THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No:

322/11

In the matter between

HLANGANANI SIHLOBO DUBE
Appellant

and

THE STATE
Respondent

Neutral citation: *Dube v The State* (322/11) [2011] ZASCA 236 (30 November 2011)

Coram: PONNAN, MHLANTLA and BOSIELO JJA

Heard: 22 November 2011

Delivered: 30 November 2011

Summary: Criminal Law – appeal against conviction and sentence – robbery with aggravating circumstances and reckless driving – whether appellant was properly identified as perpetrator – no reason for appeal

court to interfere – convictions and sentences confirmed.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Omar AJ and Makgoka J sitting as court of appeal):

The appeal against the convictions and sentences is dismissed.

JUDGMENT

MHLANTLA JA (PONNAN and BOSIELO JJA concurring):

[1] On 2 November 2006 at approximately 10h00, Milan Ignatof (the complainant) was driving his motor vehicle in McKenzie Park, returning to his workplace after withdrawing an amount of R120 000, which was to be utilized to pay wages to some of his employees. He was talking to a client on his cellular phone when a motor vehicle ahead of him suddenly slowed down and a bakkie that had been stationary until then drove into his motor vehicle, effectively causing a collision. He initially surmised that this was a genuine collision but later realized that a robbery was in progress. Three robbers were involved, two of whom had firearms in their possession. Before the complainant could react one of the robbers pointed a firearm at him and demanded the cash. He was robbed of the R120 000, his wallet containing R600 cash, credit cards and his medical aid card as well as his Nokia cellular phone. The robbers thereafter casually walked

away from the scene.

[2] Shortly after the robbers had left the scene, paramedics in the employ of ER 24 drove past. He flagged them down and alerted them to the occurrence of the robbery. They contacted the South African Police Services (SAPS) flying squad which arrived at the scene within five minutes of the robbery. The complainant provided the police officers with the description of the robbers, that is, the type and colour of clothing worn by them as well as their physical appearances.

[3] The police set out in pursuit of the robbers. Constable Rodney Ramaroka, a member of the flying squad, saw a person wearing dark trousers and a red top, who did not seem to know where he was going, walking up and down the street. Ramaroka was suspicious of him but did not arrest him and kept on patrolling. He saw another person who wore a grey polo neck, grey trousers and shoes near a certain house. This fitted the description of one of the suspects provided by the complainant. Ramaroka saw this person enter a certain residential premises. He confronted him and asked for his identification and the purpose of his visit at that house. The man replied that he was the owner. He later established that the man was not the owner but had sought refuge there. He arrested the suspect and took him to the scene where he found the other suspect. He immediately recognised the person as the one he had seen earlier, wandering near an open field. Inspector Mooka attached to the Crime Combating Unit of the SAPS, received a report from radio control. He is the one who arrested the second suspect whose clothing fitted the description provided. Mooka found a Nokia cellular phone in

his possession. The two suspects were formally charged. The complainant subsequently attended an identification parade where he positively identified the appellant as one of the robbers.

[4] The appellant and his co-accused were charged in the Regional Court, Benoni of robbery with aggravating circumstances. The appellant also faced a charge of reckless or negligent driving. At the commencement of the trial the appellant tendered a plea of not guilty. In amplification of his plea in terms of s 115 of the Criminal Procedure Act 51 of 1977, he explained that he had gone to McKenzie Park to seek casual employment and had no knowledge of the robbery. According to him, his arrest was motivated by a xenophobic mindset on the part of the police since he was a Zimbabwean national; that the police had assaulted him and compelled him to admit that he was the driver of the bakkie.

[5] During the trial the complainant also identified the appellant whilst the latter was sitting amongst five other persons in the dock. The former further elaborated that the physical appearance of the appellant had changed as he had lost some weight since the robbery. He was adamant that the appellant was one of the robbers. He identified the appellant as the person who had driven into him and he had clearly seen his face at that stage. The police officers corroborated the complainant's version in regard to the arrest of the appellant. The appellant denied ever committing the offences. Repeating his allegation that his arrest was as a result of the xenophobic tendencies of the police, he further claimed that the complainant had conspired with the police officers to falsely implicate him.

[6] On 22 November 2007 the regional magistrate rejected the appellant's version as not reasonably possibly true and accepted the State's version. He convicted the appellant of robbery with aggravating

circumstances and reckless driving. The magistrate imposed a sentence of 15 years' imprisonment for the robbery and 12 months' imprisonment in respect of reckless driving. He thereafter dismissed the appellant's application for leave to appeal against the convictions and sentences imposed.

[7] The North Gauteng High Court, Pretoria subsequently granted the appellant leave to appeal against his convictions and the sentences imposed. His appeal was dismissed by Omar AJ (Makgoka J concurring). These are the reasons why the court below dismissed the appeal:

(a) The court below characterized the evidence as circumstantial and held that the magistrate had correctly found that the police officers had corroborated the version of the complainant in every material respect;

(b) The magistrate had correctly found that the appellant and his co-accused had contradicted their versions;

(c) The court below accordingly rejected the version of both that they were victims of circumstances and found that their version was false.

(d) In regard to sentence, the court below held that the appellant, who had been legally represented, was at all times aware that the minimum sentence legislation was applicable. It thus confirmed the convictions and sentences imposed.

[8] The court below dealt with the case briefly and after dismissing the appeal in a four page judgment, surprisingly granted the appellant leave to appeal further to this court.

[9] The issue on appeal is whether the State has succeeded in proving the identity of the robbers beyond reasonable doubt. Put differently, whether the appellant was one of the perpetrators. In regard to sentence, the question is whether the sentence is excessive and induces a sense of shock.

[10] Before the commencement of the appeal we advised the appellant, who was not legally represented, of his right to legal representation in terms of s 35(2)(b) and (c) of the Constitution. We further indicated that arrangements would be made for him to obtain the services of counsel to assist him should he so wish. We also secured the services of a sworn interpreter. The appellant declined the offer of both and presented his own case. He did so proficiently in English.

[11] The appellant submitted that the State's case rested on the evidence of a single witness in regard to the robbery. The crux of his challenge related to the circumstances leading to his arrest and subsequent identification by the complainant. In so far as his arrest was concerned, the appellant submitted that it did not make sense how Ramaroka, who had seen him walking in the street, could have continued patrolling the area and not arrest him, if he were a suspect and the complainant had provided his description.

[12] Regarding this challenge, there is no doubt that the description of the suspects had been provided by the complainant. What is not clear is the manner in which the information was relayed to the officers. One has a sense that each police officer was on a look-out for a suspect fitting a particular description. This would explain Ramaroka's decision not to arrest the appellant as at that stage he was on the look-out for a person wearing grey trousers and a grey polo-neck. Indeed Mooka testified that he had received information from radio control and was provided with a description of a short, plump suspect wearing a red t-shirt. This turned out to be the appellant. The police officers placed the appellant and his co-accused in the vicinity shortly after the robbery had been committed. They arrested two suspects who fitted the description provided by the complainant. They corroborated each other and the complainant in regard to the description of the robbers. In my view, there in nothing implausible in the manner in which Ramaroka and Mooka effected the arrest of the appellant and his co-accused.

[13] The appellant assailed Mooka's version that he had seized a cellular phone from him. His criticism was that Mooka had not

requested the complainant to identify it. This issue can be disposed of relatively simply. That a cellular phone had been found on him and that it had not been shown to the complainant is thus wholly irrelevant in the determination of the appellant's guilt.

[14] The main attack by the appellant relates to the identification of him as one of the robbers. He submitted that the complainant had conspired with the police officers to falsely implicate him. In this regard he contended that the complainant had been able to identify him at the identification parade because the police had brought him to the scene after his arrest for an informal parade. He accordingly submitted that no reliance could be placed on the evidence adduced on behalf of the State.

[15] This submission has no merit. There was direct evidence of identification of the appellant as one of the robbers. The evidence adduced by the State linking the appellant to the offences consisted of the eyewitness testimony of the complainant including the report about the identification parade. There was also the evidence of the arresting officers. The complainant identified the appellant as one of the robbers. According to him, the appellant was the person who drove the bakkie and collided with his vehicle. He further testified that the appellant was never brought to him whilst at the scene. He had already provided a description of the appellant as he had seen his face during the collision. The complainant identified him at an identification parade from a line-up of about 20 men. He again identified the appellant in court amongst five men and made certain observations and remarks about the appellant's physical condition. In my view, this was direct evidence and the court below erred when it characterized this evidence as circumstantial.

[16] The appellant's version on the other hand was that the police officers had brought him to the complainant at the scene of the robbery to identify him. According to the appellant on that occasion the complainant

informed the police that the appellant had not been involved in the robbery. According to him, the complainant later conspired with the police to falsely implicate him. This was motivated by xenophobia on their part.

[17] The appellant's version does not make sense. He wants the court to believe that the complainant, who had initially exonerated him at the scene, later conspired with the police to falsely implicate him and in the process protect the real robbers. This conspiracy would involve planning with the police who came from different units. There is no evidence that the police officers knew the complainant. If the appellant is to be believed, something must have happened to the complainant to change his version and thus cause him to falsely implicate the appellant. The question to be asked is if there were to be a conspiracy, why would such a plan involve only one suspect – the complainant having failed to identify the other suspect. There is no explanation as to why the complainant would falsely implicate the appellant. In my view, the version of the appellant falls to be rejected as false.

[18] Our courts have repeatedly stated that evidence of identification must be approached by courts with caution. In *S v Mthethwa*,[1] Holmes JA enunciated the following principle:

> eBecause of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must be tested.'

The complainant, albeit a single witness was a good witness and his evidence was clear and satisfactory. The evidence of the identification parade was not attacked. The complainant explained during the dock

[1] *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-B. See also *S v Mehlape* 1963 (2) SA 29 (A) at 32A-F.

identification that the general appearance of the appellant had changed from the day of the incident. This was never disputed. His evidence of the identification of the appellant as one of the perpetrators was reliable. There was overwhelming evidence against the appellant and his version was correctly rejected as false.

[19] I am unable to find any fault with the assessment of the witnesses by the regional magistrate who had the advantage of observing them when they testified. Similarly the judgment of the court below cannot be assailed. It follows that the guilt of the appellant was established beyond any reasonable doubt. In the absence of any misdirection there is no basis upon which this court can interfere with the findings[2] of the court below. It follows that the appeal against conviction must fail.

[20] Turning to the question of sentence: The imposition of sentence is a matter falling pre-eminently within the judicial discretion of the trial court. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by an irregularity or misdirection or is disturbingly inappropriate.[3] In this case the provisions of the Criminal Law Amendment Act 105 of 1997 are applicable. The prescribed minimum sentence in respect of a conviction of robbery with aggravating circumstances is 15 years' imprisonment. A court may impose a lesser sentence if there are substantial and compelling circumstances.

[21] The court has to evaluate all the evidence when determining the existence of substantial and compelling circumstances. The mitigating

[2] See *R v Dhlumayo* 1948 (2) SA 677 (A).
[3] *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) para 10.

factors are the following: the appellant is a first offender; is relatively young; and he had been in custody for a year pending the finalization of the trial. Against that background are the aggravating factors as follows: this was a brazen attack in broad daylight; the manner in which the robbery unfolded indicates that there was prior planning; the robbers must have kept the complainant under surveillance and eventually caused the collision forcing him to stop; firearms were used to threaten the complainant; and a large sum of money and other valuable items were stolen which were never recovered. The incident must have had a negative impact on the workers who were expecting their wages from the complainant, as they were deprived thereof, albeit temporarily.

[22] In my view, the aggravating factors in this case far outweigh the mitigating factors. There are accordingly no substantial and compelling circumstances justifying the imposition of a lesser sentence. The sentence imposed is commensurate with the seriousness of the offences, the interests of society as well as the circumstances of the appellant. There is accordingly no basis for this court to interfere. It follows that the appeal against sentence also fails.

[23] In the result the appeal against the convictions and sentences is dismissed.

N Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

For Appellant	:	H S Dube (In Person) Modderbee Correctional Centre Pretoria Justice Centre, Pretoria Bloemfontein Justice Centre, Bloemfontein
For Respondent	:	E V Sihlangu Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein