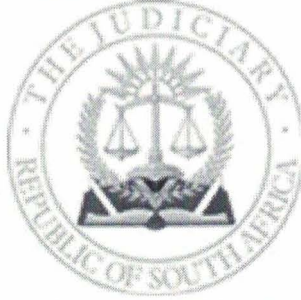


REPUBLIC OF SOUTH AFRICA



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

APPEAL CASE NO: A36/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
	24/08/2021, DATE
	<i>Mabesele</i> SIGNATURE

In the matter between:

CINDI MUSA GILBERT

Appellant

and

THE STATE

Respondent

CORAM: MABESELE J; MAHALELO J AND DU PLESSIS AJ

J U D G M E N T

MABESELE, J:

[1] The appeal is against the convictions and sentences. The appellant is convicted of murder and robbery with aggravating circumstances; two counts

of attempted murder and the counts of unlawful possession of a semi-automatic firearm and unlawful possession of ammunition. The counts of murder and robbery with aggravating circumstances are each read with the provisions of sections 51(1) and 51(2) respectively, of the Criminal Law Amendment Act¹

[2] The appellant was sentenced to life imprisonment for murder; 20 years imprisonment for robbery with aggravating circumstances; 16 years imprisonment for each count of attempted murder; 16 years imprisonment for unlawful possession of a firearm and 6 years imprisonment for unlawful possession of ammunition.

[3] The appellant contends that the state failed to prove its case beyond reasonable doubt to secure the convictions and the sentences imposed on him are shockingly inappropriate.

[4] At the centre of this appeal is the issue of identification. The appellant argues that the trial court did not correctly apply the cautionary rules in so far as they relate to the evidence of identification.

[5] The evidence is that on the morning of the 23rd August 2017, the deceased, his mother (Mrs Mollo) and brother (Percy) went to the Absa Bank at Maponya Mall to draw money in the sum of R 23 350.00 to pay for the

¹ 105 of 1997

funeral service for the late daughter of Mrs Mollo. The family spent about 10 to 15 minutes in the bank.

[6] It is common cause that the appellant was at the Absa bank on the morning of 23rd August 2017. The undisputed evidence of Mr De Wet, a national investigator of violent crimes and integrity management for Absa, which was presented through the video footage in court is that the appellant was standing in a queue and looking at the Mollo family standing in the same queue waiting to collect the money from the teller who was by then busy counting. The appellant left the bank about two seconds after the family of Mollo had left, as per the times shown in the video footage. He was wearing a black cap and a jacket.

[7] Mrs Mollo testified that an amount of R 23 350.00 in cash was handed over to her by the teller and she put the money inside the bag. Thereafter she and the two sons walked out of the bank to their car which was parked not far from the bank and thereafter proceeded to Zola 1 Funeral Parlour. The deceased drove the car. She sat next to him and Percy sat in the back.

[8] When the car stopped at the funeral undertakers the deceased asked for the bag and took the money out and put it between the driver's seat and passenger seat. At that stage she did not realise that there were men standing outside the car. After she had received her bag from the deceased she got out of the car. As she was about to climb the stairs to the mortuary she looked back and saw the two men unknown to her, at the car. She went

back to the car and stood next to the deceased and the man unknown to her who she recognised as the appellant. The appellant was holding a firearm. The other man was pushing Percy back into the car from the other side. She noticed a white motor car parked in front of their car. The appellant who stood with the deceased looked at her bag and demanded the money from her. The appellant said to her "bring the money or else I will kill you, bring the money or else I will shoot". She asked the appellant 'money for what?' The appellant shot in the air and the sound affected her ear because she was at the distance of an arm's length away from the appellant. The appellant grabbed her bag and threw her on the ground. She pleaded with the appellant not to take the money because she was going to pay for the funeral costs. The deceased too, pleaded with the appellant not to take the money. The appellant responded by saying "give me the money, please give the money". While she and the appellant were pulling the bag to their sides the bag opened and the appellant noticed that there was no money in the bag and went to the car. The deceased argued with the appellant and could do nothing because the appellant was armed with a firearm. After the appellant had taken money in the car, he came back to her and took the bag which had contained the birth and death certificates and the titles deed and pushed her on the ground. When she stood, up she went to Percy on the other side of the car and found him crying and pointed at the deceased on the ground and said that the deceased was shot. Percy was injured on the left thigh. After Percy had pointed the deceased to him, she went to the deceased and knelt and asked God what had she done on earth. While she was still uttering those words, the appellant came and shot her on the side of the head and left the

scene. The bullet did not penetrate the head and she sustained a slight injury.

[9] Mrs Mollo testified during cross-examination that the whole incident of robbery took 10 to 15 minutes and she had observed the appellant for that period of time. She testified that she and the appellant looked at each other face to face when the appellant had grabbed her and had told the police that she would be in a position to point out the appellant. She told the police that appellant had big lips and was wearing a cap. She testified that at the police station she was shown the photos which depicted a number of the male persons. She identified the appellant among them and pointed him out.

[10] Mr Percy Mollo confirmed the version of Mrs Mollo that he was in her company at the bank and drew cash in the amount of R 23 350.00. His mother took the money. From the bank they drove to Zola 1 Funeral Parlour. The journey from the bank took 15 minutes.

[11] Percy testified that after the deceased had stopped the car at the funeral parlour a white Chevrolet parked in front of them. As they were about to alight from the car two male persons alighted from the Chevrolet and approached them. They were armed with firearms. One of them approached the deceased and the other approached him on the other side of the car and instructed him to go back into the car and not look at them. The man who was with the deceased hit the deceased with the butt of a firearm on the head and demanded the money. The deceased was standing outside the car. The

man approached the mother and demanded the money. The man pushed the mother to the ground. The mother was standing next to the deceased. He testified that the appellant is not the one that hit the deceased with the butt of a firearm and pushed his mother to the ground because the appellant was threatening him on the other side of the car and instructing him not to look at him. Percy said that the appellant approached the deceased for the first time when the deceased was fighting with the appellant's companion and was going to offer help to his companion. When the appellant reached them, he shot the deceased while his companion was still struggling to cock his firearm. Thereafter the appellant and his companion took the money and in the car and the mother's bag and left the scene. He tried to chase them and the appellant shot him on the thigh. He said that the whole incident of robbery lasted for approximately 5 minutes. He said that the appellant was wearing a black cap and jacket and has big lips.

[12] On 28th August 2017 he went to the Jabulani Police Station to submit a J 88. Upon his arrival he was requested by the police officer Ndwande to view the video footage of the people who were inside the Absa bank and pointed out the suspects who robbed them of the money and killed the deceased. He pointed the appellant and someone else. He again pointed out the appellant in a photo album.

[13] During cross-examination, Percy admitted that he wrote in the statement the following: 'there was a struggle between my brother and other suspect moving towards the back of the vehicle and both fell down. I heard the shot

being fired'. He admitted that he did not mention in the statement that the appellant approached the deceased and shot him while the deceased was involved in a struggle with his companion. He explained that the omission to mention the appellant in the statement is due to the trauma which he had suffered when he made the statement.

[14] The appellant testified that on the day of the incident he was at Maponya Mall. He had gone there to meet a friend called Leonard. He roamed around the mall, waiting for Leonard and ended up entering the Absa bank. He did not do any business at the bank or made any enquires. He could not recall why he left the bank. He suggested that perhaps he had received a message from Leonard. He does not recall where he went after leaving the bank. He denied that he took part in the attack.

[15] The appellant testified during cross-examination that had he not shown the footage depicting him in the bank he would have denied that he was in the bank that day. Counsel for the state said:

'Sir I put to you that if you were not shown the video footage identifying yourself at the Maponya Mall ABSA Bank branch you would have denied that you were at the bank that day, do you have any comment ?'

The appellant responded:

'Yes, I would deny....'

[16] The evidence of identification should be approached with caution. There must be certainty beyond reasonable doubt as to the reliability of such evidence²

In R V Mokoena³ Ramsbottom J made the following observations:

*'where it is a case of identification the court should be satisfied that the identification is not only honest but is reliable from the point of view of the of the witness' opportunity of observing*⁴

[17] The robbery which resulted in the death of the deceased took place during the day. It lasted for approximately 5 to 10 minutes according to the eye witnesses. Mrs Mollo was at the distance of an arm's length away from the appellant when the appellant demanded money from her and she in turn asking the appellant 'money for what?' During the conversation she had looked appellant in the face. She described his lips as big and was wearing a cap. She and the appellant had fought for her bag before the appellant threw her on the ground. She again saw the appellant when he came to shoot her after he had taken the money from the car. She undoubtedly had sufficient opportunity to observe the appellant. In addition, Mrs Mollo pointed out the appellant at the police station among the male persons who appeared in the photo album which she was shown.

² S V Charzen and Another 2006(2) SACR 143 (SCA)

³ 1958(2) SA 212(T) at 215. See also S V Mthetwa 1972(3) 766(A) at 768-c

⁴ Emphasis added

[18] Although Percy contradicted Mrs Mollo with regard to the role played by the appellant at the crime scene, he, however, had placed the appellant at the scene. He too, described the lips of the appellant as big and said that appellant was wearing a jacket and black cap.⁵ He is the one who told Mrs Mollo that the deceased was shot by the appellant.

[19] The appellant went into the bank and stood in a queue although he was not going to do any business with the bank. He admitted during cross-examination that he looked around and at the people inside the bank. According to the time recorded in the video footage the appellant left the bank about two seconds after the Mollo family had left with the money. The witnesses identified him at the scene with the same cap and jacket which he was wearing in the bank. The robbery took place less than an hour after the Mollo family had left the bank. The fact that the appellant was not prepared to admit that he was in the bank had the video footage not depicted him, demonstrates that he had stood in a queue as though he was going to do business with bank whereas his intention was to look at the clients of the bank who were drawing the money from the bank. For all these reasons his version that he did not take part in the robbery and murder of the deceased is rejected as not being reasonably possibly true.

[20] The trial court in its judgement correctly made the following observations: 'The repeated demand of the attackers in asking "where is the money " rather than demanding valuables generally, or rather demanding to know if the

⁵ Regard should be had that the appellant was wearing a cap and a jacket in the bank

family had money shows that the attackers knew that the family had money. Given that the family had obtained the cash only 15 minutes before the attack and had driven straight to where the attack occurred, the demand for "the money" links the attackers to the family's visit to the bank. At least one of the attackers must have been at the bank when the family drew the cash' For all these reasons the appeal against the convictions cannot succeed

[21] Punishment is pre-eminently a matter for the discretion of the trial court. The appeal court may alter or interfere with the sentence imposed by the trial court only when its sentencing discretion has not been judicially and properly exercised. As correctly argued by counsel for the state the test is whether the sentence is vitiated by irregularity or misdirection or disturbingly inappropriate.

[22] The appellant is married in accordance with customary law. He has two dependent children. He owns a taxi. He has previous convictions of robbery with aggravating circumstances and possession of a firearm and ammunitions. He is currently serving a sentence of 20 years imprisonment for his previous convictions.

[23] The trial court correctly found that these personal circumstances do not justify a deviation from the prescribed minimum sentences.

[24] The appellant was sentenced to 16 years imprisonment on each count of attempted murder that relates to Mrs Mollo and Percy, respectively. The state had recommended a sentence of 10 years imprisonment on each count.

Both Mrs Mollo and Percy sustained minor injuries from the gunshots as indicated in the medico-legal examination reports marked exhibits 'D' and 'E', respectively. They were both treated at the hospital and released on the same day they were admitted. In this regard the sentences of 16 years imprisonment imposed on counts 3 and 4 do not fit the crime. Therefore this court is at large to interfere with these sentences. The court is of the view that a sentence of 7 years imprisonment on each count is appropriate.

[25] In the result, the following order is made:

1. The appeal against the convictions is dismissed.
2. The appeal against the sentences is upheld, partially.
 - 2.1 The appeal against the sentences on counts 1, 2, 5 and 6 is dismissed.
 - 2.2 The appeal against the sentences on Counts 3 and 4 is upheld.
 - 2.2.1 The sentences imposed by the trial court on counts 3 and 4 are set aside and replaced with a sentence of 7 years imprisonment on each count.



MABESELE J
(Gauteng Local Division)

I agree



MAHALELO J
(Gauteng Local Division)

I agree



DU PLESSIS AJ
(Gauteng Local Division)

Date of hearing	:	2 August 2021
Date of judgment	:	24 August 2021
For the appellant	:	Adv. A Mavatha
Instructed by	:	Legal Aids S.A
For the respondent	:	Adv. P. Ranchod
Instructed by	:	DPP - Joahnnnesburg