

SOUTH AFRICA / JUDGMENT

Baloyi v S (A468/17) [2017] ZAGPPHC 1085 (1 December 2017)

[2017] ZAGPPHC 1085

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie, M.J. Mosopa

CASE / FILE NUMBER

A468/17

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HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

CASE NO: A468/17

1/12/17

In

the matter between:

J

BALOYI

Appellant

and

THE

STATE

Respondent

JUDGMENT

1. This is an appeal by leave of the trial court against the conviction and sentence of the appellant on 31 May 2016 in the Regional Court held at Benoni on a count of robbery with aggravating circumstances. He was sentenced to 15 years imprisonment and was declared unfit to possess a firearm.
2. The relevant facts and circumstances are briefly the following. At about 19:40 on 12 February 2016 at Daveyton, the complainant, Me Nonhlanhla Mkwanazi, was returning from school to her home. She flagged down a taxi which picked her up. There was a passenger sitting next to the driver, two persons next to her in the middle seat and also two persons on the back seat. At some point one of the passengers got off the taxi. She took out money from her pencil case to pay for the ride and she did so with a R50 note. The driver gave her R40,00 change which she put in her clothing next to her breast. After a while she saw the taxi not taking the route it was supposed to and at that point the person next to her produced a firearm. She told the driver that she wanted to get off but then the person with the the firearm said no and she heard the doors locked. At some point the driver stopped and leaned backwards and took the complainant's bag and took an amount of R450,00 which she had in the bag. The person with the firearm took a cell phone and the R40,00 change which she had in her clothing.
3. The taxi continued to drive and she and the other passengers were told to face downwards and not to look at anybody. They drove for a very long distance until they came to a place behind a school. She testified that the driver, which she identified as the accused, got out of the car and opened the passenger door. He told her and the other passengers to get out and to face the other way. He then got back into the vehicle and drove off.
4. The complainant testified that she saw that the number plate had been covered with a piece of clothing, namely a jacket. As the taxi was driving off she screamed and members of the public came to assist them. She reported that she had been robbed.
5. Apparently there were roadblocks in the vicinity and soon thereafter the taxi came speeding back but then got stuck in the mud in the road. The persons inside which were part of the gang of robbers got out and ran away. The accused, which was the driver, also got out and ran away.
6. By that time members of the community had gathered and the police also arrived. The owner of the taxi also arrived in his own vehicle. The complainant drove with the police to the police station in order to make a statement. She gave the police a description of the accused and described his physique, his length and the tekkies he was wearing. The tekkies she described as grey boot type Nike tekkies with a white stripe.

7. As they arrived at the police station she saw and identified the accused when he arrived in the vehicle of the owner of the taxi. She testified that he was wearing "the very same shoes that he was wearing" earlier at the taxi. The accused was then arrested.
8. During cross-examination the complainant stated that the visibility inside the taxi was limited but that she saw the accused when he turned around to take her bag to take the money from it. She saw more of him and also the tekkies he was wearing when he was outside the taxi when they were told to get off. The complainant said that she identified the accused not by his face but by his physique and the shoes that he was wearing.
9. It was put to the complainant that the appellant did not dispute that he was present inside the taxi when the incident happened but that he had not been the driver and that sat on the front passenger seat and that he was the victim of an earlier hijacking by the person who was driving the taxi and some of the others sitting behind him in the taxi. The complainant disputed this proposition to her and was adamant that the accused was the driver of the taxi when the robbery was perpetrated. A number of times she referred to the shoes that the accused was wearing and to which he was still wearing when he arrived at the police station.
10. The complainant further testified that when they arrived at the police station the appellant had a cell phone and two R50 notes in his possession which the police took from him.
11. The owner of the taxi, Mr Lucky Mhanganye, also testified on behalf of the State. He was the owner of the taxi and testified that earlier that day the appellant came to him and wanted to borrow the vehicle. He wanted to transport people to Kempton Park for which he was going to be paid R300,00. At first the owner refused but later relented. After approximately 45 minutes the appellant phoned him and said that he had been hijacked. He told the owner where he was. On his way the owner came across the police and on their suggestion he found the appellant who informed him that he was somewhere near a graveyard. When he phoned him again the appellant told him that he was at the train station. Eventually he got hold of the appellant and took him to the police station.
12. According to the owner the complainant identified the appellant to the police as one of the robbers when they arrived at the police station.
13. The appellant testified in his own defence. His version was that he borrowed the taxi to transport people to Brakpan. Those people wanted to buy liquor at a bottle store. While they were waiting to be served he asked them whether he could transport people to East Lynn. They apparently said that it was in order and he drove off. It is not clear from the evidence exactly what happened at this point but it seemed that he picked up another two passengers. He testified that while he was driving some of the passengers pointed him with a firearm and told him to stop the vehicle. He was then ordered to sit on the front passenger seat while that person moved to the driver seat and drove off.

14. The appellant testified that at some point the driver stopped the taxi and the complainant got on board. He confirmed that one of the passengers was dropped off a little further.
15. The appellant testified that the complainant gave her cell phone to one of the robbers and that money was taken from her. He did, however, not see the money being taken from her. The appellant testified that money was also taken from him.
16. The appellant confirmed that at this stage the taxi was stopped and the complainant got off the vehicle. He said when the driver wanted to proceed, the vehicle got stuck in the mud. Two of the occupants tried to assist in getting the vehicle out of the mud but apparently there were people around and the appellant also got out of the car and ran away into the veldt. He said that he then phoned the owner of the taxi and told him of the hijacking. He testified that he told the owner that he was going to the police station but that the owner told him to wait for him at the train station.
17. The appellant's version was therefore that he was not part of the gang of robbers but that he was in fact one of their victims.
18. The appellant testified that at the police station the complainant said that he was also in the car.
19. The appellant admitted that he was wearing Nike tekkies at the time but denied that they were of the colour as testified by the complainant. He said that his tekkies had several colours including red and that they had stripes. He denied that he had covered the number plate of the taxi as testified by the complainant. He also denied that he had any money with him as testified by the complainant.
20. In his judgement the trial Magistrate found the complainant to be a very strong witness and that she was very adamant and strong with regards to her convictions as to what happened on the evening in question. He found her to be clearly aware of what was taking place around her and also found her to be an honest witness. He found that she had given her evidence in a logical, chronological manner and that he could find no improbabilities in her version. I cannot fault the aforesaid findings by the Magistrate and agree therewith.
21. Regarding the evidence: of the owner of the taxi, the Magistrate also accepted his evidence. He also found that the owner had no motive to accuse the appellant falsely at all.
22. Regarding the evidence of the appellant the Magistrate rejected his evidence as not reasonably possibly true. In coming to this finding the Magistrate referred to the improbabilities in his version and the fact that the appellant had clearly adapted his evidence as he testified. I shall merely refer to a few of these aspects.
23. In comparing his evidence with that of the owner of the taxi the Magistrate rejected his evidence that he had told the owner that he was taking people to Brakpan and not to Kempton Park as testified by the owner. He also rejected his evidence that he told the owner that he was going to the police station. These findings by the Magistrate cannot be faulted.

24. The Magistrate also found the appellant's version to be inherently improbable and in this regard referred, *inter alia*, to his decision to pick up other passengers while he had been contracted to deliver the original passengers to Brakpan, on his version. The Magistrate also referred to the description of the manner in which the appellant was allegedly robbed which did not make sense. It is not necessary to refer to these details. The Magistrate also referred to the appellant's version that the robbers drove around as if they were operating a taxi picking up passengers and by doing so increasing the risk of being caught. I could add that I find it unlikely that the robbers, on the appellant's version, would keep him in the vehicle on the front passenger seat while they were driving around and robbing people.
25. The Magistrate also rejected the appellant's version that he would not have seen the complainant's money and cell phone being taken from her. The evidence that the driver stopped the vehicle, turned around and took a bag from which he removed these items, was not disputed when the complainant testified. The Magistrate also rejected his version that he did not think of phoning the police after he had been hijacked as being highly improbable.
26. I must add that it became clear during the evidence of the appellant that he was adapting his evidence as he went along. When confronted with the fact that he had money on his person despite the fact that he had been hijacked and everybody else robbed, he denied that he had any money on him when he arrived at the police station. However, the evidence of the complainant that he had money with him at the police station was never contradicted when she testified. There is little doubt that the appellant denied that he had money with him after hearing the complainant's response during her cross examination when she asked the question why the appellant would have money and a cell phone with him if he was also the victim of a robbery.
27. The complainant's evidence as well as the owner's evidence that the complainant immediately identified him at the police station as one of the robbers, was not disputed when they testified. Yet, when he testified the appellant said that the complainant merely identified him as one of the persons in the vehicle.
28. An important aspect of the evidence turned on the shoes that the appellant was wearing at the time and was one of the main aspects relating to his identification by the complainant. The complainant's evidence, on numerous occasions, related to the grey boot-type Nike tekkies he was wearing. This was never disputed on behalf of the appellant and it was merely suggested that the shoes were not one-of-a-kind. However, when he testified, the appellant denied that he was wearing shoes as described by the complainant and said that his tekkies had different colours. As mentioned this was never put to the complainant when she testified and the appellant's evidence was clearly a last-ditch attempt to exonerate himself.
29. Of importance is also that the complainant's evidence as to the appellant's physique and length, was never disputed.

30. Lastly I may refer to a few further pieces of evidence which contradicts the version of the appellant. Firstly, the complainant testified that when she and the other passengers were ordered from the taxi she noticed that the number plate had been covered by a jacket. Her evidence that the number plate had been covered was never challenged. The appellant merely testified that he did not do so. It is difficult to imagine how any of the other robbers could have been responsible for it. Firstly, according to the uncontested evidence, none of the other robbers, except the driver, whom the complainant identified as the appellant, got out of the vehicle when they were finally dropped off. Secondly, none of the other robbers, on the appellant's version would have had reason to cover the number plate. They were not linked with the taxi and would in any event soon leave the taxi behind. They had no reason to cover the number plate. Only the appellant, who was linked to the taxi, would have had reason to cover the number plate so that the taxi could not be identified and through that, that his identity would be established.
31. Another issue relates to the evidence of the complainant that she and the other innocent passengers at the back of the taxi were told to look down. It was not her evidence and not even suggested to her, that the appellant also had to look down.
32. A further issue relates to the question why the unknown robbers, on the appellant's version, told the passengers, including the complainant to leave the vehicle but did not ask the appellant to leave the vehicle. On the appellant's version they were clearly trying to make their getaway especially after they had been approached by three pedestrians, and keeping the appellant with them would only have served as an unnecessary complication to them.
33. Tied in with this last issue is the question why the appellant decided to run away into the veldt and to hide himself. On his version he was also a victim sitting in one of the passenger seats and it would have been clear to the other passengers that he was not part of the gang of robbers. If he had remained at the vehicle nobody would have disputed the fact that he was also a victim of the robbery and hijacking. His actions as aforesaid clearly indicate that he panicked when the vehicle got stuck in the mud and that he decided to run away with the other robbers.
34. On a consideration of all the evidence I'm satisfied that the conviction of the appellant cannot be faulted and that the appeal against his conviction should be dismissed.
35. As far as sentence is concerned the Magistrate found no substantial and compelling circumstances and consequently sentenced the appellant to 15 years imprisonment as provided for by Act 105 of 1997.
36. The appellant did not testify and his personal circumstances were presented from the bar. He was 25 years of age at the time and single but in a relationship. His partner was seven months pregnant. Before his arrest he was employed as a taxi driver earning approximately R600,00 per week. He had no previous convictions and was thus a first offender. He had spent approximately three months in custody awaiting trial. It was further submitted on his behalf that he was not the person that was in possession of the firearm although he did

participate. It was also submitted that on the evidence he only took the complainant's pencil case out of the bag and the money that it contained. Furthermore that the complainant was not injured during the commission of the offence and that she was only threatened by the firearm and not injured.

37. The Magistrate considered the mitigating factors as well as the aggravating factors and in my view he cannot be faulted for finding the absence of substantial and compelling circumstances. The Magistrate, inter alia, referred to the fact that ordinary people put their trust in taxi drivers and are dependent on them for their transport. They put their lives and their possessions in their trust and trust that they will indeed be transported to their destinations in safety. Furthermore that in the present case the crime was carefully planned having regard to the rows of seats and that one of the robbers with the firearm was placed in the middle row of seats and another at the back.
38. The Magistrate found that people are entitled to get onto a taxi and go to their destinations without fear of being robbed or harassed. I cannot fault the reasoning of the Magistrate in respect of sentence nor the issues considered by him. In my view the appeal against the sentence should accordingly also be dismissed.
39. In the result the following order is made:
1. The appeal against the conviction as well as the appeal against the sentence are dismissed.

C.P. RABIE

JUDGE OF THE HIGH COURT

I agree:

M.J. MOSOPA

ACTING JUDGE OF THE HIGH COURT

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