IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: A161/2018

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE:	~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~/NO
(3)	REVISED	
	DATE:	.....
	SIGNATURE:	.....

In the matter between:

FANIE DAVID NKADIMENG Appellant

And

THE STATE Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

INTRODUCTION

[1] The appellant was convicted in the Springs Regional court on a charge of robbery with aggravating circumstances and sentenced to 15 years' imprisonment.

[2] The appeal is against both conviction and sentence.

CONVICTION

[3] The series of events culminating in the conviction of the appellant on the charge of robbery with aggravating circumstances are largely common cause, to wit:

[3.1] on 17 September 2015, the complainant was robbed of her handbag and stabbed with a knife in an open field in Kwa Thema. The handbag contained, *inter alia*, three cell phones;

[3.2] the complainant alerted members of the community of the robbery by screaming and crying at the same time for help and members of the community chased and apprehended the appellant, in the belief that he was one of the perpetrators.

[4] The following facts are in dispute:

[4.1] whether the complainant was robbed by one or two persons;

[4.2] the identity of the robber/s; and

[4.3] whether two of the complainant's cell phones were found in possession of the appellant.

[5] The complainant testified that she was robbed by the appellant and an unknown male. The complainant alleged that both the appellant and the other perpetrator ran away and that both were chased by members of the community. The other state witnesses confirmed that they saw two males running away and that both were chased by members of the community. Members of the community were, however, only successful in apprehending the appellant.

[6] The state witnesses, furthermore, confirmed that two cell phones were found in possession of the appellant, which cell phones were identified by the complainant as her property.

[7] In view of the aforesaid evidence tendered on behalf of the State, it is instructive to have regard to the appellant's plea explanation, which explanation was repeated by the appellant during his evidence. According to the appellant he was with a certain Zweli on the day of the incident. Whilst walking with Zweli, the appellant came across a female friend, with whom he engaged in conversation whilst Zweli kept on walking. After a short distance, he saw Zweli confronting the complainant, but did not see what was happening. The appellant then saw Zweli running away with the complainant following him and screaming.

[8] Apparently Zweli was running in the appellant's direction and when the complainant came across the appellant, she alleged that he was one of the persons who robbed her. He was then accosted by members of the community and assaulted where after the police arrived on the scene and arrested him. During his testimony the

appellant vehemently denied that he robbed the plaintiff and furthermore denied that the complainant's cell phones were found in his possession.

[9] Mr Kgagara, counsel for the appellant, submitted that the court *a quo* erred in three respects, namely:

[9.1] in relying on the evidence of a single witness;

[9.2] in not having proper regard to the contradictions in the evidence of the state witnesses; and

[9.3] in not finding that the appellant's version is reasonably possibly true.

[10] In the judgment of the court *a quo*, the magistrate considered the legal principles applicable to the evidence of a single witness. The magistrate then proceeded to consider the evidence in its totality and held that common sense dictates that the complainant's evidence should be accepted. The magistrate held that complainant's evidence was confirmed in material aspects by that of the other witnesses insofar as they saw two perpetrators run away and by the fact that the complainant's cell phones were found in possession of the appellant.

[11] Although there are minor discrepancies between the evidence of the state witnesses, one should bear in mind that the situation was fluid. The discrepancies, in my view, do not detract from the court *a quo*'s findings *supra.*

[12] Having regard to the appellant's version, the version is fraught with improbabilities and does not account for his behaviour on the day of the incident. For instance, the

appellant did not explain why he ran away if he did not commit the crime? Why did the appellant not confront Zweli, who according to the appellant, ran right past him?

[13] The fact that the complainant's cell phones were found in his possession remains, save for a denial, unexplained. The complainant was not present when the cell phones were discovered, removing any possibility that one of the members of the community could have for some or other unknown reason "planted" the cell phones on the appellant to implicate him.

[14] Considering the evidence in its totality, I agree that the appellant's version is not reasonably possibly true and the appeal against conviction stands to be dismissed.

SENTENCE

[15] The 15 years' imprisonment imposed by the court *a quo* is in accordance with the minimum sentence prescribed by the Criminal Law Amendment Act, 105 1997.

[16] In terms of the Act, a court may only deviate from the prescribed minimum sentence should the court find that substantial and compelling circumstances exist that justifies a deviation.

[17] In the leading case of *S v Malgas* 2001 (1) SACR 469 SCA, the Supreme Court of Appeal at 481 h – 482 b provided, *inter alia*, the following guidelines in respect of a deviation of the minimum sentences prescribed by the Act:

"B. Courts are to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weight justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning of first offenders, personal doubts as to differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

[18] Mr Kgagara submitted that the court *a quo* erred in over-emphasizing the seriousness of the offence and the interests of society. In so doing, the court failed to have proper regard to the personal circumstances of the appellant.

[19] The court *a quo* in a well-reasoned judgment, had proper regard to the appellant's personal circumstances, the circumstances under which the crime was committed and the interests of the community. The court found that the cumulative effect of these factors do not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum.

[20] I could not find any indication that the court over-emphasised any of the factors to be taken into account in establishing whether substantial and compelling circumstances justifying a lesser sentence exist.

[21] In the premises, the appeal against sentence should similarly fail.

ORDER

[22] I propose that the appeal against conviction and sentence be dismissed.

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N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree

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H.E. MKHAWANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

It is so ordered.

DATE HEARD	28 August 2019
JUDGMENT DELIVERED	12 September 2019

APPEARANCES

Counsel for the Appellant:	Advocate M.B. Kgagara (067 826 4547/083 5144 613)
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Counsel for the Respondent:	Advocate G.J.C. Maritz
Instructed by:	Office of the Director of Public Prosecutions (084 257 9436/012-351 6832) Ref: No SA 37/2018(28/8/GJCM)