IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: A341/09

In the matter between

LUVUYO NGUBO Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 04 FEBRUARY 2011

SAMELA, J

[1] The Appellant was charged with one count of robbery with aggravating circumstances, in the Cape Town Regional Court, Western Cape, on the 15th December 2006. The allegations were, that: on or about 15 December 2006 and at or near Milnerton, the Appellant did unlawfully and intentionally assault Richard Smith, and did then and there, with force, take from him a Corsa bakkie with registration number CA 148192.

[2] The Appellant pleaded not guilty, exercised his constitutional right and elected to remain silent, giving no plea explanation. After evidence was led, on the 12th December 2008, he was found guilty as charged and sentenced to seven (7) years' imprisonment. With the leave of the court *a quo* he now appeals to this court against conviction and sentence.

[3] Ms Kloppers argued on Appellant's behalf that:

(a) the court *a quo* erred in its findings that the State proved its case beyond reasonable doubt;

(b) the court *a quo* failed to apply the cautionary rule to a single witness' testimony which identified the Appellant;

(c) the victim could not remember how he alighted from the motor vehicle as the incident happened quickly;

(d) the victim's powers of observation in all probability was diminished by the trauma of the incident;

(e) the victim could not precisely describe the Appellant at the police station save to say that the one who drove the car wore a red shirt with stripes;

(f) the court *a quo* erred in accepting that the Appellant's version was not reasonably true;

(g) the Appellant was 24 years old, single, unemployed with one dependant, a child of 2½ years;

(h) the Appellant completed grade 8 as well as N1, N2 and N3 certificates in boiler-making;

(i) the Appellant was a first offender;

(j) the complainant did not suffer any physical injuries; and

(k) the motor vehicle was recovered on the same day free from any damages.

[4] The State called three (3) witnesses, namely, Richard Smith, Constable Anton van der Merwe and Eric Putuma. Mr Smith testified that he was employed as a driver at Breco Seafoods. On the 15th December 2006 at about 2 pm was on his way to the bank in a company car, which was an Opel Corsa 1400 with registration number CA 148192. At the time of driving, the driver's side was unlocked and the window was open. When he stopped at a stop street, a gun was pointed at his face. He did not know how he got out of the vehicle. Two black males got into the vehicle, the gunman on the passenger side, and the one wearing a red shirt on the driver's side. Simultaneously, a police van stopped in front of the bakkie on the sidewalk. The robbers drove away being pursued by a police van. Eventually the robbers stopped in a cul de sac at Joe Slovo. The two occupants got out and ran away chased by the police.

The driver (one of the robbers) was arrested. Later at the police station the complainant was able to identify him and his bakkie. Constable van der Merwe confirmed Mr Smith's version. He testified further that as Mr Smith stood at the crime scene, he was pointing at the Corsa bakkie. He informed them that he had been robbed of his bakkie and bag. Constable van der Merwe told the court that the bakkie which they chased was between 15 and 20 metres in front of their van, and they never lost sight of it. When the bakkie stopped and the two occupants ran away, he chased the Appellant, and had realised that the Appellant was unarmed. The Appellant ran and jumped onto a shack's roof, and he pulled the Appellant down and arrested him. Mr Putumo, a security guard, confirmed seeing the robbery and ran to report the incident to his boss.

[5] The Appellant denied that he was on the crime scene. He testified that he was from Langa going to see a friend at Joe Slovo. He had an appointment to meet with his friend at Mapindi's Tavern. On arriving at Joe Slovo he went to his friend's place and did not find him. On his way to the tavern, he met the police who arrested him.

[6] Mr Pillay argued on the State's behalf that:

(i) the complainant's robbery took place during broad day light;

(ii) the Appellant was correctly identified by the two state witnesses, namely, Smith and van der Merwe;

(iii) in this case a firearm was used to rob the complainant of his motor vehicle;

(iv) the court *a quo* correctly believed the state witnesses' versions and also that they were good witnesses;

(v) the court *a quo* took all the relevant factors as mentioned by Ms Kloppers into account.

[7] The crux of the appeal is whether the Appellant was correctly identified by the victim and his witness.

[8] Considering the identification aspect of the accused, it is indeed trite law that when dealing with identification, a court must take care to ensure that witnesses are not

only honest, but their identification of the accused is reliable, see **S v Mthetwa** 1972 (3) SA 766 (A) at 768 A-C.

[8] In this case, the credibility of the complainant and his witness cannot be seriously challenged. This is on account of factors which contribute and confirm the reliability of the state witnesses' versions from the record. These are:

(a) the complainant's description of the robber that was driving as far as his height and clothing worn accords with what the police found;
(b) the incident happened during the day;
(c) each witness identified the Appellant independently;
(d) each witness was certain that the Appellant was one of the robbers;
(e) Constable van der Merwe chased, arrested the Appellant who was at all times in his sight;
(f) the Appellant's explanation for going to his friend's place instead of going to the tavern as per appointment does not make sense.

Against the aforesaid factors, the court *a quo* was justified in accepting that the Appellant was correctly identified by the victim and his witness.

[9] Considering the totality of the evidence presented by the witnesses, the Magistrate correctly accepted their evidence. The Appellant's version is highly improbable and cannot be believed. It is therefore difficult to visualise why the witnesses would falsely implicate the Appellant in this matter.

[10] Looking at all the above, I am of the view that the Appellant was correctly convicted by the court *a quo*. It is also important to record that the Magistrate made significant credibility findings in favour of the witnesses. The witnesses' versions were consistent, reliable and there is no reason to criticise these findings.

[11] The Appellant's version is difficult to follow. His explanation is not convincing at all. I am of the view that the Magistrate correctly ruled on the evidence before her. The appeal has no merit in respect of the conviction.

Regarding sentence, only the addresses by the defence and the state are reflected in the court's record, the Magistrate's part regarding sentence and reasons is missing. In the court's record there is a signed copy of the purported notes by the Magistrate. In the interests of justice, I am of the view that this court should proceed with the documents before it and conclude this case without delay.

[12] The imposition of an appropriate sentence falls entirely within the discretion of the trial court. Unless the trial court has imposed a sentence which induces a sense of shock or misdirected itself, which misdirection should appear *ex facie* the record, a court of appeal would not lightly interfere with the sentence imposed by the trial court. See **S v Ntsele** 1998 (2) SACR 178 (SCA).

[13] The offence the Appellant committed is a very serious offence and the interest of the society needs to be protected against offenders. At the same time, the interest of the society needs to be balanced against that of an offender and the seriousness of the offence. It would seem to me in the circumstances of this case, that the sentence is not shockingly inappropriate.

[14] In the result I accordingly propose the following:

The appeal is dismissed and the conviction and sentence are confirmed.

SAMELA, J

I agree and it is so ordered.

ALLIE, J