THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 951/2019

In the matter between:

VUSI PETROS SIBANYONI **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Sibanyoni v The State* (951/2019) [2020] ZASCA 93 (18 August 2020)

Coram: Saldulker and Plasket JJA and Sutherland AJA

Heard: No hearing. Decided without a hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 18 August 2020.

Summary: Leave to appeal against refusal of petition for leave to appeal – conviction of six counts of robbery with aggravating circumstances – effective sentence of 25 years imprisonment – no reasonable prospects of success of appeal against conviction, but reasonable prospects of success of appeal against sentence.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Prinsloo and Baqwa JJ sitting as court of court of appeal):

1 The appeal succeeds.

2 The order of the court below is set aside and is replaced with the following order:

'(a) Leave to appeal against conviction is refused.

(b) Leave to appeal against sentence is granted to the Gauteng Division of the High Court, Pretoria.'

JUDGMENT

Plasket JA (Saldulker JA and Sutherland AJA concurring)

[1] It was not in dispute that, on the evening of 10 June 2012, two men entered the Dash Dash tavern in Tweefontein, KwaMahlangu, Mpumalanga; that one of them was armed with a firearm with which he fired a number of shots; that the tavern's patrons and staff were ordered by the men to lie face down on the floor; and that the two men then stole various items from them, thereby committing six counts of robbery with aggravating circumstances. The appellant, Mr Vusi Petros Sibanyoni (Sibanyoni), and a co-accused, Mr David Mongezi Mnguni (Mnguni), were charged with these offences, tried in the regional court sitting in KwaMahlangu, convicted as charged and sentenced to effective terms of imprisonment of 25 and 15 years respectively. Mnguni plays no part in these proceedings, Sibanyoni being the sole appellant.

[2] Sibanyoni applied unsuccessfully for leave to appeal against both conviction and sentence. He then petitioned the Gauteng Division of the High Court, Pretoria for leave to appeal but his petition was dismissed by Prinsloo and Baqwa JJ. He petitioned

this court for leave to appeal against the dismissal of the petition, and leave to do so was granted.

[3] We are not required to decide the merits of the appeal. See *S v Matshona* [2008] 4 All SA 68 (SCA) para 5. We must, instead, decide whether the court below's decision to refuse leave to appeal was correct or not – whether or not, in other words, there are reasonable prospects of an appeal succeeding. In *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7, this court set out the proper approach to the question as follows:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[4] The sole issue in relation to Sibanyoni's convictions is whether his identification as one of the robbers was accurate and reliable. Although one of the State witnesses was not able to make an identification of either of the robbers at all, two others identified Sibanyoni in dock identifications and three identified him in identity parades. The propriety of the identity parades and their fairness was not disputed by the defence.

[5] From the evidence of all six of the eye witnesses, it emerged that the person identified as Sibanyoni was wearing a dark khaki-coloured jacket, that some of them described as a 'soldier's jacket'; that he was armed with a firearm and that he discharged a number of shots with it; and that he took a leading role in the robbery, directing operations and giving orders.

[6] The evidence of the witnesses was consistent in respect of the fact that conditions for a reliable identification were good: the scene was lit with electric lighting and the robbers were in the presence of the witnesses for a fair amount of time. They were also consistent in their descriptions of Sibanyoni: that he was of light complexion,

which some of the witnesses described as a ‘coffee coloured complexion’; that he had a bald head; and that he was short.

[7] Sibanyoni’s defence was an alibi. He was, he said, drinking in another tavern when the robberies at the Dash Dash tavern was committed. He was nowhere near the scene of the robberies.

[8] In *S v Mthethwa* 1972 (3) SA 766 (A) at 768B-C, Holmes JA warned of the dangers of too ready an acceptance of identification evidence. Such evidence must, because of the ‘fallibility of human observation’, be approached ‘with some caution’: a court must, before accepting that evidence, be satisfied that identifying witnesses are honest and that their observations are reliable.

[9] The magistrate, in a thorough and well-reasoned judgment, found that the State witnesses were good witnesses whose evidence was mutually corroborative. He found too that their identification of Sibanyoni as one of the robbers was reliable in all the circumstances. On the other hand, he found Sibanyoni to have been a particularly poor witness whose version he rejected as being false beyond a reasonable doubt. His conclusions on conviction cannot be faulted, with the result that the court below correctly dismissed Sibanyoni’s petition against conviction. He has no reasonable prospect of appealing successfully against his convictions.

[10] I turn now to the question of sentence. The magistrate sentenced Sibanyoni to 15 years imprisonment in respect of each count of robbery with aggravating circumstances. He ordered that 13 years in respect of counts 2, 3, 4, 5 and 6 were to run concurrently with the sentence in count 1. The effect of this is that five successive periods of two years imprisonment were added to the 15 year prison term in respect of count 1. The result was that the magistrate imposed an effective sentence of 25 years imprisonment on Sibanyoni.

[11] The magistrate correctly considered the robberies to be serious. They were effected by the threat of violence with a firearm, and certain of the complainants were assaulted, albeit not particularly seriously. Sibanyoni played the leading role in the perpetration of the robberies. He had three old but relevant previous convictions.

Despite these aggravating features, a sentence of 25 years imprisonment is, on any objective basis, an extremely lengthy sentence. There are, I believe, reasonable prospects of a court of appeal interfering with that sentence. I am consequently of the view that the court below erred in refusing the petition in respect of sentence.

[12] It is unfortunately necessary to say something about the heads of argument filed by the State. In the first place, they were filed late. In the interests of finalising this appeal speedily, we have considered them without having received so much as an apology, let alone an application for condonation. That is simply not good enough. Secondly, to call them heads of argument may be to overstate their nature. The document with which we were presented contains some random quotations from cases unconnected with any argument that could have helped us in our decision-making. No indication is even given as to whether the State supports the refusal of leave to appeal or concedes that leave ought to be granted. Heads of argument, as Marcus AJ said, in *S v Ntuli* 2003 (4) SA 258 (W) para 16, are important for the proper administration of justice:

'Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done. Accordingly, it is essential that those who have the privilege of appearing in the Superior Courts do their duty scrupulously in this regard.'

[13] I make the following order:

1 The appeal succeeds.

2 The order of the court below is set aside and is replaced with the following order:

'(a) Leave to appeal against conviction is refused.

(b) Leave to appeal against sentence is granted to the Gauteng Division of the High Court, Pretoria.'

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C Plasket

Judge of Appeal

APPEARANCES

For the appellant:	T R Malanguti Instructed by: Nelspruit Justice Centre, Nelspruit Bloemfontein Justice Centre, Bloemfontein
For the respondent:	A I S Poodhun Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein