IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: **AR570/2017**

In the matter between:

MTHOBISI ERIC NGCOBO **First Appellant**
NKANYISO PANI HLELA **Second Appellant**

and

THE STATE **Respondent**

APPEAL JUDGMENT

Delivered on: 27 August 2018

Mbatha J (Gyanda J concurring)

[1] The appellants were convicted by the Regional Court sitting at Pietermaritzburg on 27 January 2016, on one count of robbery with aggravating circumstances, read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. The court found that there were substantial and compelling circumstances and imposed sentences of eight and twelve years' imprisonment respectively. With the leave of the court a quo, the appeal is against the convictions in respect of both appellants and sentence in respect of second appellant.

[2] The incident giving rise to the convictions and sentences of the appellants arose from the commission of the robbery on 20 February 2013, near Pietermaritz Street, Pietermaritzburg.

[3] The robbery occurred at day break at about 05:15am outside the place of employment of Mr Yasseen Essop, (the complainant) where he had parked his truck in preparation for a trip to deliver goods in the Eastern Cape. He was confronted by six men, two got onto his truck to search for his personal items, whilst the other four assailants robbed him of his possessions which he had on his person. His testimony was that the assault lasted for about five minutes. He had fallen down during the assault. As he got up he saw four of his assailants fleeing towards the beerhall.

[4] He got into his truck and gave chase. His testimony was that he lost sight of the assailants only for a very short time, but as he got onto Berg Street, he saw the assailants run into the beerhall. He called the police and remained on the street next to where his assailants had fled into. At the arrival of Warrant Officer Ngubane, who was in the vicinity of the beerhall, they entered the beerhall in search of the complainant's assailants. As the complainant and Warrant Officer Ngubane were leaving the beerhall, the complainant shouted as he spotted one of his assailants, pointing to the first appellant, who was still wearing the same pair of jeans and a short sleeved shirt which he had been wearing when the robbery took place. When the first appellant was searched, the cigarette lighter which the complainant identified as his came out from one of the pockets of his jeans. The first appellant was then arrested.

[5] It was undisputed that the complainant was robbed by six African males on the day in question of a gas gun, a cigarette lighter and other valuable personal possessions and that he was also assaulted during the robbery. It is also common cause that shortly after the robbery the first appellant was arrested and later on the second appellant was found in possession of a gas gun which led to his arrest.

[6] The entire appeal rests on the identification of the appellants as the persons who committed the robbery against the complainant. The court a quo found that the

complainant had positively identified both the appellants, on the basis that the first appellant was known to the complainant, he had pointed him out to the police shortly after the incident and that the second appellant was found in possession of a gas gun belonging to the complainant.

[7] On 25 February 2013 the complainant was called to make a photo identification of his assailants, where he positively identified the appellants. He identified the second appellant by a mark on his face near the eye area. The second appellant was subsequently arrested at his home. When the second appellant was arrested, he was found in possession of a gas gun, which fitted the description given by the complainant. The complainant identified it with the serrated marks, which he had scratched on the sides.

[8] The complainant's evidence was that he was able to positively identify his assailants as it was day break, the streetlights and lights from the shop also illuminated the area. Furthermore he testified that he had seen the first appellant a number of times before going past his place of employment. On the day in question the first appellant was wearing jeans and a short sleeved shirt which the complainant described as a vest, and that upon his arrest the complainant's cigarette lighter came out of the appellant's pocket.

[9] The first appellant denied that he was one of the robbers. He described his arrest as unfortunate in that he was at the wrong place at the wrong time, as he had gone to the beerhall to fetch water to wash a taxi. His defence was rejected by the court a quo as he could not explain the absence of water taps in the area where he was arrested. The second appellant's defence met the same fate as he failed to explain why he had not informed his legal representative that he had bought the gas gun on the day when the complainant was robbed, which was the very same day of his arrest. It was never suggested to the State witness that that was the case.

[10] As previously pointed out, at the heart of this appeal is the identification of the appellants and the correct evaluation of the evidence. There is nothing to suggest that there was a misdirection on the part of the court a quo when it accepted that the

complainant positively identified the appellants as he never lost sight of his assailants, visibility was good, the first appellant was identified and arrested within the vicinity of the robbery. Both appellants were positively identified in the photo identification by the complainant.

[11] The court a quo found that the second appellant's possession of the gas gun and the photo identification by the complainant linked him directly to the robbery. It correctly found that the doctrine of recent possession applied to the second appellant. The second appellant was arrested by Warrant Officer Mchunu who, whilst performing community services at the Plessislaer Police Station, received a report that someone was in possession of a firearm at Sweetwaters. This led to the search of the room of the second appellant in his presence, where the gas gun belonging to the complainant was found in his possession. This finding happened on the very same day of the robbery, by the police officers, not linked to the arrest of the first appellant. I find that the court a quo correctly rejected the second appellant's defence that he had bought it from someone else, as that version was never suggested to any of the state witnesses.

[12] The issue of recent possession is a factual question. In *S v Mavinini,*[1] possession of a motor vehicle less than 24 hours after the robbery taken together with the accused's conduct was accepted as suggesting his involvement in the robbery. The Supreme Court of Appeal in *S v Mothwa*[2] affirmed the principles in *S v Skweyiya*[3] in that the court must be satisfied that:

'*(a)* the accused was found in possession of the property; and *(b)* the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between possession and the actual offence, the rareness of the property, and the readiness with which the property can or is likely to pass to another person.' (Footnote omitted)

[1] *S v Mavinini* 2009 (1) SACR 523 (SCA).
[2] *S v Mothwa* 2016 (2) SACR 489 (SCA) para 8.
[3] *S v Skweyiya* 1984 (4) SA 712 (A).

[13] In *Zwane & another v The State*,[4] quoted with approval in *Mothwa* above, the court stated:

'The inference that a person found to be in possession of recently stolen property is the thief or one of the thieves (or, in this instance, one of the robbers) can only be drawn as the only reasonable inference where the nature of the goods stolen and the time lapse between the theft (or robbery) and the discovery of the goods in that person's possession lend themselves to such a finding (see *S v Parrow* 1973 (1) SA 603 (A) at 604B-E; *S v Skweyiya* 1984 (4) SA 712 (A) at 715 C-D; *S v Mavinini* 2009 (1) SACR 523 (SCA) para 6). The crucial question would be whether the items concerned are of the type which can easily and quickly be disposed of, in which event anything beyond a relatively short time lapse cannot be said to be recently stolen (see *Skweyiya* at 715E). In my view the items found in the trunk of the car had little or no value to the robbers and are of the type that can be disposed of quite easily. These items were found in the trunk the very next evening after the robbery. It is in my view a sufficiently short time lapse to justify invoking the doctrine of recently stolen property. But that is only one side of the case. The other side is the defence evidence of the first appellant and Ms Mathlaba, set out above.'

In general, objects such as firearms and cellphones exchange hands very quickly. In the present case, it is important to note that this was a gas gun without the magazine and the police who recovered it described it as a 'toy gun', in that regard it could not be disposed as quickly as possible or at all by the second appellant.

[14] The court a quo considered the discrepancies, the contradictions with regard to the evidence of the complainant and Warrant Officer Ngubane as to the type of shirt that was worn by the first appellant. The court correctly found that these were not material discrepancies and had no effect on the totality of the evidence. There was no misdirection on the part of the court a quo in finding that the versions of the two appellants were a fabrication. In conclusion we are satisfied that the court's approach to the evaluation of evidence was correct. It considered the totality of the evidence. The court a quo correctly concluded that the appellants were positively identified and that the versions given by the first and second appellants were false.

[15] It is trite that a court will only interfere with sentence if the trial court misdirected itself in passing sentence. Moreover, a misdirection alone does not

[4] *Zwane & another v The State* [2013] ZASCA 165 para 11.

suffice for a court of appeal to interfere. A misdirection should be material, as expressed by Trollip JA in *S v Pillay.*[5] In *S v Malgas*[6] the court stated that:

'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 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" . . . in the latter situation the appellant 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. No such limitation exists in the former situation.'

[16] The court found substantial and compelling circumstances in respect of both appellants, which led to the sentences of eight and twelve years' imprisonment respectively. It found that the first appellant had good prospects of rehabilitation as he had no previous convictions. The only difference in the sentences lay with the fact that the second appellant was no stranger to the courts' of law. He already had two previous convictions for robbery. In my view, because of his previous brushes with the law, the sentence of twelve years imprisonment imposed by the court a quo still shows that the aims of sentencing being the general deterrence, personal deterrence, rehabilitation and retribution were taken into account. It is clear to me that the second appellant had not learnt any lesson from his previous convictions. I find that there was no discrepancy in sentencing.

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[5] *S v Pillay* 1977 (4) SA 531 (A) at 535E-H.
[6] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

[17] I am therefore of the view that the sentence imposed by the court a quo on the second appellant does not induce a sense of shock.

[18] Accordingly, I make the following order:

1. The appeal against conviction in respect of the first appellant fails.
2. The appeal against conviction and sentence in respect of the second appellant fails.
3. The convictions and sentences imposed on both the appellants by the trial court are confirmed.

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Mbatha J

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Gyanda J

Date of hearing	:	17 August 2018
Date Delivered	:	27 August 2018

Appearances

For the Appellants	:	Mr BC Mbatha
Instructed by	:	Justice Centre Pietermaritzburg
For the Respondent	:	Adv J Khathi
Instructed by	:	The Director of Public Prosecutions Pietermaritzburg