THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable
Case No: 174/2017

In the matter between:

TSHAMUHAU MAPHAHA	**FIRST APPELLANT**
THABO MOLEFE	**SECOND APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Maphaha v The State* (174/2017) [2018] ZASCA 08 (1 March 2018)

Coram: Leach, Mbha and Mocumie JJA and Plasket and Mothle AJJA

Heard: 21 February 2018

Delivered: 1 March 2018

Summary: Appeal against refusal of petition for leave to appeal against conviction and sentence for robbery with aggravating circumstances – no reasonable prospects of success concerning conviction – concerning sentence, trial court appeared not to have taken into account period of about three and a half years spent by appellants awaiting trial – reasonable prospects of success on appeal against sentence.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mokgwatleng J and Seboko AJ sitting as court of appeal):

(a) The appeal succeeds to the extent set out below.

(b) The order of the court below is set aside and replaced with the following order.

'The appellants are granted leave to appeal against sentence to the Gauteng Local Division of the High Court, Johannesburg.'

JUDGMENT

Plasket AJA (Leach, Mbha, Mocumie JJA and Mothle AJA concurring)

[1] This is an appeal against the refusal of a petition for leave to appeal, special leave having been granted by this court. The appellants were charged with and convicted of robbery with aggravating circumstances. They were accused 3 and accused 4 of ten accused in the trial. They were both sentenced to 15 years imprisonment.

[2] This appeal does not concern the merits of the matter directly. They are relevant only insofar as they relate to whether the appellants have reasonable prospects of success for purposes of the appeal against the refusal of their petition.[1] In *S v Smith*[2] this court set out what that entails:

'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

[1] *Matshona v S* [2008] 4 All SA 69 (SCA) para 5.
[2] *S v Smith* 2012 (1) SACR 567 (SCA) para 7. (References omitted.)

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.'

[3] In respect of the convictions, two broad issues were raised. The first was whether the trial court erred in accepting the evidence of the State witnesses and, at least by implication, in rejecting the evidence of the two appellants. The second was whether the fundamental right of the appellants to a fair trial was violated. As far as sentence was concerned, it was argued that the magistrate misdirected himself by not considering and taking into account the lengthy period spent by the appellants in custody awaiting trial when he was required to decide whether substantial and compelling circumstances were present to justify a deviation from the prescribed sentence of 15 years imprisonment.

The facts

[4] It was common cause that on the night of 13 April 2008 in Wynberg, Johannesburg, a robbery with aggravating circumstances was committed by a group of men at the premises of an automotive components factory, CRH Continental. It was also common cause that two of the persons involved were the appellants, who I shall refer to in the narration of the facts as accused 3 and accused 4. They were dressed in South African Police Service uniforms and were armed with firearms.

[5] The curious facts as to how the robbery was committed forms the backdrop of this appeal. In what follows I shall set out the evidence that the trial court accepted and then detail the versions of accused 3 and accused 4.

[6] Accused 3 and accused 4 were student constables stationed at the Alexandra police station. They, along with a third trainee, Ms Nomsa Kgomo, were instructed by their superior, Captain Ramahotswa, who was accused 7 in the trial, to accompany two off-duty policemen to the scene of a robbery then supposedly in

progress. They were told that a group of detectives from another police station would join them to foil the robbery and that their function was to provide support to these detectives.

[7] Sergeant Munyai (accused 1), Constable Matsaung (accused 5), accused 3, accused 4 and Kgomo sallied forth from the Alexandra police station in a double cab vehicle clearly marked as a police vehicle. They appeared to proceed without any great sense of haste, contrary to what one would expect in the circumstances. Eventually, they met a group of men – the 'detectives' – who climbed into the back of the vehicle. They proceeded to the scene of the crime that was about to be committed.

[8] As accused 1 and accused 5 were not officially on duty, they were dressed in civilian clothes, as were the 'detectives'. It would appear that the only people in the group who were armed were accused 3 and accused 4, as well as Kgomo who remained in the vehicle throughout.

[9] Accused 1, on arrival at the premises of CRH Continental, approached a security guard who was on duty inside the premises but behind a closed gate. Accused 1 informed the security guard that a robbery was in progress inside the factory. When the security guard asked accused 1 how he knew this, accused 1 told him that one of the owners of the factory had telephoned the police. The security guard, on the strength of this statement, opened the gate and was immediately overpowered and handcuffed by accused 1. Accused 5, the 'detectives', accused 3 and accused 4 entered the premises.

[10] Mr Marcel Christofoli, a partner in CRH Continental, walked out of the factory to see two policemen inside the premises. This must have been accused 3 and accused 4. He saw that the security guard was surrounded by a group of five or six men dressed in civilian clothes.

[11] One of the men in uniform, identified by Christofoli as accused 4, ran towards him, threw him against a wall, put a firearm to his head and dispossessed him of his wallet, watch, cigarettes and cellphone. Accused 4 then dragged him by the hair into

an area of the factory referred to in the evidence as the tool room. He was ordered by accused 4 to lie on the floor. Other people who worked at CRH Continental were already lying on the floor. The intruders demanded the key to the safe. When Christofoli said that there was no safe on the property, he was kicked repeatedly.

[12] While accused 3 and accused 4 remained in the tool room guarding the people lying on the floor, the other men ransacked the factory, taking computers, tools and, as one of the witnesses put it, 'whatever they could find'. They stacked their loot at the front door of the tool room.

[13] At one stage, one of the men suggested killing one of the prisoners to force the others to divulge the whereabouts of the key to the safe. Accused 4 told Christofoli to stand and when he did so, accused 4 pointed his firearm at him. Christofoli explained the position again and was told that he could lie down again. The men then turned their attention to Mr Harold Keitchel, a partner of Christofoli. They took him upstairs and assaulted him.

[14] After this, the men loaded their loot into the police vehicle, took the gate of the premises off its rail, because they had no other means of opening it, and left the premises. An argument developed between accused 1 and accused 5 as to whether they should proceed to an informal settlement in Alexandra or to the police station. At some stage, however, accused 1 stopped the vehicle and the 'detectives' alighted with the loot and left. Accused 1, accused 3, accused 4, Kgomo and accused 5 then proceeded to the police station.

[15] By this stage, the robbery had been reported to the Bramley police station. The vehicle used had been identified by the call sign painted on it as a vehicle that came from the Alexandra police station. The next day the accused were arrested. Some of the stolen property was recovered thereafter.

[16] Accused 3 and accused 4 testified that they had been instructed by accused 7 to perform support duties for a group of detectives who would be foiling an armed robbery then in progress. When they arrived at the premises of CRH Continental and the security guard was overpowered and handcuffed, they thought that he was one

of the robbers. They thought that Christofoli, Keitchel and the others who were overpowered, made to lie on the floor and guarded by them were robbers too. They were puzzled by the fact that the 'detectives' ransacked the factory and stole property that they found there. They were also puzzled by the fact that when they left the factory, the people who they thought were robbers were left behind. They claimed that their inability to realise that they were taking part in a robbery, and not foiling one, arose from the fact that they were mere trainees and had not been provided yet with sufficient training to distinguish between the two activities.

The issues: conviction

[17] The first issue was a factual one: the magistrate believed the State witnesses and disbelieved accused 3 and accused 4. The test for permissible interference by a court of appeal with a trial court's factual findings imposes a high threshold. In *S v Francis*[3] Smalberger JA explained it as follows:

'This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited. Accused No 5's complaint is that the trial Court failed to evaluate D's evidence properly. It is not suggested that the Court misdirected itself in any respect. In the absence of any misdirection the trial Court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In order to succeed on appeal accused No 5 must therefore convince us on adequate grounds that the trial Court was wrong in accepting D's evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony.'

[18] The magistrate found that all of the State witnesses, including Kgomo, who was a so-called s 204 witness, were good witnesses. After applying the appropriate cautionary rule where necessary, he accepted their evidence. His conclusion is fully borne out by the record, and I can see no misdirection on his part as to his assessment of the evidence and his factual findings.

[3] *S v Francis* 1991 (1) SACR 198 (A) at 204c-e. (References omitted.) See too *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706; *S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426a-c.

[19] The version of accused 3 and accused 4 is improbable, even if it is accepted that initially they were ordered by accused 7 to take part in preventing a fictitious robbery: as soon as the action started with the overpowering of the security guard, who would not have opened the gate to policemen if he had been part of a gang of robbers, they could have been in no doubt that their police colleagues and the 'detectives' were the villains and that they were in fact taking part in a robbery, not preventing one.

[20] Even if the magistrate did not say so expressly, he rejected the versions of accused 3 and accused 4 as false beyond reasonable doubt. In so doing, and given the improbability of the version, he cannot be faulted. An acceptance of the State witnesses' evidence and a rejection of the versions of accused 3 and accused 4, leads to the conclusion that both were active participants in the robbery. In these circumstances, the defence that was raised, that they were following a lawful order, has no bearing. The facts found proved by the magistrate renders that defence irrelevant.

[21] In the face of the overwhelming evidence against accused 3 and accused 4, Mr Masako who appeared for them, conceded – and correctly so – that there were no reasonable prospects of successfully appealing against conviction. He also, once again correctly, in my view, conceded the second issue – the argument that accused 3 and accused 4 had not had a fair trial because of the way in which the magistrate had treated their counsel.

[22] All that the magistrate did in the portions of the record highlighted in the heads of argument was to clarify for himself what the cross-examiner wanted to ask or to put to witnesses, and from time to time – and with good reason – query the relevance of a line of questioning. Even if, at times, the magistrate was robust, that does not equate to an unfair trial. Litigation, and particularly litigation in the criminal courts, is not for the faint-hearted.

[23] In the result, I am unable to find that reasonable prospects exist of a court of appeal interfering with the conviction of accused 3 and accused 4.

Sentence

[24] When sentencing accused 3 and accused 4, the magistrate imposed the sentence prescribed by the Criminal Law Amendment Act 105 of 1997 for a first offender who committed the offence of robbery with aggravating circumstances. He accordingly found no substantial and compelling circumstances to justify a deviation from the prescribed sentence.

[25] In imposing sentence, the magistrate took into account the personal circumstances of accused 3 and accused 4, but he also considered their crime to be particularly serious. He was justified in doing so: the spectre of policemen in uniform and armed with firearms assaulting citizens and robbing them of their possessions before loading their plunder into a police vehicle is, to put it at its lowest, cause for grave disquiet.

[26] That said, however, the magistrate does not appear to have taken into account the fact that both accused 3 and accused 4 spent about three and a half years in custody prior to their conviction. The correct approach to sentencing when an accused has spent a lengthy period in detention awaiting trial was dealt with by Lewis JA in *S v Radebe*[4] in which she held:

'A better approach, in my view, is that the period of detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or

[4] *S v Radebe* 2013 (2) SACR 165 (SCA) para 14.

crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.'

[27] As this exercise appears not to have been done, and if it had been done, it may have had a bearing on the sentences imposed by the magistrate, I am of the view that there are reasonable prospects of success on appeal against sentence.

The order

[28] I conclude that there are no reasonable prospects of a successful appeal against conviction, but there are reasonable prospects of success on appeal against sentence.

[29] I accordingly make the order set out below.

(a) The appeal succeeds to the extent set out below.

(b) The order of the court below is set aside and replaced with the following order.

'The appellants are granted leave to appeal against sentence to the Gauteng Local Division of the High Court, Johannesburg.'

_____

C Plasket

Acting Judge of Appeal

Appearances:

For the Appellants:	I D Masako
Instructed by:	Johan Schaefer Attorney, Johannesburg
	Symington & De Kok, Bloemfontein
For the Respondent:	E H F Le Roux
Instructed by:	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein