IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal No.: A268/2015

In the appeal between:-

KGOSILETSILE LEETO Appellant

and

THE STATE Respondent

CORAM: MOLEMELA, JP *et* CHESIWE, AJ

JUDGMENT BY: MOLEMELA, JP

DELIVERED ON: 22 December 2016

Introduction

[1] This is an appeal against conviction and sentence. Leave to appeal was granted by the trial court.

Litigation history

[2] The appellant was arraigned in the District Court in Bloemfontein on a charge of robbery. During the testimony of the complainant, it came to light that a weapon was used during the robbery. The appellant was then warned about the more serious nature of robbery with aggravating circumstances and the applicable minimum sentences. He was subsequently convicted of robbery with aggravating circumstances. After his conviction by the District Court, the matter was transferred to the Regional Court for sentencing. After

a delay of about nine months, during which period the appellant was in custody, the Regional Court sentenced the appellant to 5 years' imprisonment. The appellant immediately brought an application for leave to appeal. Leave to appeal was granted and he was released on bail. The appellant was legally represented throughout the trial.

[3] There were delays in prosecuting the appeal, partially because the arrangements for the transcription of the record were made at a very late stage. The appellant has attributed that delay to a lack of funds to pay his attorney's fees. Further delays were apparently due to the reconstruction of record pertaining to the sentencing part of the proceedings. As a result of the delay in prosecuting the appeal, the appeal was argued approximately seven years after the appellant was sentenced. He is currently out on bail, which was granted on the day on which sentence was imposed.

Application for condonation

[4] The appeal was initially enrolled for April 2016 but was struck off the roll when the appeal panel realised that the appellant had failed to apply for condonation for the late filing of the Notice of Appeal. The Notice of appeal was filed eighteen months after the granting of leave to appeal. The appellant's attorneys subsequently filed an application for condonation, which was not opposed by the State. Having considered all the circumstances, this court finds that condonation ought to be granted.

Facts giving rise to the appeal

[5] An account of the incident leading to the appellant's arraignment was related by the complainant as follows: On the morning of 10 December 2004 the complainant went to a mall with the intention of withdrawing money from an automated teller machine (ATM). Upon approaching the banking section of the mall he noticed four persons in the vicinity of three ABSA Bank ATM's. Two were standing next to each other, one was standing at the ATM and the fourth person, whom the complainant later identified as the appellant, was standing in a corridor. The complainant joined the queue. While waiting in the queue, the appellant whistled to him signalling to him that he should use

the other ATM. Using sign language, the complainant signalled to the appellant that he preferred to stand in that same queue.

[6] According to the complainant, when the person who had been standing at one of the ATM's left the machine, the complainant approached the machine and inserted his bankcard. Just after he had punched in his personal identification number (PIN), someone came from under his shoulder and punched a number in. When he looked at him he realised that this was one of the persons he had observed in the corridor when he was approaching the ATM section. He shoved this person aside, but a second person rushed at the same ATM and punched a number in. He realised that he was being robbed and tried to resist. While he was embroiled in a scuffle with these two persons, the appellant rushed at him and tripped him, as a result of which he fell. The appellant started kicking him. During this scuffle, the three persons, including the appellant, were communicating with each other in Sesotho. He could not understand what they were saying, as he is Afrikaans speaking. He saw one of them passing his bankcard on to the appellant. The appellant grabbed the card and went to the ATM. He was still trying to fight these persons off when one of them drew a knife. He tried to fight back but was overpowered when a third one joined in.

[7] He continued putting up a fight until he managed to disarm his assailant of the knife. At that point, the appellant left the ATM and tried to run past him. He stabbed the appellant with a knife. The appellant then threw the card over his shoulder and ran out of the mall. The appellant's accomplices fled in a different direction. The complainant jumped onto his bicycle and pursued the appellant. At that point the complainant's uncle came from around the corner. To avoid being cornered, the appellant ran in the direction of the police station, with the complainant and his uncle in hot pursuit. The appellant ran into the police station. The complainant reported the matter to the police. The appellant was searched and several bankcards bearing different names were found in his possession. The police questioned him about the cards but he could not give an explanation. The appellant was then arrested. The complainant then went back to the ATM with the card that the appellant had thrown over his shoulder. Later in the day he used his ATM

card to draw his bank-statement and discovered that an amount of R1 000 had been withdrawn from his bank account at the time of the incident.

[8] The arresting police officer was also called as a state witness. He corroborated the complainant's statement regarding how the appellant ended up being arrested. He further testified that at the time when the complainant reported that the appellant had robbed him, the appellant tried to run out of the other door of the charge office but was cornered just outside the building. When the police asked the appellant why he was running away, he did not give any explanation. It was at that stage that the police searched the appellant and discovered several bankcards in his possession. When he was questioned about these bankcards, the appellant said they were his own. When questioned why they bore other people's names, he could not account.

[9] In his own version the appellant admitted having been present at the ATM section of the mall at the time when the complainant was robbed. He admitted witnessing the robbery and seeing the robbers fleeing from the scene. He denied having participated in the robbery. He saw the complainant and his friend chasing after the person who had robbed him. He watched them until they turned around the corner and then proceeded to the ATM to withdraw money. Before he could do any transactions on the ATM the complainant approached him, riding a bicycle and stabbed him while he was on his bicycle. He ran away without asking any questions. The complainant chased after him until he entered the police station. When the complainant entered the police station, he jumped over the counter. At the time when he was searched by the police, only his own bankcard was found in his possession.

Grounds of appeal

[10] The appellant's grounds of appeal are that the state did not prove its case beyond reasonable doubt and that the trial court erred in rejecting his version. The basis of the appeal against sentence is that the sentence imposed was shockingly inappropriate.

Evaluation

[11] It is trite law that the state bears the onus of proving an accused person's guilt beyond reasonable doubt[1]. Considering the advantage which a trial court has of hearing and appraising witnesses, a court of appeal will not tamper lightly with the trial court's credibility findings. It will do so if it is shown that the findings made by the trial court were clearly wrong[2]. The trial court's evaluation of the evidence demonstrates that it was alive to the fact that the complainant was a single witness in respect of the robbery. It is evident from the record that the trial court scrutinised the complainant's evidence and applied the cautionary rule to it on account of the complainant being a single witness and in relation to his identification of his robbers. It found the complainant's evidence satisfactory in all material respects[3]. It also correctly found that the appellant acted with common purpose with two other persons. Indeed, the evidence revealed the appellant's active association from the time the appellant arrived at the ATM section. He is the one that tried to direct the complainant to a specific ATM; he is the one that tripped the complainant after his bankcard had been grabbed from the machine. He communicated with the other two perpetrators throughout the incident. He is the one that was given the appellant's bankcard for purposes of withdrawing the money from the ATM while the complainant was being threatened with a knife.

[12] The conspectus of the record reveals that the complainant presented a cogent account of events that was not seriously challenged under cross-examination. It is evident from his evidence that before his attack, he had had sufficient opportunity to make observations at the banking section of the mall. His evidence is detailed and describes the position of and the role played by each of his assailants from the time he arrived at the ATM up to the time the three robbers fled in different directions, from which time his attention was focussed on the appellant.

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[1] S v V 2000 (1) SACR 453 (SCA)
[2] S v Mkhohle 1990 (1) SACR 92 at 100e
[3] S v Sauls 1981(3) SA 172 ; Pistorius v S [2014] ZASCA 47

[13] As the trial court correctly pointed, all observations made by the complainant before the robbery were made while he was calm and not under any threat of attack. It is also evident that the complainant was vigilant from the moment he arrived at the ATM's. He maintained his vigilance despite his assailant's efforts to distract him. He described the scuffle in great detail and was able to explain the role played by each assailant. It is clear from his description of the incident that the appellant acted with a common purpose with the other two assailants. He is the one that came to his accomplices' assistance by tripping the complainant. He is the one that the card was handed to during the scuffle. When it became evident that the complainant was trying to do everything in his power to retrieve his bankcard, he was threatened with a knife in order to subdue him while the appellant was withdrawing money. The incident happened in the morning and visibility was not disputed. It is also evident from the appellant's narration of the incident that he had a vivid recollection of the incident. The reliability of the complainant's evidence of identification is beyond reproach and passes muster.[4]

[14] With regards to the appellant, he placed himself at the scene and gave a highly improbable version. Although he initially indicated that the complainant was robbed by one man who pretended to be a security guard, he later changed tack under cross-examination and claimed that the person who impersonated a security guard was in the company of an accomplice. His description of how the complainant attacked him and how he reacted to the attack are highly improbable. His behaviour at the police station was not of an innocent victim of assault. The police officer's evidence of his strange behaviour in attempting to run away from the safety of the police station after the complainant had identified him as the person who had robbed him was not challenged in any way. It was only at the stage of his evidence in chief that the appellant denied that the police officer who testified about his reaction was present at the police station. He could not satisfactorily explain why he did not

[4] S v Mthethwa 1972 (3) SA 766 (A)

give his legal representative proper instructions in this regard. The trial court found him to be evasive and untruthful.

[15] It is trite law that a court of appeal will not tamper lightly with the trial court's credibility findings. This is on the acceptance that the trial court would have the advantage of hearing and appraising the witnesses. The credibility findings will be tampered with if it is shown that the findings made by the trial court were clearly wrong[5]. It has not been submitted that the trial court committed any misdirection of fact. Furthermore, when consideration is paid to all inconsistencies, improbabilities and contradictions in the appellant's evidence, there is no reason to doubt the correctness of the credibility findings made by the trial court. I am satisfied that the state proved its case beyond reasonable doubt. Furthermore, the trial court correctly found the appellant to be an untruthful witness and correctly rejected his version as false beyond reasonable doubt. The concession made by the appellant's representative in relation to the appellant's conviction was thus properly made. There is therefore no reason to tamper with the appellant's conviction.

[16] As regards sentence, it is established law that a court with appellate jurisdiction has limited powers to interfere with the sentence imposed by the trial court[6]. The sentencing discretion lies with the trial court and its sentence will be interfered with on appeal only if the discretion in question was not exercised judicially and properly[7], or if there is disparity between the sentence imposed and the one that the court of appeal would have imposed had it been the trial court. In *S v Malgas*[8] the court stated as follows:-

> "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by

[5] S v Mkhohle (supra)
[6] S v Salzwedel & Others 1999(2) SACR 586 (SCA) at 591 F-H
[7] S v Rabie 1975 (4) SA 875 (AD)
[8] 2001 (1) SACR 469 (SCA) at 478 d-h

> the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate" It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned."

[17] It is evident from the record that the trial court properly considered the triad of sentence. The appellant's personal circumstances were that he was 30 years old at the time of commission of the offence, that he was a first offender, that he was in a relationship and had two minor children and that he was gainfully employed at the time of the incident. In determining the appropriate sentence, the trial court also considered that even though the appellant acted with common purpose, he was not the one that was in possession of a knife. It also took into account that the appellant was stabbed by the complainant and suffered injuries. To the appellant's advantage, the trial court accepted that the knife was only produced after the complainant had been dispossessed of his bank card.

[18] In as far as aggravating factors are concerned, the trial court took the prevalence of the kind of robbery committed into account and rightly so. It also correctly took into account that the offence was well-planned by the three perpetrators. As the appellant was employed at the time of commission of the offence, it can be accepted that his deed was not motivated by need. His lack of remorse for his actions impacts negatively on his chances of rehabilitation. The aggravating factors far outweigh the mitigating factors. Having considered all these circumstances, I am satisfied that the trial court did not err or misdirect itself in any way. As I see it, there also exists no disparity between the sentence imposed by the trial court and one which this court would impose if circumstances so warranted or if it was the trial court. There is therefore no reason to tamper with the sentence imposed. The delay of six months in

transferring the matter from the district court to the regional court is indeed deplorable and is a matter of grave concern. The same applies to the delays in the prosecution of the appeal. It is clear that although part of the delay was due to a lapse of the judicial system, the appellant also had a hand therein. His prejudice was relatively minimal as he was in custody for only nine months while awaiting trial. This period was duly taken into account when sentence was imposed on him by the trial court. The appellant has been on bail ever since he was granted leave to appeal, shortly after his sentencing. He was legally represented and would have known that if he did not have sufficient money to pay his attorney, he could apply for legal aid. He was at some point aware that his appeal had been withdrawn and chose to ask his attorney for a refund of the money he had already paid, instead of taking steps to advance the finalisation of the appeal. The delay cannot under such circumstances warrant tampering with either the conviction or the sentence.

[19] In the result, the following order is granted:

1. The appeal against conviction and sentence is dismissed.
2. The conviction and sentence imposed on the appellant are confirmed.

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M. B. MOLEMELA, JP

I concur.

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S. CHESIWE, AJ

On behalf of appellant: Adv. P. R. Cronje
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of respondents:	Adv. S. Giorgi Instructed by: The Director: Public Prosecutions BLOEMFONTEIN

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