IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A15/2011

DATE: 15 APRIL 2011

In the matter between:

SHAHIED JOHNSON 1st Appellant

DEON JACOBS 2nd Appellant

THULANI HLALUKANA 3rd Appellant

and

THE STATE Respondent

J U D G M E N T

SABA, AJ:

The appellants, who were legally represented throughout the proceedings, were convicted on a charge of robbery with aggravating circumstances on 29 September 2009. On the same date the first and third appellants were sentenced to 18 years imprisonment and the second appellant was sentenced to 13 years imprisonment. With the leave of the court *a quo*, they now appeal against sentence.

The state case is based on the evidence of the following witnesses. Matthew Grant Browse testified that on 2 April 2008 he was with a group of friends, namely Thomas Key, David Banks, Roman Mellett, Gareth, who were painting murals on the walls in Hatfield Park as part of their visual art studies when the second appellant approached them and talked to them about how he liked their painting works and then left. Second appellant came back, followed by the first appellant, third appellant and other unknown persons. The third appellant, who had a knife, took his Nokia 3200 cell phone from his bag.

He saw Mellett throwing his cell phone over the wall. The appellants and the unknown men ran down the road. Gareth shouted for security guards to come and assist, while his other friends chased the men. The second appellant and third appellant were later found in a taxi and on being searched, Banks' cell phone was found on the second appellant and nothing was found on the third appellant, and the two were arrested. While they were at the police station, the first appellant was brought in by the police.

David Michael Banks testified that he spoke to the second appellant for about 20 minutes at the park. After some time he noticed that he was no longer there. He saw him again with

the first appellant and other male persons and the first appellant came to him carrying a knife. The other male person went to Gareth and Gareth handed over his cell phone. He took his V3 Motorola cell phone and gave it to the first appellant. He then asked for his SIM card, but the first appellant threatened him with a knife. The suspect regrouped and then left.

Two of his friends went to find security guards at Hatfield Station, while he and the other friends chased the suspects with the assistance of police and security officers until they saw the two suspects jumping inside the taxi. The first and second appellants were pulled out of the taxi and when they were searched, his and Gareth's cell phones were found on them.

Thomas Keyes testified that the second appellant asked for a cool drink that was next to his friends and they ignored him and he stayed with them for about an hour and a half and then left. He came back later with four other persons who asked their names to be written on the wall and when they ignored them, the second appellant went to close the gate and the others, including the first and third appellant surrounded them with knives. These male persons demanded their cell phones and thereafter his black Nokia 2630 cell phone and a wallet

containing bank cards and a sum of R300,00 were taken from him by two men who did not appear in court.

Three of his friends ran to Hatfield Station to call security officers, while he and two other friends chased the suspects through the main road. With the help of the security and police officers, the first and second appellants were pulled out of the taxi and arrested and that he only saw the first appellant when he was brought at the police station.

Jan Venter, a security officer at Hatfield Park Station testified that on 2 April he was at the railway station when two white males came to the station, running and screaming that they had been robbed. They pointed the direction where the robbers ran to. He and a colleague gave chase and found two of the suspects inside a taxi. They searched them and found a Samsung and Motorola V3 cell phones, a metal cigarette case and a cigarette lighter. They handed them to the police, who arrested them. They later found the first appellant in a flat nearby, laying under the blankets with a knife.

Raymond Adams then testified that while he and Constable Hattingh were patrolling across the railway line at Hatfield Station on 2 April 2008, they saw five unknown men running across the railway line. He then saw two young males of about

16 to 18 years running and shouting that they had been robbed of their cell phones by men who ran across the railway lines. They gave chase and later saw two suspects getting into a taxi. They pulled the suspects, who happened to be second and third appellants out of the taxi. They searched them and found the victims' cell phones and a black wallet.

Shahied Johnson, the first appellant, testified that on 2 April he was at a pub in Cape Town where he had been drinking a lot of beers and wine with his friend, Saartjie. He later boarded a taxi to Saartjie's flat, where they passed out. He was woken up by police and security guards, who said he was part of a group of people who committed robbery. He was searched and his Chocolate, a Razor Motorola cell phone, money and cigarettes were found. He was told that the phone belonged to the people who were robbed. He denied that he was found by the police hiding under the blankets, having a big knife. He denied taking part in the robbery. He said he did not know the other appellants and had never seen them.

Deon Jacobs, the second appellant testified that on 2 April 2008 he went to Village Laundry, to a lady called Aunty Helen, who would help him open a bank account. He ended up in Claremont Main Road. When he was about to approach a taxi, a Venture motor vehicle stopped and four or five men jumped

out and informed him that he robbed certain people. He was taken to this Venture and a few minutes afterwards the third appellant was brought in. He was searched and his bank details, matriculation certificate were found. The police officer then drove towards the park and people in the park looked at his face and said he could be one of the robbers. He was arrested and taken to the police station.

Thulani Hlalukana, the third appellant, testified that on 2 April 2008 he was in a taxi to Wynberg and a police car stopped the taxi. Police and security officers opened the taxi and asked who the last person to get into the taxi was, and they were told that it was him. Police officers took him out of the taxi, searched him and found his wallet and his Samsung D500 cell phone. After that they took him to the Venture which was parked behind the taxi and he was assaulted and asked about the cell phones that were robbed. After that, a security officer found a cell phone on the floor inside the taxi. He and the second appellant were taken to the police station. He denied that a cigarette lighter and a metal cigarette holder were found on him and also denied taking part in the robbery at the park. He said the second appellant was not known to him at the time of their arrest.

The appellants' grounds of appeal are that the magistrate

erred in overemphasising the interests of society and under-emphasising the personal circumstances of the appellants, that he failed to consider an element of mercy and that the sentence he imposed was shockingly inappropriate. In S v Rabie 1975 (4) SA 855 (A) at 857D-F, the following was stated:

> "In an appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal should be guided by the principle that a punishment is pre-eminently a matter for the discretion of the trial court and should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'. The test is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

The record shows that the magistrate adequately addressed the personal circumstances of the appellants, the seriousness of the offence, as well as the interests of society, without overemphasising or underemphasising any. He correctly found that there were no compelling and substantial circumstances justifying a departure from a minimum sentence prescribed.

In sentencing the first and third appellants to 18 years imprisonment, the magistrate indicated that the first and third appellants each had a previous conviction for robbery and, therefore, a minimum sentence of 20 years imprisonment was applicable in their case. I find this to be a misdirection for the reasons that follow. The crime of robbery where aggravating circumstances are found to be present falls within the ambit of Part II of Schedule 2 of the Minimum Sentences Legislation. Part II specifically refers to robbery when there are aggravating circumstances. Section 51(2)(a) of Act 105 of 1977, dealing with sentences to be imposed, provides the following:

> "Notwithstanding any other law, but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence, referred to:
>
> (a) Part II of Schedule 2 in the case of;
>
> (i) A first offender to imprisonment for a period not less than 15 years.
>
> (ii) A second offender **of any such offence**, to imprisonment for a period not less than 20 years."

There is no indication that the first and third appellants were

previously convicted of robbery where aggravating circumstances were found to be present. What appears from the list of their previous convictions is the crime of robbery plain. The words **of any such offence**, in my view, mean that a person has to be convicted of the same offence, in this case robbery when there are aggravating circumstances as stated in the Act, that is before he can be treated as a second offender for purposes of imposing a minimum sentence of 20 years imprisonment.

The minimum sentence applicable to the first and third appellants is 15 years imprisonment and the sentence of 18 years imprisonment imposed by the magistrate, therefore justifies interference. Considering the fact the second appellant was the mastermind behind this robbery, this court cannot find any grounds for interfering with his sentence of 13 years imprisonment.

In the result, the following order is proposed:

1. The appeal against sentence in respect of appellant 2 is dismissed.

2. The appeal against sentence by appellants 1 and 3 are upheld.

3. The sentence of 18 years imprisonment in respect of appellant 1 and 3 are set aside and substituted with a sentence in each case of 15 years imprisonment.

4. The sentence is backdated to 29 September 2009 in terms of section 282 of the Criminal Procedure Act 51 of 1977.

SABA, AJ

BINNS-WARD, J: I agree with order proposed. I would only remark that in my view the magistrate was misdirected in finding the existence of substantial and compelling circumstances to deviate from the prescribed minimum sentence in respect of appellant 2, but as notice has not been given to that appellant ~~with~~ in respect of the possibility of that sentence being increased by the court, he may count himself fortunate. An order in the terms proposed by Saba, AJ is, therefore, granted.

BINNS-WARD, J

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