IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A321/2010

DATE: 15 OCTOBER 2010

In the matter between:

AUBREY WELKOM 1st Appellant

JOHAN VISAGIE 2nd Appellant

and

THE STATE Respondent

J U D G M E N T

JOHN ROGERS, AJ:

On 21 January 2010, the appellants were convicted in the Wynberg Regional Magistrate's Court on a charge of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977, and both sentenced to eight years direct imprisonment. Each of the appellants appeals, with leave of the court *a quo,* against both conviction and sentence. The convictions and sentences followed a trial at which both appellants pleaded not guilty and were represented throughout by Ms F Kinnear of the Athlone Justice

Centre, Legal Aid.

Conviction:

The robbery of which the appellants were accused was against one Franklin Witbooi, whom they were alleged to have stabbed and hit with a blunt object on or about 8 November 2008, at or near Athlone, with intent to steal cash of R650,00 from him. The State relied on the testimony of a single witness, namely Witbooi. Each of the appellants testified in his own defence and neither called any further witness.

Witbooi testified that on the night of 8 November he had been walking from visiting one friend to visit another in Vygieskraal. He was alone and it was after 9 p.m. and there were no street lights. He had not had anything alcoholic to drink. As he was walking, someone seized him from behind by his belt. He struggled to free himself and in doing so, turned and saw that it was the second appellant, Visagie, whom he knew from living in the same area for some time. He told Visagie to release him and Visagie told him just to stand still and hand over his money.

With Visagie, was the first appellant, Welkom, whom Witbooi also knew from living in the same area for some time and one

known to Witbooi as Papbek. Welkom hit Witbooi on his left arm with a *piksteel* and Papbek stabbed Witbooi in the arm with a screwdriver and then put his hand in Witbooi's jacket pocket and withdrew R650,00. Welkom, Visagie and Papbek then ran away with the money. Witbooi was left with open wounds on his arm and his hip. He went home and the following day he reported the incident to the police. He identified Welkom and Visagie to the police as two of his assailants and took the police to their addresses. Welkom and Visagie were then arrested. Witbooi never recovered his money.

Welkom initially denied knowing Witbooi. Subsequently he acknowledged that Witbooi and he lived close to one another and saw each other frequently. He also initially denied knowing anything about the robbery. Subsequently he said that he had in fact seen Witbooi that night. He and Visagie had been together drinking. At 11 p.m. they were on their way home and were passing a shop. They saw Witbooi who asked them whether they had seen three people. They answered that they had not, whereupon Witbooi began abusing them. They took no further notice of Witbooi and walked on. There were a number of other people in the vicinity.

None of this had been put to Witbooi, and when asked in

cross-examination why that was so, Welkom said that he had not been asked about it by his attorney. During cross-examination, Welkom said that Witbooi had been drunk. This was something that he had not said during his evidence in chief. Welkom acknowledge during cross-examination that there was no bad blood between Witbooi and him and could not suggest any reason why Witbooi would incriminate him falsely. In response to questions by the court, Welkom said that he had heard of Papbek and that he had been arrested at his home the morning after the robbery.

Visagie denied knowing Witbooi at all or even having seen him previously. He said that he had been with Welkom on the night of the robbery. They had been drinking and were on their way home. At a shop he bought some cigarettes, and as they were leaving, Witbooi confronted them. Witbooi was drunk and asked Welkom whether he had seen three people. At that Visagie's mother approached and he left with her. There were also other people in the vicinity. The following morning Witbooi and two others came to Visagie's home and assaulted him. Again none of this had been put to Witbooi, although in response to a question by the court, Visagie said that he had given his version of events to his attorney. Visagie could not suggest why Witbooi would incriminate him falsely, other than that Witbooi may have been offended, because he could see

the night before that Visagie was not concerned about him.

In terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent witness. However, the well known cautionary rule requires that the evidence of a single witness be treated with care. Relevant considerations in evaluating the reliability of evidence of identification by a single witness include whether the person identified was previously known to the witness and whether there was a proper opportunity for identification by the witness of the person identified. S v Mthetwa 1972(3) SA 766 AD at 768A-C.

In the current instance the learned magistrate considered Witbooi to be a credible and trustworthy witness. He had given his evidence in a straightforward and logical manner and had not given the impression of seeking to conceal anything or to incriminate the appellants falsely. As to the reliability of Witbooi's identification of the appellants, it was dark and Witbooi would have been alarmed and suffered a measure of pain. However, it would not have been pitch dark, and the appellants were within touching distance of him. Moreover, he must have known the appellants and their addresses as he testified. Welkom clearly knew who Witbooi was and where he lived, and no other explanation was offered for the arrest of

Visagie the following morning.

The learned magistrate properly went on to consider whether the versions of the appellants could nevertheless reasonably possibly be true. He concluded that they could not and that the appellants had clearly been untruthful. He pointed out in this regard that in testifying to having come across and spoken with Witbooi the evening of the robbery, the appellants had clearly deviated from instructions to their attorney and that they had also sought to mislead the court as to their knowing Witbooi.

In the circumstances the learned magistrate held the identification of the appellants by Witbooi, as perpetrators of the robbery against him, to be reliable. I see no reason to question the correctness of the verdict reached by the learned magistrate or his reasons for arriving at that conclusion. A trial court has the benefit of seeing, hearing and appraising witnesses and there does not seem to me to be anything in the record to suggest that the learned magistrate was wrong in his evaluation of the evidence.

The appellants clearly did not tell their attorney of having come across and spoken with Witbooi the evening of the robbery, otherwise she would undoubtedly have put it to

Witbooi. It follows that Visagie's evidence that he did furnish his attorney with the version to which he testified, is not credible. Given the obvious importance thereof, Welkom's evidence that he did not furnish his attorney with the version to which he testified because he was not asked about it, is also not credible.

It is also noteworthy in my view, that neither of the appellants called any witness to corroborate the version of their having coming across and spoken to Witbooi the evening of the robbery, notwithstanding that according to Visagie, his mother had come along while that was happening and that according to both appellants, there had been others in the vicinity.

I consider the circumstances to have been such that Witbooi would have been quite capable of identifying as perpetrators of the robbery against him, individuals known to him, as it seems clear the appellants were, and I agree with the learned magistrate that with Witbooi having no axe to grind with the appellants, it is improbable that he would falsely have incriminated them.

Sentence:

Section 51(2)(i) of the Criminal Law Amendment Act 105 of 1977, read with Part II of Schedule 2 thereto and section

51(3)(a) thereof, provides for minimum sentences of imprisonment for varying periods to be imposed on various classes of offenders convicted on the charge of robbery with aggravating circumstances, unless in the instance the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

As to the personal circumstances of the appellants, the learned magistrate took into account that Welkom was only 18 and Visagie only 19 at the date of the robbery. Visagie had no previous convictions and Welkom had one conviction for theft committed on 7 May 2007, for which he had merely been cautioned and discharged. Welkom had reached Standard 5 at school and had been working as a general labourer at a wage of R400,00 per week for a year at the time of his arrest. Visagie had reached Standard 8 school and had been working as a general labourer at a wage of R500,00 per week for two and a half years at the time of his arrest. Visagie had a six year old child living in Kimberley, for whom he regularly sent contributions towards maintenance on a voluntary basis. Both appellants had been in custody from the time of their arrest, i.e. for a period of about 14 months as at the date of the sentence.

As to the crime, the learned magistrate took account of the

fact that while armed robbery was always a serious crime, the robbery in question, in which the weapons used were a *piksteel* and a screwdriver, and in which the complainant had been injured, but evidently not severely, was not on a par with the more serious categories of armed robbery with which the court had frequently to deal. Nevertheless the kind of thuggery in which the appellants had indulged could not be tolerated on the streets and a strong message had to be sent to the community that it would be heavily punished. Witbooi had also not recovered his money. In the circumstances the learned magistrate held, correctly in my view, that substantial, that compelling circumstances existed which justified the imposition of lesser sentences on the appellants than the prescribed minimum sentences. He then proceeded to sentence each of the appellants to direct imprisonment for a period of eight years.

In the absence of material misdirection, an appeal court only interferes with a sentence imposed by a trial court if the disparity between the sentence of the trial court and the sentence which the appeal court would have imposed, had it been the trial court, is so marked that it can be properly be described as shocking, startling or disturbing inappropriate. S v Malgas 2001(1) SACR 469 (SCA) at para 12.

It is trite that youth is a factor to be taken into account in matters of sentence, although in a particular case the nature of the crime might be such as to reduce any mitigating effect of youth, among other reasons because of the protection society may need against the particular offender. See S v Maarman 1976(3) SA 510 (A) at 513A-B.

In S v Hawthorne & Another 1980(1) SA 521 (A), it was held that a trial judge in imposing sentence could take into account the fact that the accused had been in detention for a long time and could apply that fact for the benefit of the accused by making the period of imprisonment, which was actually imposed, shorter than it would otherwise have been.

In my view, without minimising the seriousness of the crime or armed robbery, and mindful of the need to quell crimes of violence, a sentence of direct imprisonment for eight years, after a period of 14 months in custody, for youthful culprits, who were effectively first offenders, and who were in regular employment before their arrest, and, in the case of Visagie, who was voluntarily maintaining a child, for a crime in which the weapons used were items not designed as weapons, in which serious injuries were not caused and in which relatively little was taken, is disturbingly inappropriate.

I consider a period of direct imprisonment for each appellant to have been appropriate, but blending the need to send a strong message to the community that crimes of the kind in question will not be tolerated with an element of mercy, and to provide an incentive for the appellants to mend their ways, I would have imposed on each of the appellants a sentence of imprisonment for eight years, of which three were suspended for a period of five years from the date of his release, on condition that he was not convicted of a crime involving theft or attempted theft or violence or a threat of violence committed within that period.

Conclusion:

I would accordingly dismiss the appeals against the convictions, but uphold the appeals against the sentences and substitute for the sentence in respect of each appellant, a **SENTENCE OF IMPRISONMENT OF 8 (EIGHT) YEARS OF WHICH (3) THREE YEARS ARE SUSPENDED FOR A PERIOD OF 5 (FIVE) YEARS FROM THE DATE OF HIS RELEASE** on condition that he is not convicted of a crime involving theft or attempted theft or violence or the threat of violence committed within that period.

JOHN ROGERS, AJ

GRIESEL, J: I agree. It is so ordered.

GRIESEL, J