

SOUTH AFRICA / JUDGMENT

Bosman v S (CA99/15) [2016] ZAECHGHC 96 (29 September 2016) [2016] ZAECHGHC 96

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket, J Smith, M Kahla

CASE / FILE NUMBER

CA99/15

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case

no: CA 99/15

Date

heard: 5/9/16

Date

delivered: 29/9/16

Not

reportable

In

the matter between:

JONATHAN

BOSMAN

Appellant

and

THE

STATE

Respondent

JUDGMENT

PLASKET, J:

[1] The appellant, Mr Jonathan Bosman, was convicted by Roberson J of robbery with aggravating circumstances (count 1), attempted robbery with aggravating circumstances (count 3) and murder (count 4). He was sentenced to 15 years' imprisonment, ten years'

imprisonment and life imprisonment respectively for these offences. He appeals against conviction and the sentences imposed in respect of counts 3 and 4. He does so with Roberson J's leave.

[2] The incidents giving rise to the convictions occurred on two occasions. On 3 November 2010, Mr Geoffrey Swartz was accosted by three men near the SANTA Hospital in Graaff-Reinet. He was robbed at knife-point of R780 and a cell-phone.

[3] On 17 December 2010, near Oval Drive, Graaff-Reinet, an attempt was made to rob Mr Gari Ncube who was then stabbed and thrown off the railway bridge on which he was standing at the time. He died as a result of the stab wounds that were inflicted by his assailant.

[4] Bosman's defence to count 1 was an alibi. He was, he said, at work at the time the robbery was committed. His defence to counts 3 and 4 was that, although he was present on the railway bridge when these offences were committed, they were not committed by him but by his companion, Mr Henrico Saptoe.

[5] This appeal involves an attack on the factual findings made by Roberson J. In circumstances such as this, the factual findings of the trial court are presumed by the court of appeal to be correct and will only be interfered with if they are tainted by material

misdirection or are clearly wrong. It is not sufficient for an appellant to raise a reasonable doubt as to the correctness of the

factual findings.[1]

Count 1

[6] The evidence of Swartz was that he was unable to see two of his assailants but one stood directly in front of him. After he had been robbed and his assailants had fled, he was informed by people present nearby of the name of the appellant and where he lived. He reported the incident to the police who searched in vain for the culprits. About a week later, a detective arrived at the place where Swartz was working. He had three men with him and asked Swartz whether any of them were involved in the robbery. Swartz did not identify any of them. Later still, he brought another person. Swartz identified him as one of the robbers. That person was Bosman. As stated, Bosman's defence was an alibi – that he was at work on the day in question.

- [7] In her judgment, Roberson J evaluated the evidence of Swartz and concluded that as the incident occurred in broad daylight and the robber that he was able to observe had not covered his face in any way, the conditions for a proper identification were good. She also took into account that when Bosman was brought to him by the detective, he identified him immediately. She was alive to two problems that had emerged with regard to Swartz's statement to the police, but regarded these as immaterial and having no bearing of the true issue, his powers of observation. She concluded that his identification of Bosman as one of his assailants was reliable.
- [8] She was not impressed with Bosman as a witness, describing his version as improbable. She held that a person in his position would have told the investigating officer immediately that there was someone who could confirm his alibi that he had been at work. The fact, furthermore, that this only came to light during cross-examination placed a question mark over its veracity. With reference to Bosman's evidence that the investigating officer had told him that Swartz had identified one of the three people who he had earlier brought to him, Roberson J found this also to be highly improbable. Why, she asked, would the investigating officer

have brought Bosman to Swartz if he had earlier identified a person as his assailant.

- [9] On a conspectus of the evidence as a whole, she accepted the evidence of Swartz and the investigating officer as to the identification of Bosman and rejected Bosman's evidence as not being reasonably possibly true.
- [10] Having considered the record and the learned judge's reasoning, I conclude that there is no indication of a material misdirection in her evaluation of the evidence and it certainly cannot be said that her factual findings are clearly wrong. No basis exists, consequently, for interference with her factual findings and the appeal against conviction on count 1 must fail.

Counts 3 and 4

- [11] Two witnesses, Mr Ndumiso Stok and Ms Ntombekaya Maduna, saw from a distance how a person had attempted to rob and then stabbed the deceased and had thrown him off the railway bridge on which they and a third person were standing. It is common cause that the three people on the bridge were the deceased, Bosman and Saptoe.
- [12] Saptoe testified that Bosman was the person who had attempted to rob and had stabbed the deceased before throwing him off the bridge. Bosman, on the other hand, testified that Saptoe had committed these acts.
- [13] Roberson J did not rely on the evidence of Saptoe, except where it was supported by the evidence of Stok and Maduna. That approach was the correct approach because he was not a particularly good witness.

[14] Saptoe had informed the investigating officer that Bosman's trousers and shoes were bloodstained as a result of the stabbing of the deceased. He went to Bosman's house and found the items concerned. When he showed them to Bosman, he denied they were his but later conceded that the trousers were his but the shoes were not. The blood on the shoes was later identified, through DNA analysis, to be that of the deceased.

[15] Roberson J found Stok and Maduna to have been completely neutral, objective witnesses. There was, she said, no reason to reject their evidence. They were not, however, able to identify the person who perpetrated the offences. She considered the evidence of the deceased's blood being on Bosman's shoes to be particularly damning. Stok and Maduna had testified that one person

had held the deceased and stabbed him before throwing him from the bridge. The other person on the scene had stood a short distance

away. It followed, she held, that the person with the deceased's blood on his shoes must have been the person who stabbed the deceased. That person was Bosman.

[16] She found Bosman to have been a most unsatisfactory witness who contradicted himself and tailored his evidence when he was confronted with contradictions and improbabilities. Important aspects of his version, such as his assertion that Saptoe had burnt his own bloodstained clothes, was never put to witnesses. Furthermore, his evidence that the deceased had leapt from the bridge, rather than been pushed from it, was highly improbable as was his evidence that he was concerned about the well-being of the deceased but nonetheless did nothing to help him.

[17] While Roberson J accepted that a person enjoys a right to silence, she found it strange that a person in Bosman's position, as an innocent witness to a murder on his version, would not immediately inform the police as to who had killed the deceased.

[18] Having considered all of the evidence, she was satisfied that the evidence of Bosman was to be rejected as false beyond reasonable

doubt and that the State had proved its case against him beyond reasonable doubt.. She accordingly convicted him of attempted robbery

with aggravating circumstances and murder.

[19] As with the conviction on count 1, I can see no misdirection on the part of Roberson J. Bosman has not established any basis for this court to interfere with her factual findings and the convictions on counts 3 and 4. The appeal against these convictions must therefore fail.

Sentence

[20] It is trite that a court of appeal's power to interfere with the sentence imposed by a trial court is limited to situations in which the sentence is vitiated by a material misdirection or is so severe (or lenient) that it induces a sense of shock.[2]

- [21] No prescribed sentence applies in respect of count 3, the attempted robbery of the deceased. A prescribed sentence of life imprisonment applies in respect of count 4, the murder conviction.
- [22] Roberson J considered Bosman's personal circumstances. Apart from his previous convictions, they are unremarkable. She held that they did not serve as substantial and compelling circumstances to justify a less severe sentence than that prescribed. Instead, she pointed to a number of aggravating factors. He had five previous convictions. They were for arson, theft, stock theft, assault with intent to do grievous bodily harm and housebreaking with intent to steal. He committed the attempted robbery and murder after he had been arrested for the robbery of Swartz and had been released on warning. He had learnt nothing from his previous encounters with the criminal justice system. The crimes were particularly serious, prevalent, brutal and ruthless.
- [23] I can see no misdirection in Roberson J's sentences and neither induces in me a sense of shock. Indeed, they strike me as appropriate and proportional in the circumstances. There is, consequently, no basis upon which to interfere with them, and the appeal against sentence must fail.

Order

- [24] The appeals against both conviction and sentence are dismissed.

C Plasket

Judge of the High Court

I agree.

J Smith

M Kahla

Acting Judge of the High Court

APPEARANCES:

For the appellant: E Crouse instructed by the Grahamstown Justice Centre

For the respondent: JC Coetzee of the office of the Director of Public Prosecutions, Grahamstown

[1] R v Dhlumayo & another 1948 (2) SA 677 (A) at 705-706; S v Francis 1991

(1) SACR 198 (A) at 204c-e; S v Hadebe & others 1997 (2) SACR 641 (SCA) at 645e-f; S v Monyane & others 2008 (1) SACR 543 (SCA), para 15.

[2] S v Malgas 2001 (1) SACR 469 (SCA), para 12.

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