REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

CASE NO: A392/16.

Reportable

Of interest to other Judges.

In the matter between:

THOMAS SPHIWE MAHLANGU
APPPLICANT

and

THE STATE
RESPONDENT

J U D G M EN T

Coram: RE Monama et A Basson, JJ

Introduction.

[1] The Appellant was charged and convicted in the Regional Court, Benoni on one count of robbery with aggravating circumstances in terms of the

provisions of the Criminal Procedure Act read together with the provisions of Section 51(2) of the Criminal Law Amendment Act (" the Act"). He was sentence to the imprisonment period of 18 years. During the trial he was represented.

[2] On 19 June 2013 he was granted leave to appeal both the conviction and the sentence by the trial court. The Appellant attacks the evidence of the voice identification and that the sentence of 18 year is "strikingly inappropriate".

The applicable principles.

[3] It is trite that we can only interfere with the conviction when there is a material misdirection. Insofar as the sentence is concerned we can only interfere with sentences that have been improperly imposed by the sentencing court. This court does not have unlimited or *carte blanche powers*[1].

The proceedings in the trial court.

[4] The Appellant pleaded not guilty and did not disclose the reasons. The State led evidence of one witness, being the complainant. Mr Wilford John Charles. The complainant testified that during the early evening of 16 June 2013 he was alone at home. At about 19:00 he went outside in response to the persistent barking of the dogs. He exited the house through the front door which he left open. Three men confronted him with guns. He was threatened with death at gun point. He was assaulted in the bedroom and was ordered to lie flat. He was tied up with cables and his head was secured with a blanket. His assailants demanded R1,5 million. They search him and took his wallet which contained his bank cards. They demanded and he gave them the pin number of his bank cards. Some of them went twice to withdraw money from his account at the nearby ATM. They used his vehicle.

[5] During this ordeal they ransacked the house and helped themselves to the food. One of them who guarded him said the following:

> "Makulu you do not recognise me I used to work for you three years ago." [2]

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[1] See S v Le Roux and Others 2010(2) SACR 10 SCA at 26 A-D

[2] See line 2-9 of the record.

The complainant testified that he replied in the negative but that he recognised the voice as that of the Appellant who had worked for him for a period of two years but absconded some two months before the incident.

[6] The complainant testified about the goods that were stolen and in July 2009 he identified the Appellant thorough his voice at a parade. At the parade he identified the Appellant but requested that another person and the Appellant attend the second parade as he wanted to be sure. He testified about the goods that were stolen during the robbery. The BMW that was also stolen was recovered after an hour.

[7] The Appellant denied all the allegations. He testified that he was not amongst the robbers. He was at a tavern in Barcelona with a friend by the name of Letabe. He also visited his mother. The next morning he was on his way to work. He was in a taxi and observed several motor vehicles including security vehicles at the gate of the complainant. He then phoned one Sibongile to enquire.

[8] During cross – examination the complainant persisted that the voice he recognized is that of the Appellant. On the other hand the Appellant contended that he was not amongst the robbers on 16 June 2009. However, he conceded that if he had worked with somebody for a long time it is possible to recognise him through his voice.

The evaluation of evidence in the trial court.

[9] The trial court commenced its evaluation by referring to the well-known principle. that there is no onus on the Appellant. The State must prove its case beyond reasonable doubt. The trial court adopted the correct approach to the evidence of the single witness[3].

[10] The only issue for the trial court to determine was the identity of the perpetrator. The court had the benefit of the direct evidence of the complainant. Such voice evidence must be accurate, the recollection of the events must be accurate and the conveyance of the events must be accurate. The complainant had no hearing problem, he was with the Appellant for approximately six hours and the complainant has known the Appellant for a considerable time. The complainant was credible.

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[3] See page 45 of the record.

Evaluation of the process in the trial court.

[11] Section 37(1)(C) of the Criminal Procedure Act makes provision for an identification parade. It has been held that the voice is part of the category of marks, characteristics or feature of the body. Provided that the parade was properly held, the evidence of voice is acceptable in our courts,[4] but must be credible in the sense of reliability.

[12] The recommended safeguards relating to an identity parade were observed rigorously. The procedure was not challenged. The most important safeguard is the fact that the complainant has known the Appellant for a long time. During that period he became familiar of the voice of the Appellant. The room for a mistake is substantially minimised. Furthermore, the evidence of the Appellant regarding the taxi story has been refuted.

[13] The State witnesses have been found credible in the sense of reliability. This positive finding of the trial court cannot be faulted. Accordingly, the submission by Miss Masete for the Appellant must be rejected. The corroboration that she sought is abundantly there. *In casu* the trial court has correctly addressed the concerns stated in a series of the decisions of the courts since the advent of S v Mthethwa [5]. I found no misdirection.

The sentence of 18 years imposed by the trial court

[14] The Appellant was charged with the offence of robbery with aggravating circumstances[6]. He was represented throughout. The Appellant confirmed that he understood the charge[7]. He was convicted as charged[8]. Accordingly, the submission by Miss Masete that the trial court cannot rely on the provisions of the Act must be rejected.

[15] Notwithstanding the statement in the preceding paragraph, it is necessary to restate the jurisdictional requirement necessary to attract the sentence in excess

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[4] See Levack and Others v Regional Magistrate, Wynberg and Another 2003(3) SACR 187 SCA

[5] 1972 (3) SA 766 (AD) See also S v Charzen and Another 2006(2) SACR 143 SCA.

[6] See Annexure C to the record.

[7] See page 1 of the record

[8] See line 20 page 47 of the record.

of 15 years. In this case a sentence of 18 years was imposed. The relevant provisions of the Act read as follows:

'51(2) 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 in---

(a)Part II of Schedule 2, in case of –

(i) a first offender , to imprisonment of not less than 15years;

(ii) a second offender of any such offence, to imprisonment for a period of not less than 20 years;....."

It is common cause that the Appellant has been convicted of the offence referred to in the above section and that he has one previous conviction of theft and not robbery or robbery with aggravating circumstances. It must be noted that even common robbery is not sufficient to trigger the sentence of more than 15 years if the offender has no previous conviction of robbery with aggravating circumstances[9].

[16] In the circumstances of this case I find that there is a misdirection. The appeal must succeed. Accordingly, the order of the court is set aside and replaced with the following order:

1. The appeal against the conviction is dismissed ,
2. The appeal against sentence succeeds,
3. The sentence of the trial court is set aside and replaced with the following sentence;
   "The appellant is sentenced to 15 years imprisonment
   and he is declared unfit to possess a firearm. "
4. The sentence is antedated to 26 February 2013.

[9] See S v Mokela 2012(2) SACR 431 SCA at 434J to 435A-E

I agree,

A BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

And it is so ordered

RE MONAMA,

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA.

Appearances

For the Appellant:	Ms MM Masti.
Instructed by:	Justice Center, Pretoria.
For the Respondent:	Adv. M Marriott .
Instructed by:	Office of the State Attorney, Pretoria.
Date of hearing:	28 August 2017.
Date of judgment:	15 September 2017.