

SOUTH AFRICA / JUDGMENT

Bhengu v S (AR213/10) [2010] ZAKZPHC 53; 2011 (1) SACR 224 (KZP) (16 September 2010) [2010] ZAKZPHC 53

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Lopes, Gcaba

CASE / FILE NUMBER

AR213/10

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

Case No AR213/10

In the matter between :

Sandile Goodman Bhengu Appellant

and

The State Respondent

J U D G M E N T

Lopes J

- [1] The appellant in this matter was charged together with his co-accused Nhlakanipho Knowledge Ndawalane in the Port Shepstone regional Court with one count of housebreaking with intent to steal, and a further count of attempted murder.
- [2] On the 21st November, 2008, they were convicted on both counts and sentenced on the count of housebreaking to fifteen years imprisonment on the basis that given the circumstances of the offence, that was the minimum sentence which could be imposed because of the aggravating circumstances with accompanied the robbery. On the count of attempted murder they were sentenced to undergo five years imprisonment suspended for five years.

- [3] The complainant on both counts was Mr Neil Barnard who told the Court he was awoken in the early hours of the morning of the 27th March 2007 by what turned out to be two men trying to break into his cottage. Arming himself with a fishing gaff he confronted one of the men. Whilst he was doing so he was stabbed eight times in the back by the other attacker.
- [4] Realising that one of his lungs had been punctured, and believing he was going to die, he went and sought assistance from his neighbour and asked her to phone the police. Eventually an ambulance arrived and he was taken to hospital where he spent a week recuperating from his injuries.
- [5] When Mr Barnard returned from hospital, he discovered both his motor vehicle and the keys to his Nissan bakkie were missing. The keys had always been kept on a hook in the kitchen of the cottage.
- [6] Mr Barnard identified his motor vehicle from an album of photographs produced at the hearing. He testified that he had recovered the vehicle eventually from the Hibberdene police station after it had been recovered by Tracker or the Metro police.
- [7] Aspects of his evidence that were significant were, that he did not know the identity of his attackers, or who had stolen his motor vehicle, and that he was unsure of his street address as he did not use it as such but used a post office box number.
- [8] Olga Monroe who was the next door neighbour of Mr Barnard testified that at about two o'clock of the morning in question Mr Barnard had knocked on her front door asking for help. She had opened the door and found him standing there covered in blood. He collapsed onto the floor of her house while she telephoned for help.
- [9] Whilst waiting for the ambulance Mrs Monroe looked out and saw two men standing in Mr Barnard's yard near his bakkie. Thinking it was neighbours who were coming to assist her, she screamed at them to come and help her because Mr Barnard was dying. They did not respond and she closed the door again and went to attend to Mr Barnard. Mr Barnard then told her that he had heard a vehicle. She opened the door just in time to see his bakkie being reversed out of the driveway. At that stage she realised that the two men she had seen were not neighbours.
- [10] Mrs Monroe was unable to identify the two persons she saw standing next to Mr Barnard's car.
- [11] The next witness to give evidence was Raymond Msawenkosi Ngongo. He testified that on the morning in question the appellant and his co-accused had arrived with a Nissan Hardbody bakkie to sell to him. He had previously indicated to them his need for a motor vehicle and they sold it to him for R15 000. The bakkie which he had purchased from the appellant and his co-accused was later taken from him by the police who arrived at his home looking for another vehicle, a Nissan Sentra, which was parked there. When checking the Nissan Sentra they had seen the bakkie and made enquiries about it. Mr Ngongo subsequently pleaded guilty to

receiving stolen property with regard to his purchase of the bakkie. He testified that the vehicle had been brought to him by the appellant and his co-accused on the morning of the 27th March 2007 between 4 and 5am. He remembered the date because he regarded it was an important date because he was entering another

stage in his life – i.e. acquiring a motor vehicle.

[12] Mr Ngongo conceded that he had purchased the bakkie appreciating that it was stolen, but he did so because of his own greed. He accepted that he was dishonest in acquiring the bakkie.

[13] By reference to the photo album Mr Ngongo identified the bakkie as the one which had been stolen from Mr Barnard.

[14] At the end of the State case an exhibit was handed in. This document was an affidavit by Inspector Vusumuzi Goodman Mkhize that he had, on the 27th March 2007 at 5.30am attended the scene of an attempted murder and theft of motor vehicle complaint at 37 Juniona Road, Elysium. He had lifted a palm print on the outside of the north facing lounge door which matched the right palm print of the appellant.

[15] Thereafter both the appellant and his co-accused applied for their discharge in terms of s 174 of the Criminal Procedure Act, 1977. Both applications were refused.

[16] The legal representatives of the appellant and his co-accused then indicated that they would not be leading any evidence and closed their cases.

[17] The State case against the appellant is based on three facts :-

that Mr Ngongo testified that the appellant and his co-accused had brought the bakkie stolen from Mr Barnard to him on the morning of the offence and some few hours after it was committed; and

that the appellant's right palm print was found on the sliding door, allegedly of the premises where Mr Barnard was assaulted; and

that the appellant and his co-accused did not testify in the face of this evidence.

[18] Mr Butler who appeared for the appellant, drew our attention to the fact that the address reflected in Exhibit C as the premises where the finger print had been lifted are reflected at 37 Junonia Road, whereas Mr Barnard testified that he resided at 22 or 23 "Janonia Road" (as it is spelt in the record). As Mr Naidoo for the State pointed out, however, Mr Barnard was clearly unsure of his street address and testified that he usually used a post office box number.

[19] In this regard the probabilities are overwhelming that the palm print was lifted from the premises at which Mr Barnard was robbed and attacked. If either of the legal representatives for the appellant or his co-accused had for one moment believed that the reference in the affidavit of Inspector Mkhize had been to a finger print lifted from premises different to

those where the offence took place it would have been astonishing had they not dealt with this immediately. In my view there can be no doubt that the appellant's right palm print was found at the scene of the crime.

[20] However, and even on the assumption that I am wrong in that conclusion, there still remains the fact that Mr Ngcongo gave evidence that the appellant and his co-accused had brought the stolen bakkie to his home within three hours of the robbery taking place. Even accepting that he was a single witness who had previously been charged with the same offences, and had pleaded guilty to a lesser charge, there is no reason to disbelieve his evidence.

[21] In *S v Francis* 1991(1) SACR 198 (A) @ 205 B – G, Smalberger JA stated :-

“It is not necessarily expected of an accomplice, before his evidence can be accepted, that he should be wholly consistent and wholly reliable, or even wholly truthful, in all that he says. The ultimate test is whether after due consideration of the accomplice's evidence with the caution which the law enjoins, the Court is satisfied beyond all reasonable doubt that in its essential features the story that he tells is a true one ...”

[22] Mr Naidoo who appeared for the State, submitted that Mr Ngcongo's evidence survives the application of the cautionary rules to be applied to his evidence. I agree.

[23] In my view the evidence which was adduced was such that it clearly called for an answer from the appellant and his co-accused. In *S v Boesak* 2001(1) (CC) @ 11 paragraph 24, Langa DP stated :-

“The right to remain silent has application at different stages of the criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a Court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of an accused. Whether such a conclusion was justified will depend on the weight of the evidence.”

[24] In my view the silence of the accused in this case, given the evidence which had been adduced by the State, can only lead to the conclusion that they were guilty of attempting to break into Mr Barnard's cottage in order to steal from him and attempting to kill Mr Barnard.

[25] The learned magistrate convicted the appellant and his co-accused of the crime of housebreaking with intent to steal with aggravating circumstances as defined in s 1 of the Criminal Procedure Act, 1977 read with the Criminal Law Amendment Act, 1997.

- [26] However, the problem with such a conviction is that there is insufficient evidence to demonstrate that the appellant and his co-accused were guilty of housebreaking. This is because there was no evidence of a displacement. At the initial stage when they were attempting to break into the cottage, they were apparently unsuccessful, and Mr Barnard emerged from the cottage to confront them. At some later stage they must have gone into the cottage and retrieved the keys to the motor vehicle. However, there is no evidence as to how they did so and it is probable that they simply entered the house through the open door left by Mr Barnard.
- [27] In his judgment on sentence the learned magistrate was alive to the fact that there is a thin line separating the two offences. This is because the injuries which were inflicted on Mr Barnard were carried out in the course of the attempted housebreaking.
- [28] The learned magistrate gave consideration to all the personal circumstances of the appellant and his co-accused and found that there were no substantial and compelling circumstances which would persuade him to reduce the minimum sentence imposed in terms of Part 2 of Schedule 2 which obliged him to sentence the appellant and his co-accused to imprisonment for a period of not less than fifteen years.
- [29] In all the circumstances I set aside the conviction of housebreaking with intent to steal with aggravating circumstances as defined in s 1 of the Criminal Procedure Act, 1977 read with the Criminal Law Amendment Act, 1997 and replace it with the following :
- “The accused are convicted of attempted housebreaking with intent to steal with aggravating circumstances as defined in s 1 of the Criminal Procedure Act, 1977 read with the Criminal Law Amendment Act, 1997.”*
- [30] In addition, I confirm the conviction on the count of attempted murder.
- [31] In a consideration of sentence, in addition to all the personal circumstances of the appellant and his co-accused which were taken into account, it is important to bear in mind the following :-

the appellant and his co-accused attempted to break into the cottage of Mr Barnard; and

when Mr Barnard emerged from the cottage, the appellant and his co-accused attacked him, severely injuring him; and

the appellant and his co-accused did not take the opportunity which presented itself once they became aware of the fact that Mr Barnard was alive to their activities, of fleeing the scene and ceasing their unlawful conduct; and

only when they were satisfied that Mr Barnard was severely injured did they move away from him; and

However, clearly having realised that he had fled to his neighbour's home in his injured state, they elected to re-enter his premises, to take the motor vehicle keys from the kitchen and then steal the motor vehicle.

- [32] Their conduct in so doing was extremely serious. They were callous in persisting with the theft of the motor vehicle after having severely injured Mr Barnard.
- [33] There is no doubt that the public is entitled to feel safe in their homes. This is not merely a case of motor vehicle theft. What the appellant and his co-accused did was to set out to enter the premises of Mr Barnard and steal from him. When faced with his opposition they attempted to murder him. It was entirely fortuitous that they did not do so. That the appellant was 20 years of age at the time of the commission of the crime cannot operate in his favour to the extent that it can constitute a substantial and compelling reason not to impose the minimum sentence. The conduct of the appellant and his co-accused against Mr Barnard was calculated, brutal and callous. They showed absolutely no concern for the property of, or indeed the life of, Mr Barnard.
- [34] Mr Butler for the appellant submitted that the time which the appellant had spent in custody should have been taken into account in the determination of his sentence.
- [35] Mr Naidoo submitted that in terms of sub-s 51(4) of the Criminal Law Amendment Act, 1997 that was not so.
- [36] Sub-s 51(4) appears to have been repealed or, as it is described, "omitted" by the Criminal Law (Sentencing) Amendment Act, 2007. (See Government Gazette No 30638 dated the 31st December, 2007).
- [37] In *S v Vilakazi* 2009(1) SACR 552 (SCA) the Court held that it would be unjust if a period of imprisonment awaiting trial is not brought into account in any subsequent custodial sentence. The Court accordingly ordered that a sentence imposed upon the appellant was to expire two years earlier than would ordinarily have been the case. In this regard Nugent JA said at page 574, paragraph 60 :-

"There is one further consideration that must be brought to account. The appellant was arrested on the day the offence was committed and has been incarcerated ever since. At the time he was sentenced he had accordingly been imprisoned for just over two years. While good reason might exist for denying bail to a person who is charged with a serious crime it seems to me that if he or she is not promptly brought to trial it would be most unjust if the period of imprisonment while awaiting trial is not then brought to account in any custodial sentence that is then imposed. In the circumstances I intend ordering that the sentence – which for purposes of considering parole is a sentence of fifteen years imprisonment commencing on the date that the appellant was sentenced

- is to expire two years earlier than would ordinarily have been the case."

- [38] Having considered all the evidence I am of the view that the learned magistrate was correct in finding that there were no substantial and compelling circumstances which were present.

[39] Because of the possibility of the conduct of the appellant and his co-accused becoming confused across the two counts, and counting both offences as one for the purposes of sentence, the appellant is sentenced to undergo imprisonment for a period of fifteen years.

[40] I accordingly substitute the sentence of the learned magistrate with the following :-

“The accuseds are sentenced to fifteen years imprisonment. With regard to accused number 1, the sentence is to be antedated to the 21st November 2008, the date on which the original sentence was passed, and a period of eighteen months is to be deducted when calculating the date upon which his sentence is to expire.”

Gcaba A J : I agree.

It is so ordered.

Date of hearing : 7th September 2010

Date of hearing : 16th September 2010

Counsel for the Appellant : J Butler (instructed by Legal Aid SA)

Counsel for the Respondent : D Naidoo (instructed by the Director of Public Prosecutions)

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