REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A257/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

16 FEBRUARY 2017 **FHD VAN OOSTEN**

In the matter between

PITSO MOGOSI **FIRST APPELLANT**
MPHO LUCAS LENGANE **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] The appellants were convicted in the Randfontein Regional Court of robbery with aggravating circumstances (count 1), unlawful possession of a firearm (count 2) and unlawful possession of ammunition (count 3). They were each sentenced to undergo 15 years' imprisonment on count 1, and 5 years' and 4 years' imprisonment respectively on counts 2 and 3, which were ordered to be served concurrently. The appeal is directed against sentence only and is with leave of this court granted on petition.

[2] The facts on which the appellants were convicted can be summarised as follows: On 19 April 2009 at 21h45 the complainants, George Maditse, a member of the SAPS and his younger brother Kutlwano Mothlabane, were robbed by the appellants of their motor vehicle, a red Toyota Corolla, after having come to a standstill at a stop sign in Nokwe street. The appellants approached their vehicle. Appellant 2 was armed with a firearm which he pointed at the complainants and he proceeded to the driver's side of the vehicle. Appellant 1 went around to the passenger side of the vehicle where Maditse was sitting. The appellants got inside the vehicle and ordered the complainants to move to the back seat. Appellant 2 handed the firearm to appellant 1 to guard the complainants and appellant 2 got into the driver's seat. They drove off and *en route* to Soweto, some 10 kilometres further, at Cooke One, the vehicle stopped apparently when the appellants became aware that Maditse was reaching out and trying to get hold of his service firearm which was hidden under the driver's seat. Appellant 1 struck Maditse with the firearm he had in his possession in the face. A struggle ensued for possession of the two firearms. Accused 1's firearm fell on the road and was run over by passing vehicles. Appellant 2 ran away hotly pursued by and apprehended by Mothlabane. The police arrived shortly thereafter on the scene and appellant 2 was handed to them. Appellant 1 was later arrested. Both appellants were later positively identified at an identification parade by Maditse.

[3] Both appellants relied on an alibi defence which was rightly rejected by the court *a quo* as false.

[4] Before I turn to sentence it is necessary to refer to a number of disturbing features in the evidence presented by the State on counts 2 and 3. Maditse was not asked nor did he describe his firearm in his evidence. A description of his firearm does appear on his police statement, which was handed in as an exhibit during his cross examination. The description of his firearm, however, was not dealt with at all. The State did not lead *viva voce* evidence concerning the discovery of a firearm at the scene after the incident but instead relied on statements which were handed in by consent.

[5] This is what those statements reveal: In the first statement Constable Fourie states that she visited the scene on 20 April 2009, at 00h49, took photos and 'collected a 1 X 9mm *China* serial nr 47030032 and 1 magazine with 8 live rounds

found on the scene across the road from where the vehicle was found parked and sealed in forensic bag FSC1003538'. The photographs she had taken of that particular firearm indeed depict the engraving on the barrel of the pistol: '*China* 47030032'. The next document is an affidavit, in terms of s 212 of the Criminal Procedure Act 51 of 1977, by Capt Kekana, a senior forensic analyst in the SAP, stating that on 17 August 2009 he received a sealed forensic bag with number FSC-1003538 (which corresponds with the bag number referred to by Fourie) containing 'One 9mm parabellum calibre *Norinco* model 213 semi-automatic pistol serial number 47030032), with magazine eight 9mm parabellum calibre cartridges'. Although the serial number corresponds with the serial number furnished by Fourie, the brand names, *China* as opposed to *Norinco*, differ. Lastly, a page from the SAP 13 register kept at Randfontein SAP was handed in, in which the following entry appears:

> '20-04-09.
> (1) 1 X M213 9X19mm reeks 47030032.
> (2) 01 magasyn.
> (3) 05 lewendige rondtes. Items 1, 2 3 is geseël in fsl sak fsc?1003538.'

[6] The discrepancy in the brand names as well as the number of live rounds is apparent. In the scant and inept manner in which this case was dealt with in the court *a quo*, it is hardly surprising that the discrepancies escaped the attention of all concerned. Nor was it observed by counsel in this appeal. In my view the discrepancies could only and should have been cleared up by the evidence of the deponents to the statements. It is not for this court to speculate on the possible reason therefore.

[7] It follows that the conviction of both appellants on counts 2 and 3 cannot stand and that they fall to be set aside in the exercise of this court's inherent common law powers of review.

[8] A further difficulty arises concerning the reference in count 1 to the Beretta firearm. I have already referred to the lack of evidence as to the identification of the firearm. But, a further difficulty arises. The evidence for the State reveals that appellant 2 was pursued and apprehended by Mothlabane, while Maditse was involved in a skirmish with appellant somewhere in the veldt. Maditse testified that while the fight was in progress, his firearm fell in the grass, that it was picked up by

appellant 1 and that he ran away with it. Certainly, at that stage appellant 2 was nowhere near this spot. No basis accordingly existed for finding that appellant 2 had robbed the complainants of a firearm, as is alleged in count 1 on which both appellants were convicted 'as charged'. But, Maditse's version that appellant 1 picked up his firearm and ran away with it, in any event, is seemingly unsatisfactory. He makes scant mention thereof in his police statement, is stating: 'The other suspect I was fighting ran away with my firearm'.

[9] Maditse's evidence, moreover, is difficult to understand where he stated:

> 'I managed to go and show the police where we were fighting and where I think the firearm fell off and then when we were looking around there we found the firearm there'

The only firearm found at the scene was the *China* firearm referred by Fourie, but she states that it was found across the road from where the vehicle was parked, which the photographs show was on the side of the road across the complainants' parked vehicle. Significantly, Fourie made no mention in her statement that Maditse had pointed out the firearm. On the contrary, she states in the covering affidavit attached to the photograph album, that the photographs were taken 'volgens uitwysings deur Insp Manyelo', who was not called to testify resulting in the lacuna on this aspect of the State's case, remaining extant.

[10] In my view the appellants were wrongly convicted of the robbery of the Beretta firearm referred to in count 1. This court, once again in the exercise of its inherent powers of review, is accordingly entitled to rectify the conviction on count 1 by excluding the Beretta firearm as one of the items robbed. I am satisfied that the conviction of robbery of the complainants' motor vehicle referred to in count 1 and the court a quo's finding that aggravating circumstances exited, are in order.

[11] It remains to consider the appropriateness of the sentence imposed on count 1. Appellant 1 was 28 years' old at the trial, single but the father of 3 children and had been in employment earning an income of R4 500 per month. One previous conviction of theft was proved against the appellant in respect of which a suspended sentence was imposed. Appellant 2 was 26 years' old, the father of two children, earned an income of R120 per day, and a first offender. Appellant 2 complained that

he 'had a problem with epilepsy' but was unable to produce proof thereof.

[12] The appellants' showed no remorse and their personal circumstances are overshadowed by the seriousness of the crime they have been convicted of (See *S v Nombewu* 1996 (2) SACR 396 (E)). The complainants were robbed of their vehicle at gunpoint and they were deprived of their freedom of movement. The court *a quo* in my view, correctly concluded that no substantial and compelling circumstances existed warranting a departure from the minimum sentence of 15 years' imprisonment. The sentence moreover does not strike me as disproportionate to the offence of robbery the appellants have been convicted of and I accordingly find no reason for interference by this court.

[13] In the result the following order is made:

1. Count 1 (Robbery with aggravating circumstances) is amended by deletion of the words 'and a firearm with serial number 8670792 a Beretta'.
2. The conviction of both appellants on count 1, as amended in paragraph 1 above, is confirmed.
3. The appeal of both appellants against the sentence of 15 years' imprisonment imposed on count 1, is dismissed.
4. The conviction and sentence of both appellants on counts 2 and 3 are set aside.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

EJ FRANCIS
JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANTS ***ADV K PHETOE***

COUNSEL FOR RESPONDENT	***ADV T BYKER***
DATE OF JUDGMENT	***16 FEBRUARY 2017***