IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. CA&R 52/2020

Date heard: 16 November 2021

Date delivered: 25 November 2021

In the matter between:

XOLISA LORIDA GWAMA Appellant

and

THE STATE Respondent

JUDGMENT

RUGUNANAN, J

[1] On 18 February 2019 and in the regional court, Uitenhage, the appellant was convicted of two counts namely; count 1, robbery with aggravating circumstances, and count 2, housebreaking with intent to steal and theft. The State alleged that at all times material to the commission of the offences the appellant acted in the furtherance or execution of a common purpose with an unknown person.

[2] The offence on count 1 attracted the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 with regard to the mandatory sentence of 15 years' imprisonment for a first offender. Having found that

substantial and compelling circumstances were not extant, the appellant was sentenced to 15 years' imprisonment, and for the second count he was sentenced to 5 years' imprisonment. The sentences were ordered to run concurrently.

[3] The appeal to this court against the conviction and sentence for each count lies with leave being granted to the appellant on petition.

[4] It is not in dispute that on the morning of 26 November 2014 the home of the complainant in Despatch was broken into and that several items of value among them, a white Samsung tablet with an integrated mobile phone was stolen. The evidence indicates that the complainant left home at about 08h15 and returned about 30 minutes later. He found a Toyota motor vehicle parked in the driveway inside the yard of his property. The front door of his house was open and he saw an unknown man loading a television set into that vehicle.

[5] The complainant had been driving a VW Polo at the time and as soon as he parked it a second man, also unknown to the complainant, hurriedly emerged from the house and approached him at gunpoint. The man, who the complainant later identified as the appellant, pointed the firearm at the complainant's head. The complainant observed that the man wore a white glove on his left hand and a reddish-brown one on his right hand. He threatened to kill the complainant and robbed him of his vehicle. Upon entering the house the complainant observed that the security gate to the front door was broken and so too was the front door.

[6] The complainant's vehicle was recovered later that day and the tablet was recovered from the appellant's possession on 8 December 2014. The circumstances pertaining to the recovery of these items were dealt with in evidence by Constable Garth Hawkins and the investigating officer Detective Mario Jonck. Their evidence is not strictly relevant to the identity issue. It only suffices to mention that the tablet was tracked by Constable

Hawkins through electronic means when it was found in the possession of the appellant.

[7] Photographs of the appellant were found in the tablet after Constable Hawkins had unlocked it in the presence of the complainant. I pause to mention that the complainant testified that photographs of his wife that were stored in the tablet were no longer there. The photographs enabled the complainant to identify the appellant as the person who robbed him. The complainant is a bespectacled individual. Indications from his evidence are that his eyesight was not compromised nor did his spectacles compromise his ability to have observed events on the day in question or when he identified the appellant from the photographs.

[8] The appellant denied that he was in Despatch on 26 November 2014. He denied involvement in the commission of the offences but admitted being in possession of the tablet when he was arrested on 8 December 2014. His explanation was that the tablet was brought to him by three men on 4 December 2014. One of them stated that he had forgotten his "lock code" and asked the appellant to unlock the tablet. In cross-examination the appellant explained that unlocking a mobile phone entails reprogramming the device with a new lock code or a password - this can only be done once the existing user data in the device has been wiped out. The appellant undertook to have the tablet ready for collection on 7 December 2014.

[9] In the context of the aforegoing summary, the evidence tendered by the State indubitably established that a housebreaking did in fact occur at the premises of the complainant, that items were stolen, among them the tablet, and that the complainant was robbed of his motor vehicle at gunpoint.

[10] On the merits of the convictions the issue on appeal essentially turns on whether the magistrate's factual findings were correct in his assessment of the evidence by concluding that the complainant's identification of the

appellant was reliable. This must be evaluated against the circumstance that the appellant raised the defence of an *alibi*.

[11] Tritely, a court of appeal will not readily interfere with the factual findings of a trial court unless they are wrong. Where there has been no misdirection on fact by the trial court the presumption is that its conclusion is correct, and if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it (see in this regard *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 677-678). The findings of fact and credibility by a trial court are presumed to be correct because it is that court and not the court of appeal which has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies (see *S v Leve* 2011 (1) SACR 87 (ECG) at paragraph [8]).

[12] In *S v Mthetwa* 1972 (3) SA 766 (AD) at 768A-C Holmes JA stated that the reliability of the observation of a witness depends on:

> "*... various factors, such as lighting, visibility and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities ...*"

[13] The complainant testified that the appellant was unknown to him when the offences were committed, that the appellant's head and face were uncovered, and that he was of slender build. Save for this evidence the complainant did not proffer any other distinguishing detail on the identity issue. He linked the identity of the appellant in the dock by matching the photographs extracted from the tablet. The photographs were entered into the record as exhibits and depict a group of four adult males fraternising.

[14] Although a witness may exhibit a failure to articulate a verbal description of characteristics or circumstances of an individual previously encountered, recognition may occur subconsciously.[1] That, however, is not the test. Subjective assurance does not suffice notwithstanding the honesty and sincerity of a witness. The witness's recollection of the appearance of an individual previously encountered must be approached with caution. What is required is certainty beyond reasonable doubt that the identification is reliable (see generally *S v Charzen and Another* 2006 (2) SACR 143 (SCA) at paragraph [11]). In this regard the guilt of an accused must be determined by a holistic evaluation of all the evidence constituting what is, after all, a mosaic of proof (see *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426F-G).

[15] In my view the possibility of mistaken identity is militated against a holistic consideration of the following factors, most of which the magistrate correctly had regarded when he evaluated the reliability of the complainant's testimony as a single witness:

(i) the incident occurred in the morning during daylight;

(ii) the complainant first observed the appellant when he advanced towards the complainant's motor vehicle;

(iii) he observed the appellant at close proximity when the appellant pointed the firearm at him and ordered him to exit his motor vehicle;

(iv) the appellant's head and face were not covered at all and nothing obstructed the complainant's view of the appellant;

(v) when the complainant went to the police station to identify the tablet he was at that stage unaware that it was found in the possession of the appellant, nor was he aware that the appellant had been

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[1] Compare *S v Majimane en Andere* 1999 (1) SACR 204 (O).

arrested; he straightaway and spontaneously identified the appellant from photographs stored in the tablet when it was inspected in the presence of Constable Hawkins who, in fact, confirmed this in his evidence;

(vi) Constable Hawkins had no idea that photographs were stored in the tablet, nor did he describe the appellant to the complainant when the complainant presented himself at the police station to identify the tablet;

(vii) the identification by the complainant was made despite the fact that the appellant appeared in group photographs taken with other adult males;

(viii) the complainant's subconscious and spontaneous identification enabled him to place the appellant at the scene and to define the role played by the appellant in the commission of the offences;

(ix) the appellant never disputed that the tablet was found in his possession nor did he dispute his appearance in the photographs.

[16] The appellant testified that he repaired the tablet on 5 December 2014. This was a day after it was brought to him. Despite having the contact number of one of the persons who brought it, he could not explain why he did not immediately contact the person to inform him that the tablet was unlocked well before the collection date.

[17] He stated, moreover, that the tablet took good quality pictures and for that reason he used it on 6 and 7 December 2014 and that, by the time of his arrest, his photographs were stored in its cache. He stated, however, that when he used the tablet, he coded it with his own password. In cross-examination he conceded that he was never instructed by any of the men who visited him a few days earlier to install a new password. In all likelihood

it emerges from this evidence that the appellant used the tablet as if it belonged to him, and he did so well before the agreed date on which it had to be collected.

[18] Strangely, when he was approached by the three men he did not quote a fee for unlocking the tablet, nor did he state if a fee would be fixed on the return day. Despite knowing that such items including cellphones are usually stolen and require unblocking, he was evasive in answering the question whether he enquired if anyone of them owned the tablet.

[19] As for the appellant's *alibi*, it was argued that his personal mobile phone records, subpoenaed by his legal representatives under section 205 of the Criminal Procedure Act 51 of 1977, supported his version that he was at his home in New Brighton on the day of the commission of the offences.

[20] The approach to the evaluation of an *alibi* defence is that there is no *onus* on an accused to establish it. If it is reasonably true then the accused must be acquitted. It must not be evaluated in isolation but in the totality of all the evidence and the court's impressions of the witness (see *R v Hlongwane* 1959 (3) SA 337 (AD) at page 340H-341B).

[21] For his part the appellant stated that he was at home and never went out because he was expecting a phone call from a friend. When asked if his girlfriend with whom he lived was present, he stated that he could not remember. Adverting to the mobile phone records, they merely indicated that the appellant's phone was in the area he claimed to be but were not conclusive of his actual and specific whereabouts or physical presence in that area. This is because the records indicated that several signal masts had picked up the signal from the appellant's phone. By implication this meant that the phone may have been moving. In the absence of clear evidence as to how signal masts functioned in tracking the movement or signal from a mobile phone, the magistrate correctly regarded the records as a neutral factor. In effect, this jettisoned any merit in the appellant's *alibi*.

[22] A reading of the magistrate's judgment indicates that he extensively explored and was conscious of the application of the cautionary rule when dealing with the evidence of the complainant as a single witness. The magistrate gave a proper and considered approach to the evidence before him and his analysis was not unsupported by precedent. He correctly found that there were no material contradictions or inconsistencies in the complainant's testimony. Indeed, the record reflects that the complainant gave a clear and logical account of the events of the day in question. He readily conceded that he did not see the first perpetrator who exited his house because his view of the person was obscured by the television set. Furthermore, the complainant did not know the appellant before the incident and the magistrate found no reason why the complainant would falsely implicate the appellant.

[23] As for the appellant, he was not an impressive witness. A telling indicator is that he had the contact number of one of the persons who brought the tablet to him. He had ample opportunity for disclosing this this to the arresting officer to have it followed up as an exculpatory explanation. That he did not do so is peculiar particularly in circumstances when exculpatory protestations of innocence would have readily ensued. His *ad hoc* explanation that he was stressed was correctly rejected by the magistrate as highly unlikely.

[24] In the circumstances, I am unable to fault the magistrate's evaluation and acceptance of the evidence implicating the appellant. Mr Charles, who appeared for the appellant, properly conceded this. The appellant was correctly convicted on both counts.

[25] In challenging the sentences imposed by the magistrate the misdirection contended for by the appellant is that an overly harsh sentence was imposed on count 1. This emanated from an overemphasis by the magistrate of the seriousness of the offence and the interests of society. The failure to have accorded sufficient weight to the appellant's personal

circumstances, it was argued, detracted from a finding that circumstances substantial and compelling in justification of a lesser sentence were present.

[26] Section 51(2) of the Criminal Law Amendment Act ordains, in the case of a first offender convicted of an offence referred to in Part II of Schedule 2, a minimum sentence of 15 years imprisonment. Robbery when there are aggravating circumstances[2] or the taking of a motor vehicle is an offence prescribed in the applicable part of the said Schedule.

[27] Since the inception of the Criminal Law Amendment Act, it has become an established norm that the sentences specified in the Act are not to be departed from lightly or for flimsy reasons. Speculative hypothesis favourable to the offender, undue sympathy or an aversion to long-term imprisonment are to be excluded from reckoning. The existence of substantial and compelling circumstances means that there has to be truly convincing reasons to depart from the imposition of a prescribed minimum sentence.

[28] The judgment on sentence indicates that the magistrate gave consideration to the appellant's personal circumstances: namely; that he was 40 years of age at the time he was sentenced; that he is unmarried but has two dependent minor children aged 2 and 14; that he was employed as a general worker and financially supported his children and extended family; that he did community work during weekends; that he completed matric and studied journalism but did not attain this qualification; and that he is a first offender.

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[2] "[A]*ggravating circumstances*" as defined in section 1 the Criminal Procedure Act 51 of 1977 in relation to robbery or attempted robbery means: (i) the wielding of a fire-arm or any other dangerous weapon; (ii) the infliction of grievous bodily harm; or (iii) a threat to inflict grievous bodily harm, by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.

[29] The appellant did not testify in mitigation of sentence. Referring to the contents of a pre-sentence report, his legal representative made submissions from the bar. In contending for a deviation from the prescribed sentence much was made of the fact that the complainant did not sustain injuries, that his vehicle was recovered and so too were some of his household possessions. It is one thing to proffer a recitation of an accused's personal circumstances and to contend that they constitute substantial and compelling circumstances, but quite another to fuse or regulate those circumstances in the consideration of an appropriate sentence.[3]

[30] In the present matter the State correctly contended that aggravating circumstances and the taking of a motor vehicle were present. Throughout the conduct of the trial, as evidenced by the record, the appellant persisted in maintaining his innocence and expressed no remorse particularly in the light of the aggravating features attendant on the commission of the offence and the consideration that the complainant was called to give oral testimony and relive the traumatic ordeal that he had experienced.

[31] The appellant and his co-perpetrator gained entry into the privacy and sanctity of the complainant's home. They did so by causing damage and brazenly helped themselves to items of jewellery and household effects in broad daylight. It is neither speculation nor conjecture to state that the appellant and his accomplice must have been in the vicinity of the complainant's residence and were maintaining vigilance over his activities. The complainant's unanticipated return readily explains the haste in which the appellant exited the house and made for the complainant's vehicle. These observations I make do not operate to the appellant's advantage in the enquiry relating to substantial and compelling circumstances.

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[3] Cf. *S v Mthetwa and Others* 2015 () SACR 302 (GP) at paragraph [15].

[32] I am unable to fault the magistrate's assessment and conclusions. His judgment indicates that he gave careful consideration to the well-known triad of factors and no aspects were left out of reckoning. The interests of society in the expectation that criminals be brought to book, that fair and deserving punishments should be meted out as also the seriousness of the offences were given adequate consideration - all within the context of a considered evaluation of the appellant's personal circumstances and the objectives intended by implementing the minimum sentencing legislation. Absent any demonstrable indication that particular facts were overemphasised at the expense of others, there is in my view no basis for interfering with the imposed sentences, particularly on count 1.

[33] On the facts, I am unable to find that the prescribed sentence was imposed as a result of material misdirection or that it induces a sense of shock, or that it is totally out of proportion to the gravity or magnitude of the offence, or that the concurrency of the sentences are grossly excessive. A cumulative conspectus of all relevant factors persuades me that there are no convincing reasons to warrant interference with the prescribed minimum sentence.

[34] In the result the following order issues:

34.1 The appeal against the conviction for robbery with aggravating circumstances is dismissed.

34.2 The appeal against the sentence of 15 years' imprisonment for robbery with aggravating circumstances is dismissed.

34.3 The appeal against the conviction for housebreaking with intent to steal and theft is dismissed.

34.4 The appeal against the sentence of 5 years' imprisonment for housebreaking with intent to steal and theft is dismissed.

34.5 The conviction and sentence imposed by the court *a quo* on each of the aforementioned counts is confirmed.

S. RUGUNANAN
JUDGE OF THE HIGH COURT

BENEKE AJ:
I agree.

M. BENEKE
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Appellant:	H. Charles Instructed by Legal Aid South Africa Makhanda / Grahamstown
For the Respondent:	S. Mtsila Instructed by The Office of The National Director of Public Prosecutions Makhanda / Grahamstown