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.: A193/2016

In the appeal between:

BOSMAN TSHEPISO RAMOELETSI Appellant

and

THE STATE Respondent

CORAM: REINDERS, J *et* RAMDEYAL, AJ

JUDGEMENT: REINDERS, J

HEARD ON: 29 MAY 2017

DELIVERED ON: 8 JUNE 2017

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[1] The appellant, who was legally represented, was arraigned before the Regional Court at Parys with three co-accused.

[2] Appearing as accused number 2 on the charge sheet, he stood accused of the following charges:

Count 1: Robbery with aggravating circumstances

Count 2: Robbery with aggravating circumstances
Count 3: Assault with the intent to cause grievous bodily harm
Count 4: Assault
Count 5: Malicious damage to property

[3] On 1 November 2013 Appellant pleaded not guilty to the charges but was convicted on 13 March 2015 on charges 1 to 4. On the same day he was sentenced as follows:

Count 1: Fifteen (15) years imprisonment
Count 2: Twelve (12) years imprisonment
Count 3: Three (3) years imprisonment
Count 4: Six (6) months imprisonment

In terms of sec 280(2) of the Criminal Procedure Act 51 of 1977 (the "Act") seven years on count 2 and both the sentences imposed on counts 2 and 3 were ordered to run concurrently with count 1, with an effective sentence of twenty years imprisonment to be served by appellant.

[4] Leave to appeal was refused by the trial court but granted on petition by this court in respect of the conviction on count 4 (assault) and the imposed sentences in respect of all four charges.

[5] All of the crimes of which the appellant were convicted, were committed on 6 April 2013 in the suburb Tumahole in Parys. In respect of count 4 it was alleged that appellant assaulted the complainant Mr Conrad Boy-Boy Marumo

(Marumo) by hitting him with open hands and kicking him. The State's version, as accepted by the trial court, as to what transpired in the early morning hours of 6 April 2013 was to the effect that Marumo was assaulted by appellant, accused number 1 and 4 after his (Marumo's) ostensible attempt to take the complainant in count 3, Mr Teboho James Mia (Mia) to safety after he (Mia) had been assaulted by accused number 1, 4 and appellant.

[6] The State supports both the conviction on the assault charge and the sentences on all four charges. Mr Simpson contended that the trial court did not misdirect itself in any way.

[7] Heads of argument on behalf of appellant was prepared by Mr Makhene but Mr Reyneke appeared before us in court. On the papers it was contended that the court a quo erred in convicting the appellant as Marumo was a single witness in respect of the assault on him, and he cannot be said to be a competent or credible witness.

[8] An application of the necessary caution in respect of a single witness requires, in essence, that the court satisfy itself that despite the defects, shortcomings and contradictions in such evidence, the truth has been told and that the complainant's evidence is trustworthy.

See: ***S v Sauls*** 1981 (3) SA 180 (A)

[9] It is trite that in the absence of an irregularity or misdirection by the trial court, a court of appeal is bound by credibility findings thereof, unless it is convinced that such findings are clearly incorrect. In order to succeed on appeal appellant must convince us, on adequate grounds, that the trial court was wrong in accepting the evidence of the complainant. Bearing in mind the advantage which the learned magistrate had of seeing, hearing and appraising witnesses, it is only in exceptional cases that an appeal court will be entitled to interfere with a trial court's evaluation of oral testimony.

See: ***S v Francis*** 1991 (1) SACR 198 (A) at 204c-e.
J v S [1998] 2 All SA 267 (A) at 271c.

[10] Marumo was confronted with discrepancies between his evidence in court and a statement which he allegedly made before a police officer. The learned magistrate warned the defence council that cross-examining would be allowed provisionally, but the author of the statement should be called to testify. Same was not done and as such the statement was not proven. Accordingly the magistrate correctly disregarded the alleged contradictions and discrepancies between Marumo's evidence in court and the statement. In his evidence-in-chief Marumo initially indicated his assailants as follow:

> "Nou wie is hierdie mense van wie u praat?---Dit was Papi, Tshipiso en Nula.
> Is daardie mense hier? ---Ja.

> Kan jy hulle aan die hof uitwys, wie is Papi?---Daardie een met ‘n goud hemp.
> Waar meneer?---Die eerste beskuldigde.
> Ja?---Tshipiso is die beskuldigde die beskuldigde nommer 3, hy is nou die 2de van die linkerkant af van die mense wat in die beskuldigdebank sit.”

Later on in his evidence-in-chief and during cross-examination Marumo however consistently referred to the appellant as accused number 2 as being one of his assailants. The court a quo was clearly satisfied that the reference to the appellant as accused number 3 was a slip of the tongue or that there might have been a problem with the allocation of numbering of the accused before court, or no numbering at all. What is clear from the evidence is that Marumo identified appellant as one of his assailants by his name as Tshepiso. From his judgment it can be gleaned that the trial court did not consider this to have an impact on the identification by Marumo of appellant. That the defence also holds this view is clear from the fact that the point was not laboured by the defence on papers or orally before us.

[11] The magistrate found that Marumo made a good impression on him in the witness stand and was an honest, credible and reliable witness. The finding by the magistrate that Marumo was a credible witness can in my view not be faulted. The only question that remained was whether it was the appellant who assaulted Marumo and therefore whether he was a reliable witness in as far as he testified

that the perpetrator was the appellant. Mr Reyneke indeed submitted that the attack on the finding of the learned magistrate was not as much a question of credibility but rather the reliability of Marumo's evidence.

[12] The court a quo was well alive to the fact that the reliability in particular of Marumo should be considered to exclude the reasonable possibility of a mistake of the identity of his assailant. As far as count 4 is concerned the magistrate dealt with counts 3 and 4 simultaneously in his evaluation thereof as he evidently considered it to be closely related in time and place, as both assaults took place in the same street and in the early morning hours of 6 April 2013. In accepting the evidence of both the state witnesses Marumo and Mia, the magistrate was aware of discrepancies between their evidence, of which the most important aspect was whether Marumo alone took Mia to his home after being assaulted or whether he (Marumo) had assistance in doing so. The magistrate did not find same to be material but rather pointing away from a conspiracy to falsely implicate the appellant as hinted by the defence. The magistrate also found that Mia and Marumo corroborated each other in as far as Marumo confirmed that at least accused number 1 and appellant assaulted Mia when he arrived at the scene, whilst Mia also testified that he had known accused no 1 and the appellant before the assault. These corroborations place appellant at the scene where the assaults took place.

[13] Marumo's inherent honesty was found by the magistrate in the fact that he testified that he couldn't identify accused 3 as one of his assailants. From his judgment it can be gleaned that the court was satisfied that there was adequate lighting at the crime scene for Marumo to identify the appellant and the totality of the evidence sufficiently indicated that Marumo was not mistaken as to the identity of his assailant. The conviction by the trial court can, in my opinion, not be faulted insofar as it undertook a holistic consideration of the evidence and was, correctly, satisfied that the truth had been told and that appellant's guilt had been established beyond reasonable doubt. I am not convinced that the magistrate erred or was wrong in the approach followed by him and the appeal against the conviction cannot be sustained.

[14] The next enquiry is whether or not the sentences imposed are just, regard being had to the cumulative impact of mitigating and aggravating factors inclusive of the interests of society. It is trite that the powers of a court of appeal to interfere with the sentence imposed, are limited insofar as it can only interfere where the sentence is disproportionate, harsh or the sentencing court committed a material misdirection or did not exercise its discretion properly or at all.

See: ***S v Pieters*** 1987(3) SA 717 (A)

S v Makondo 2002 (1) All SA 431 (A).

[15] Mr Reyneke referred us to ***S v Moswathupa*** 2012 (1) SACR 259 where it was held that a court must not lose sight of the fact that the aggregate penalty imposed must not be unduly severe when dealing with multiple offences to be punished. The effective sentence of twenty years imprisonment in total imposed is a hefty one. However, the appellant was convicted on two counts of robbery with aggravating circumstances. The magistrate took into account that appellant was not a first offender. He has previous convictions which includes housebreaking with the intent to steal and assault, both of which are directly relevant to his convictions *in casu*. The magistrate had regard to the appellant's personal circumstances and took into account that appellant had been in prison awaiting trial for almost 2 years.

[16] On count 1 the court a quo found no substantial and compelling reasons to deviate from the prescribed minimum sentence of fifteen years. Individualising the sentences as is expected of him, such circumstances were found to be present in the particulars of the crime itself. If the magistrate erred on count 2 it was in favour of the appellant by not finding the prescribed minimum sentence is applicable and imposing a lesser sentence of 12 years. The sentences imposed on count 3 (three years) and count 4 (six months) cannot be faulted in any way. Having imposed the various individual sentences, the magistrate applied the provisions of sec 280(2) of the Act and considered 20 years to be an appropriate and proper sentence.

[17] As mentioned the sentence is hefty but it does not induce a sense of shock. The question is not whether I would have imposed the same sentence but whether the magistrate misdirected himself. I do not find any misdirections. Had I to impose a sentence as court of first instance, I would not have imposed a sentence which differs in duration so much that it would entitle me to conclude that the disparity is of such a considerable nature entitling me to interfere. Accordingly the appeal stands to be dismissed in this respect as well.

[18] It follows that I am satisfied that the sentence imposed by the trial court cannot be faulted in any way.

[19] Consequently I make the following order:

The appeal against both the conviction on count 4 as well as the appeal against the sentences on counts 1, 2, 3 and 4 are dismissed.

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C. REINDERS, J

I concur.

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T. RAMDEYAL, J

It is so ordered.

On behalf of the appellant: Mr. D. Reyneke
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. A. Simpson
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN