can identify that they were the ones."

[26] When it comes to identification, the inability to give a description is not fatal. See *S v Pretorius en 'n Ander* 1991 (2) SACR 601 (A) at 607 I - J. Mr Makoena clearly had sufficient time and opportunity to have observed the face of the perpetrator, which lends reliability to his identification of the appellant. He only took twelve seconds to point the accused out at the identity parade.

[27] When considering the court a quo's findings regarding the credibility and reliability of Mr Makoena's evidence, it cannot be faulted. Mr Kambi also conceded this much, in my view correctly so. The appeal against the conviction on count 4 can therefore not be upheld.

COUNTS 6 & 7:

[28] On 7 March 2009 at about 10h00 Mr PJD de Wet was driving into Bloemfontein via Nelson Mandela Drive when four men jumped onto his Toyota Hilux vehicle (a "bakkie") at a red robot. They were two black males and two white males. The vehicle had a sliding window at the back of its cabin, which was open. One of the white males immediately entered the cabin of the vehicle via the said window. He told Mr de Wet that he had a firearm and instructed him to continue driving, otherwise he will shoot him. Mr de Wet did not see the firearm, but accepted that the assailant had it underneath his jacket. He demanded money, but Mr de Wet indicated that he only had a couple of rand in his jeans' pockets. Whilst they were driving out of town, the driver's window was open and one of the assailants at the back

held a black object against Mr de Wers head on the right hand side. Mr de Wet could however not see what type of object it was. Mr de Wet was instructed to turn onto a gravel road and to drive on. The assailant inside the cabin again demanded money, stating that he wanted the money with which Mr de Wet was to pay labourers. Mr de Wet again responded that he had only about R50.00 in his wallet, after which he took his wallet from his pocket. The assailant however insisted that he wants a big amount of money.

- [29] Mr de Wet intentionally increased the speed of his vehicle over a bump in the road. The bump-effect caused by the impact had the result that a black stick fell from the hand of the assailant inside the cabin. Mr de Wet then hit him with the backside of his hand in his face. The assailant jumped out of the vehicle. When Mr de Wet then tried to turn the vehicle around, one of the assailants at the back hit him with a brick against the right hand side of his head. They tried to remove the vehicle's key from the ignition, but without success. The assailants also attempted to pull him from his vehicle and he was hanging on inbetween the inside and the outside of the vehicle. One of the assailants stabbed him with a knife beneath his right ear at that stage. The assailant with the knife continuously tried to stab Mr de Wet and in the process he threatened to kill him. Mr de Wet fought back and although he was stabbed a number of times during this struggle, he managed to get back into the cabin of the vehicle from the passenger's side. None of the assailants were in sight at that stage. He managed to start his vehicle and drove off to the nearest police station. He was bleeding profusely, especially from a stab wound in his neck from which the blood was spurting. According to Mr de Wet the assailant who stabbed him with a knife was not the same person who hit him with a brick.
- [30] Mr de Wet attended an identity parade on 24 March 2009 and he pointed the appellant out as the assailant who attacked and stabbed him with a knife.
- [31] Mr Kambe submitted that Mr de Wet's identification of the appellant as the alleged assailant with a knife is not reliable as he did not have sufficient opportunity to observe this assailant. His life was in danger and he was fighting back to stay alive, probably without concentrating on the face of his assailant. Mr Kambe pointed out that on Mr de Wef s own version he never saw the assailant from the front, but only from the side.
- [32] In her judgment the court a quo gave consideration to the fact that towards the end of his cross examination Mr de Wet was unsure about his identification of the appellant. She however emphasized the fact that he was very certain of his identity of the appellant during the identification parade.
- [33] It is evident from Mr de Wet's evidence that he obviously, and understandably so, experienced this incident as a terrible ordeal. He testified that he was literally fighting for his life. He also became emotional at times during his evidence. Captain Roets, who conducted the identity parade, indicated that Mr de Wet pointed the appellant out within 10 seconds. He also recorded on the Identification Parade Form that Mr de Wet was positive about his identification, indicating that the appellant attacked and stabbed him with a knife

in his arm and his face. During Mr de Wef's evidence in chief he again identified the appellant as having been the assailant with a knife. Mr de Wet explained that he knows the appellant well from his side, as that was the manner in which the appellant approached him and fought with him. Although the appellant was wearing a balaclava, it only covered his forehead, not his face. Mr de Wet described his reactions during the identification parade as follows:

"Hy het my geneem na 'n vertrek toe wat 'n danker ruit he!, toe sien ek die persoon dat ek eers geskrik gehad, toe se hulle nee, hulle kan jou nie sien nie, jy kan net hulle sien."

Mr de Wet therefore seems to have been shocked and scared when he saw the appellant.

[34] Regarding his identification of the appellant at the identity parade, the following was his evidence in chief:

"Mnr de Wet, wat het hulle vir u gese wat moet u doen? --- Hulle se hulle gaan die mense inbring, hulle sal nommers he, dan moet ek nou se watter nommer wat ek kan uitken daarso, dan sal hy een vorentoe slap. Toe vra ek net okay ek het een uitgeken, toe vra ek vir horn of hy net die ou kan laat draai want ek ken horn meer van die kant af as hoe hy lyk in die gesig."

[35] In cross examination Mr de Wet testified as follows:

"...Sir, my client indicates he was not the one who robbed you. --- I know him from the side, he looks, I know him exactly from the side and am sure about it. Can he just ...

Ekskuus, ek kan nie hoar nie, dan. --- Ekskuus tog u Edele, kan hy net omdraai na die kant toe so?

Okay, just, u can repeat what you said but just a little louder please? --- Yes, maar ek is seker dit is hy want van die kant af ken ek horn goed, so ek is seker, ek het horn baie van die kant af gesien daai dag en nagmerries kry ek van di!, ek he!die gesig bly sien, en ek weet oak nie nou nie.

Sir, you also said if he just turns know. --- If he can just turn so I can make sure but he must turn like this so I can see this side of the face.

So, he was not turning to you at all, just the side? --- No, I never saw the side, ag from the front, I just saw it from the side, from the side and when they went for the parade too, then I asked them also can he turn.

Sir, you saw him from the side, if he does not have any scars on that side. --- No, it is from the wrong side sir, so Jet us see here.

He has got no scars on this side. --- I do not know at the moment, no, but I am sure, I do not know.

Ekskuus, ek kan niks hoor wat u se nie, meneer. --- Okay, ek is seker dit is hy maar ek weet nou nie meer nie, want hy lyk reg en dit lyk of dit hy is.

... dan moet die beskuldigde maar opstaan en sywaarts draai, meneer. Please stand up and turn sideways. --- Look at that side, look that side. Ek weet nie, ek is deurmekaar.

Goed, die beskuldigde het nou opgestaan, hy staan met sy rug na die hof toe, hy kyk met sy, hy staan met sy Jinkerkant na die getuie toe en u se u is nou nie meer seker nie. --- Ek weet nou nie."

[36] During re-examination, Mr de Wet testified as follows:

"Mnr de Wet, toe u die dag die uitkenningsparade bygewoon het, en die persoon wat u op die uitkenningsparade uitgewys het, was u die dag van die uitkenningsparade seker? --- Ek was seker daai dag, ek was dood seker, toe ek daar gesit het, het ek net gekyk, ek het nie dadelik, ek het lank gekyk na horn."

[37] The dangers of incorrect identification are well known. The following passage from *S v Mthetwa* 1972 (3) SA 766 (A) at 768A stipulates the relevant principles in this regard:

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

[38] The principles regarding the evidential value to be attached to an identification at a properly held identity parade as opposed to a so-called dock identification, are set out in Hiemstra's Criminal Procedure, A Kruger, at p.3-8:

"Dock identification-In view of the fact that a witness will be inclined to regard the person in the dock as the perpetrator, it is of the greatest importance that an identification parade be held. Confronting a witness with the suspect and asking "Is this the person?" destroys the value of the witness's identification, while a parade could have confirmed it (*R v Madubedube* 1958 (1) SA 276 (0)).

Identification is often the central question in a trial, although in court it has little, if any, evidential value: courts attach value to identification at an identification parade."

See also Commentary on the Criminal Procedure Act, Du Toit, at RS 55, 2015, ch3 - p.18:

"An identification parade is not only an effective investigative procedure but also serves an important evidential purpose in that it can provide the prosecution with evidence which is of far more persuasive value than an identification in court, ie the so-called 'dock identification' (see generally ..."

[39] The circumstances under which Mr de Wet observed the assailant who attacked and stabbed him with a knife, were clearly very difficult. However, the identity parade was held a mere 17 days after the incident, a point of time at which Mr de Wet would still have had a very good and clear memory of the events that occurred that day. This is also confirmed by his evidence "...ek het hom baie van die kant af gesien daai dag en nagmerries kry ek van dit, ek het die gesig bly sien...". In my view his spontaneous reaction of fright when he first saw the appellant at the identity parade before he was informed that it was a one-way window, to an extent also serves as confirmation of the correctness of his identification. Although he testified that he never saw his assailant from the front, it is in my view evident that he must have seen him from the front as well, considering that he apparently recognised the appellant before he requested that he should turn sideways. I repeat his evidence in this regard:

"Toe vra ek net okay ek het een uitgeken, toe vra ek vir horn of hy net die ou kan laat draai want ek ken horn meer van die kant af as hoe hy lyk in die gesig."

[40] Mr de Wet insisted at the identity parade to view the appellant from the side. When he testified at the trial, which was 19 months after the date of the incident, he again insisted accordingly. In my view this confirms that he had in fact observed his assailant's face during the attack, albeit mostly from the side; hence his consistency in this regard.

[41] I have given due and thorough consideration to the fact that Mr de Wet became uncertain of his dock identification of the appellant

towards the end of his cross-examination. Mr de Wet was clearly very emotional and distressed during the presentation of his evidence

having to relive the ordeal. His apparent uncertainty also transpired only right at the end of his cross-examination, when he was put under even more pressure. It should also be kept in mind that the presentation of his evidence only took place about 19 months after the incident, which is a lengthy period of time. Therefore, when it is considered in proper context against the background of the legal principles, the facts and my findings above, I am of the view that not much weight can and should be attached to Mr de Wef's eventual uncertainty.

[42] In the circumstances I am satisfied that the state proved the identity of the appellant beyond reasonable doubt. The appeal against the convictions on counts 6 and 7 can therefore not be upheld.

COUNT 8:

[43] Count 8 relates to the arrest of the appellant on 18 March 2009 by Warrant Officer Van Zyl. He received information about the

whereabouts of the appellant, whom he was looking for in connection with car hijacking and attempted murder. He went to the address

provided to him, knocked on the door and a male person responded from inside the shack, inviting him to enter. The appellant was lying on the bed. Van Zyl introduced himself and enquired from the appellant what his name was. The appellant introduced himself as Seun. Warrant Officer Van Zyl requested him to get up, where after the appellant kicked Van Zyl and they started wrestling. Eventually Van Zyl was able to handcuff the appellant and he arrested him.

[44] During cross examination Van Zyl testified that Warrant Officer Steyn accompanied him to the said address and denied the appellants version that there were twelve other officers with him. He also denied that the appellant was assaulted during his arrest, other than the wrestling in order to arrest the appellant.

[45] In the judgment the court a quo indicated that the appellant did not impress her as a witness and that there were numerous improbabilities in his evidence. She consequently rejected the appellant's version regarding this incident as not being reasonably possibly true.

[46] I cannot fault this finding. Mr Kambi, during his argument, also conceded that this conviction is in order and I do not deem it necessary to deal in any further detail with this count. The appeal against the conviction on count 8 cannot be upheld.

AD SENTENCE ON COUNT 4:

[47] In terms of section 51(2)(a)(i) of Act 105 of 1997 a minimum prescribed sentence of 15 years' imprisonment is applicable to a conviction of robbery with aggravating circumstances. A court may only impose a lesser sentence when it is satisfied that there are substantial and compelling circumstances which justify such deviation.

[48] The personal circumstances of the appellant and the relevant mitigating factors pertaining to this specific count were duly

considered by the court a quo. These are the following:

1. The appellant was 32 years old at the time of sentencing.
2. He passed grade 11 at school.
3. He is unmarried, but has one child who at the time of sentencing was 2 years and 4 months old. The child was living with the appellant's sister.
4. He was employed at his brother's tavern and earned approximately R600.00 per week.
5. He was in custody awaiting trial for a period of 2 years and 5 months.
6. The appellant is a first offender.
7. Although a firearm was used in committing the robbery, no shots were fired and the complainant did not sustain any injuries.

The following aggravating factors were present:

1. The appellant did not show any remorse.
2. Robbery with aggravating circumstances is a very serious offence which is prevalent in the court's area of jurisdiction.
3. The interests of the community demand that criminals should be properly sentenced in order to protect the community. Therefore an appropriate sentence is also one which will deter future criminals from similar conduct.

[49] After having considered all of the above mitigating and aggravating factors, the court a quo concluded that the cumulative effect of the mitigating factors, especially the period of time the appellant spent in custody awaiting trial and the fact that the complainant did not sustain any injuries, constitute substantial and compelling circumstances which justify and necessitate a deviation from the prescribed sentence. The court a quo consequently considered imprisonment of 10 years to be an appropriate sentence.

[50] A court of appeal will only interfere with a sentence imposed by a court a quo when such court committed a material misdirection or when the sentence is shockingly inappropriate. See *S v Malgas* 2011 (1) SACR 469 (SCA) at 478 F - G.

[51] In my view the trial court did not commit any misdirection, nor is the sentence shockingly inappropriate. The court a quo already imposed a lesser sentence than the prescribed minimum sentence and in my view, correctly so. However, the surrounding circumstances to the commission of this offence are very serious. The appellant conducted the offence in a very blatant manner in that he first robbed Mr Makoena outside the shop, then forced him into the shop in order to rob money from the shop itself and then, as if those

two criminal actions were not enough, he also forced Mr Makoena to accompany him to the township whilst threatening him that he will be killed should he tell the police about the incident. The aforesaid conduct is in my view indicative of the appellant's complete lack of respect for law and order. He actually conducted three offences in one, which contributes to the seriousness of this particular offence. There is no basis upon which we can or should interfere with the imposed sentence of 10 years' imprisonment.

AD SENTENCES ON COUNTS 6 AND 7:

[52] The appellant was sentenced to 10 years' imprisonment on count 6 (attempted robbery with aggravating circumstances) and to 12 years' imprisonment on count 7 (attempted murder), to be served concurrently.

[53] It should be noted that in the charge sheet count 6 deals with the attempted robbery of money and not of a motor vehicle. In my view the original charge sheet, where it dealt with charge 6, incorrectly averred "gelees met die bepalings van Artikel 51(2), 52(2), 52A en 528 van die Strafwysigingswet 105 van 1977 (sic)". This charge does not fall within the ambit of Part II of Schedule 2, as no minimum sentence is prescribed for a conviction of attempted

robbery with aggravating circumstances. Although Part IV of Schedule 2 makes provision for attempted robbery by including

Schedule 2, Part II of the Criminal Procedure Act, 51 of 1977, it also has the proviso regarding the possession of a firearm which was intended for use as such in the commission of such offence. In the present instance the state did not allege same in the charge sheet, nor has it been proved that the appellant or any of the other assailants was in possession of a firearm during the attempted robbery. The mere fact that Mr de Wet was told by one of the assailants that he was in possession of a firearm, does not serve as such prove, especially considering that eventually only a black stick fell from the hand of the said assailant.

[54] Correctly so the court a quo remarked in her judgment regarding the conviction on count 6 that although completed robbery (of money) has been proven by the state, the appellant was only charged with attempted robbery in count 6 and can therefore only be convicted as such. What is unfortunately not pertinently evident from the court a quo's judgment on sentence, is whether any consideration, for purposes of sentencing, was given to this fact. This is a very important aspect considering the absence of a prescribed minimum sentence for a conviction of attempted robbery with aggravating circumstances.

[55] In her judgment on sentence, the court a quo stated the following:

"Dan moet ek verder in ag neem dat u op vyf aanklagte gevonniss moet word en moet ek daarteen waak dat die kumulatiewe effek van die vonnisse nie onnodig swaar is nie. Ek moet ook in gedagte hou dat u nou reeds sedert Maart 2009 in aanhouding verkeer, dit is twee jaar en vyf maande. Dit is hoofsaaklik hierdie feit wat vandag redelik swaar inwerk op die vonnisse wat ek vir u gaan ople. Hierdie lang tydperk wat u verhoorafwagtend in aanhouding is. beskou ek as 'n dwingende en wesenlike omstandigheid wat ek in ag moet neem wanneer ek vonnis oorweeg. Die enigste ander faktor wat na my mening as 'n moontlike dwingende en wesenlike omstandigheid in ag geneem kan word wat aanklagte 1 en 4 aanbetref, is die feit dat die klaers nie enige beserings opgedoen het nie. Ek is egter van mening dat wat al hierdie aanklagte aanbetref geen ander vonnis as direkte gevangenisstraf en 'n redelike lang termyn van direkte gevangenisstraf gepas is nie." (Own emphasis.)

[56] Considering the aforesaid, it appears to me that the court a quo found that the period of time which the appellant spent in prison awaiting trial constitutes a substantial and compelling circumstance which justifies the imposition of a lesser sentence on all the robbery charges, including the attempted robbery to which charge 6 pertains. The absence of injuries inflicted to the complainants in charges 1 and 4 was only found to be an additional substantial and compelling circumstance. I therefore unfortunately have to conclude that in her consideration of an appropriate sentence on count 6, the court a quo apparently approached the matter on the incorrect basis that a prescribed minimum sentence of 15 years' imprisonment is the point of departure. This constitutes a material misdirection which entitles us as the court of appeal to consider the sentence afresh.

[57] In addition to the aforesaid the court a quo made reference to the knife stabbing both in relation to counts 6 and 7. Although the act of violence alleged in both charges 6 and 7 is in fact the stabbing with a knife, one should be mindful not to take the same aggravating circumstance into account twice. In the unreported judgment of *S v Ngcobo* (SS225/2006) [2007] ZAWCHC 97 (21 September

2007) the following applicable principles were stated:

"I mentioned that the evidence does not tell us precisely how the assaults progressed, because although part 1 of the second schedule prescribes a minimum sentence of life for rape involving the infliction of grievous bodily harm, the question is whether applying the minimum sentence requirements of the Act to the rape of Mrs Bisset in the present case, would not perhaps amount to an impermissible duplication of sentence. Prior to the passing of the minimum sentence legislation in 1997, the common law warned against the danger of duplicating sentences in cases of this kind, a warning which is illustrated by the instructive case of *S v S* 1987(2) SA 307 (A), a decision of the Appeal Court. The facts of that case have certain similarities to the facts of the present case. The appellant accused in that case, was a 38-year-old male who was convicted of the rape of a 70-year-old woman. As in the present case, the rape occurred after he had entered her home, and, as in the present case, the assault which he perpetrated on the victim, caused her death. Because the Trial Court could not be certain that the death had been caused intentionally, he was convicted of culpable homicide, and not of murder. The Trial Court sentenced the accused to a term of imprisonment on the charge of culpable homicide, but to death on the charge of rape. The accused, in that case, had two previous convictions for rape, and the rape and the negligent killing of his victim had occurred on the same day as his release from prison on another charge. In the course of his judgment in passing sentence, the Judge a quo made the following remarks - and I quote from page 311, opposite the letter, I, to 312, opposite the letter, A, of the judgment:

'Jy het dit goedgevind om in die danker ure van die nag by haar eie huis gewelddadiglik in te breek. Dit is vir my nou duidelik, in terugskou van al die feite, met een doel alleen, en dit was om haar te verkrag. Jy het dit nodig gevind om in die proses van verkragting soveel geweld op haar toe te pas, dat sy gesterf het. Jy is verantwoordelik vir die feit dat sy dood is. Hierdie verkragting val, in my oordeel, in die heel ernstige kader van verkragting. Jy het nie alleen by die vrou se eie huis in die danker gaan inbreek waar sy alleen was nie, maar jy het haar in haar eie slaapkamer gaan verkrag, en jy het nog haar dood ook veroorsaak deur die geweld wat jy op haar toegepas het.'

In the course of its judgment, in which it set aside the Court a quo's sentence of the death penalty for the rape, the Appeal Court made the following remarks, indicating that the Court a quo had erred in its approach to the sentence. At 313A to F of the judgment, Smalberger, A J said the following:

'Tweedens blyk dit dat die verhoorregter die dood van die oorledene in aanmerking geneem het by die bepaling van 'n gepaste vonnis op die verkragtingaanklag. In die opsig het hy fouteer. Daar moet 'n duidelike verskil getref word tussen die doodsveroorsaking van die oorledene, wat 'n element van die strafbare manslag is, en die geweldpleging, wat 'n bestanddeel van die verkragting is. Die verhoorregter moes noodwendig die doodsveroorsaking van die oorledene in aanmerking neem by die bepaling van 'n gepaste straf ten opsigte van die strafbare manslagaanklag. Hy was nie geregtig om dit ook in aanmerking te neem met betrekking tot die vonnis op die verkragtingaanklag nie. Op hierdie aanklag was alleenlik die aard en omvang van die geweldpleging tydens die verkragting 'n relevante oorweging. Dit is ongeoorloof om die doodsveroorsaking by straftoemeting twee keer in aanmerking te neem, omdat dit sou indruis teen die beginsel dat duplisering van vonnisse vermy moet word. Gevolglik moes die verhoorregter die oorledene se dood wegdink toe hy die appellant op die verkragtingaanklag gevonnissen het, maar hy het klaarblyklik nagelaat om dit te doen.'

As to the danger of taking into account the same aggravating factors twice for the purpose of imposing sentence in respect of separate

offences, see also *S v Witbooi* 1982(1) SA 30 (A) at 35, and *S v Pietersen* 1989(3) SA 420 (A) at 426E to G."

See also: *Guide to Sentencing in South-Africa*, S.S. Terblanche, Second edition, at

p. 183 - p.184.

[58] In deciding on an appropriate sentence, the personal circumstances of the appellant as listed herein earlier, are obviously *mutatis mutandis* to be taken into consideration in favour of the appellant, which the court *a quo* duly did. The mitigating factors, being that the appellant spent a period of 2 years and 5 months in custody awaiting trial and that he is a first offender, are also to be taken into consideration.

[59] In general the following aggravating circumstances are present, which were also duly referred to by the court *a quo*:

1. Both the offences are of a very serious nature and are prevalent in the court's area of jurisdiction.
2. Both the offences were committed with severe violence.
3. The offences were committed by a group of people, acting in the execution of a common purpose, which must have been premeditated. The complainant had no choice but to (at least initially) succumb to their superior numbers.
4. The appellant did not show any remorse.

- [60] The interest of the community comes to the fore in the case of serious and violent crimes like these. The court is duty bound to properly sentence criminals in such circumstances in order to protect the community. Therefore an appropriate sentence is also one which will deter future criminals from similar conduct. However, the rehabilitation purpose of punishment should also be reflected in an appropriate sentence.
- [61] With regards to count 6 as such, I have to be mindful of the fact that, as pointed out earlier, the appellant were not charged with attempted robbery of the vehicle as such. He should therefore not be punished as though that is the charge, nor should he be sentenced on the basis of completed robbery. Although the attempted robbery was accompanied by severe violence which should be taken into account for purposes of sentencing, the serious injuries inflicted upon Mr De Wet during the stabbing with a knife are only to be taken into account as aggravating factor when considering the sentence on the attempted murder charge. In the circumstances I am of the view that 8 years' imprisonment is an appropriate sentence on count 6.
- [62] The knife attack on the complainant was extremely brutal and he suffered serious and severe injuries. As remarked by the court a quo, it is mere grace that the appellant survived the attack. This is a severe aggravating factor which
- is to be reflected in an appropriate sentence. When all the facts and circumstances are taken into consideration, I consider a sentence of 10 years' imprisonment to be an appropriate sentence.
- [63] I agree with the finding of the court a quo that the sentences on charges 6 and 7 are to run concurrently.

AD SENTENCE ON COUNT 8:

- [64] The appellant was sentenced to 18 months' imprisonment, to be served concurrently with the sentences on counts 1 and 4. I have already dealt with the personal circumstances of the appellant and those are equally relevant in this instance. However, the lack of co-operation of the appellant with the police in circumstances where he must have realized the seriousness of the situation, is in my view a further reflection of the appellant's disrespect for law and order. Having considered all the circumstances, this sentence cannot be considered to be shockingly inappropriate. Mr Kambi did not attempt to argue otherwise, in my view correctly so. The appeal against the appellant's sentence on this count should consequently be dismissed.
- [65] I agree with the court a quo that this sentence should be served concurrently with one or more of the other sentences imposed. In view of the appellant's successful appeal against the conviction on count 1, I deem it appropriate that this sentence should run concurrently with the sentence imposed on count 4.

[66] Because the incident pertaining to counts 6 and 7 is completely separate and removed from the incident pertaining to count 4, I can find no basis upon which any of these sentences are to be served concurrently.

[67] Consequently the following orders are made:

1. The appellant's appeal against his conviction on count 1 is upheld and the said conviction and sentence are set aside.
2. The appellant's appeal against his convictions on counts 4, 6, 7 and 8 are dismissed.
3. The appellant's appeal against the sentences imposed on counts 4 and 8 are dismissed.
4. The appellant's appeal against the sentences imposed on counts 6 and 7 are upheld, the said sentences are set aside and substituted with the following:

4.1 Count 6: 8 (eight) years' imprisonment.

4.2 Count 7: 10 (ten) years' imprisonment.

4.3 The aforesaid sentences are to be considered to have been imposed on 5 August 2011.

4.4 The sentences on counts 6 and 7 are to be served concurrently.

5. For the sake of clarity it is again ordered that the sentence imposed on count 8 is to run concurrently with the sentence imposed on count 4.

C VAN ZYL, J

I concur:

R MOKOENA, AJ

On behalf of the appellant: Mr Kambi

Instructed by:

Justice Centre

Bloemfontein

On behalf of the respondent: Adv. D.W Bontes

Office of the Director: Public Prosecutions

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Prepared on 12 October 2026 · Esheria