

SOUTH AFRICA / JUDGMENT

Mvimbi v S (A609/14) [2015] ZAGPPHC 43 (2 February 2015)

[2015] ZAGPPHC 43**COURT**

North Gauteng High Court, Pretoria

BEFORE

C J van der Westhuizen, N V Khumalo

CASE / FILE NUMBER

A609/14

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Appeal****case no. A609/14****Date:**

2 February 2015

Not

reportable

Not

of interest to other judges

In

the matter between:

VALITHUBA

MVIMBI.....Appellant

v

THE

STATE.....Respo

ndent

JUDGMENT

1. The appellant was convicted in the Regional Court at Benoni on two counts of robbery with aggravating circumstances read with the provisions of sections 51 of the Criminal Law Amendment Act, 105 of 1997.
2. For purposes of sentence, both counts were taken as one. Appellant was sentenced to 10 years of imprisonment.
3. Appellant was legally represented at the trial. His initial defence was that of denial, and at a belated stage, that of alibi.
4. Leave to appeal against conviction and sentence was granted by the court a quo.
5. The state relied on the evidence of two witnesses, the complainant and the police officer who testified in respect of the identity

parade.

Conviction

6. The main thrust of the appeal against conviction relates to the issue of identity. The complaint being that:
 - (a) Counsel for the appellant submitted that there is a discrepancy in her evidence regarding the amount that was robbed. Nothing turns on this issue, as it does not assist in the criticism of the identification of the appellant.
 - (b) The complainant was- criticised that she testified that she had been stabbed, yet she did not obtain medical assistance, but treated herself. There is no merit in this criticism either. The treatment of the wound would depend on the severity thereof. The fact of the matter is that she suffered a stab wound during the robbery that was committed with a knife and caused severe trauma to the complainant.
 - (c) It was also submitted that the complainant had identified the appellant as one of the perpetrators, yet according to her evidence

she would not have been able to do so as she was “deurmekaar7confused. There is no merit in this criticism. The witness had ample time to take notice of the appellant, he was the main participant, he called her by her name, he knew her address, he

stood face to face when talking to her initially, he assaulted her and was in close proximity of her before and during the attack as well as thereafter. There is no merit in the submission that in her statement to the police soon after the incident, no mention was made of the fact that she would be able to identify the attacker. When she had calmed down and could recall what had happened, she was able to assist in the preparation of an identity kit, and also identified the appellant at an identity parade.

- (d) The complainant was further criticised that she only managed to identify the appellant at the identity parade a few months later.

Nothing turns on this aspect. I refer to what I have said in the immediate preceding paragraph in respect of the identity kit and the identity parade, and she was also able to identify the appellant in court.

- (e) The criticism in respect of the complainant taking 6 minutes to identify the appellant at the identity parade, whilst the co-worker

identified a different person at the same parade, is of no consequence. The witness who was in charge of the identity parade testified as to the complainant being traumatised. The horror of the incident was reflected in the trauma shown on the face of the complainant at the identity parade where she made the positive identification and such trauma can be seen in the photograph submitted in evidence where the complainant identified the appellant.

- (f) The failure by the co-worker to identify the appellant is of no consequence. He walked in on the robbery and was not subjected to the same type of assault as the complainant. The co-perpetrator took him to the backroom whilst the appellant continued to assault the complainant. The police officer who was in charge of the identity parade testified as to her being traumatised and explained that the length of the identification period is not uncommon.
- (g) It was submitted on behalf of the appellant that there were alleged flaws in the holding of the identity parade. There is no merit in the submission. The procedure of the identity parade
7. The court a quo dealt in detail with the appellant's version. The defence of alibi was scrutinised and it was pointed out that there was a major conflict in the evidence of the appellant and his alibi witness. The appellant testified that at the time he was in Springs in Third Street at the shop where his friend worked, whilst his girlfriend testified that the appellant was with her in Springs in Second Street at the relevant time on that particular date. She was adamant that the appellant was with her and not elsewhere. That being so, there is no credible evidence before the court as to the defence of the appellant. The court a quo correctly rejected the defence of alibi. The appellant's version cannot reasonably possibly be true.
8. The court a quo dealt thoroughly with the evidence presented by the state and correctly applied the principles applicable to that of a single witness. The manner in which the court a quo considered the evidence cannot be faulted.
9. Each of the criticisms directed at the findings of the court a quo was also raised at the trial and was dealt with by the court a quo in its judgment.
10. In my view, there is no basis on which this court could upset the conviction.

Sentence

11. It was submitted on behalf of the appellant that the sentence of 10 years induces a sense of shock. What induces a sense of shock is the audacity to raise general issues of personal circumstances and to rely on the issue that the appellant is a first offender in the face of the provisions of section 51 of Act 105 of 1997, which prescribes a minimum sentence in respect of the crime under consideration of 15 years in particular where the accused is a first offender.

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12. In this regard it was held in *S v Vilakazi* 2009(1) SACR 552 (SCA) at 58 that:

“In cases of serious crime the personal circumstances of the offender, by themselves, will necessary recede into the background.”

13. Counsel for the appellant conceded that an order was made by the this court calling on the appellant and the State to present to this court in writing why this court should not increase the sentence of 10 years to a lengthier term of imprisonment. None of the parties adhered to this order and it was submitted on behalf of the appellant that the period of 10 years of imprisonment still induced a sense of shock and was content with the submissions made in that regard in the heads of argument.
14. No explanation other than what is said above was presented on behalf of the appellant in respect of why no written reasons in respect of the possible increase in sentence were presented. When it became clear to counsel appearing on behalf of the appellant that an increase in sentence was a reality, the attitude in respect of sentence changed, and it was submitted that the appellant withdraws the appeal against sentence and the court was told that the sentence of 10 years imprisonment is accepted as proper in the circumstances.
15. There is no indication that the appellant was aware of the fact that his appeal against sentence would be abandoned, neither whether the appellant accepted the period of 10 years imprisonment as proper.
16. Counsel for the State told the court that no written reasons in respect of an increase of sentence were submitted in view thereof

that the appellant had not submitted his reasons. However, counsel for the State sought to address the court on the issue of an increase in the sentence of imprisonment despite conceding in his heads of argument that the sentence of 10 years imprisonment was “commensurate with the gravity of the offence and does not evoke a feeling of shock.” In this regard, counsel for the State referred to the case of *S v Vilakazi* supra. No submission was made by counsel for the State in respect of what the length of the increased period of imprisonment should be, should this court intend to increase the period of incarceration of the appellant.

17. This court is now faced with a perplexing situation. Once it appeared that there might be an increase in the term of imprisonment, counsel for the appellant attempted to withdraw the appeal against sentence. Neither the State nor the appellant gave this court assistance concerning whether there should indeed be an increase in respect of the length of term of imprisonment, and if so what that increased period should be.
18. In *S v Bogaards* 2013(1) SACR 1 (CC) it was held that the effect of the formal notification requirement in respect of a possible increase in the sentence is that future appellants will not be taken by surprise at the hearing. On the contrary, they will be in a position to properly prepare a case against a possible increase in the sentence. See paragraph [65] of that judgment. In casu the appellant had not availed himself of this opportunity, but was content to argue that the sentence should in fact be reduced.
19. The power of the court of appeal to increase a sentence would be completely ineffective if an appellant had an unfettered right to withdraw his appeal against sentence once notice of possible increase in sentence is given. It was held in *R v Jurgens* 1953(2) SA 383 (T) at 388 that once notice of possible increase in sentence is
20. In terms of the provisions of section 51 of the Criminal Law Amendment Act, 105 of 1997, the court is obliged to impose the minimum prescribed sentence unless the court finds substantial and compelling circumstances to exist.
21. The court a quo considered all the points raised including that the appellant had been incarcerated for two years pending the trial. The court a quo in fact disregarded the appellant's prior convictions and treated the appellant as a first offender.
22. The court a quo took into account the fact that the appellant was incarcerated for a long period prior to the conviction and sentencing and held that such fact was a substantial and compelling circumstance. The appellant was in custody for a period one month short of two years prior to being convicted of a serious crime.
23. In my view, the seriousness of the crime of which the appellant has been convicted cannot be ignored. The complainant was attacked by the appellant in a rough manner, an open wound was inflicted with the knife used in the attack, she was threatened as to her safety within her own house in no uncertain terms. It may be that the crime of robbery was pre-meditated when regard is had to the complainant's evidence, but the honourable magistrate did not deal with this aspect in his judgment. A large amount was robbed from the business where the complainant was employed.
24. As dealt with above, the crime of which the appellant has been convicted is serious and as mentioned by the honourable magistrate,

prevalent in the area.

25. It follows that this court of appeal is entitled to consider an increase in the sentence of the appellant. It further follows that this court of appeal is entitled to refuse the appellant leave to withdraw the appeal against sentence.
26. In view of all the foregoing, I am of the view that an appropriate sentence would be one of 15 years imprisonment.
27. Accordingly, I would dismiss the appeal against the conviction and set the sentence imposed by the court a quo aside, and replace it with a sentence of 15 years imprisonment.
28. The following order is therefore proposed:
- a) The appeal against conviction is dismissed.
 - b) The appellant is refused leave to withdraw his appeal against sentence.
 - c) The sentence of 10 years of imprisonment imposed by the court a quo is set aside.
 - d) The appellant is sentenced to 15 years imprisonment.

C J van der Westhuizen

Acting Judge of the High Court of South Africa:

Gauteng Division: Pretoria

I agree and it is so ordered

N V Khumalo

Judge of the High Court of South Africa:

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