

SOUTH AFRICA / JUDGMENT

Bruintjies and Others v S (CA & R 71/2010)

[2010] ZAECHGC 99 (25 October 2010)

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COURT

Eastern Cape High Court, Grahamstown

BEFORE

Chetty, Dambuza

CASE / FILE NUMBER

CA & R 71/2010

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

In the matter between:

Case No: CA & R 71/2010

Date Delivered: 25/10/10

JONATHAN BRUINTJIES

.....First

Appellant

NATANIEL BRUINTJIES

.....Second

Appellant

GREGORY MALIE

.....Third

Appellant

And

THE STATE

.....Respondent

Coram: Chetty and Dambuza JJ

Date Heard: 13 October 2010

Date Delivered: 25 October 2010

Summary: Criminal

Law – Robbery with aggravating circumstances – Firearm
used – Identification of appellants not in issue

– Alibi

– Appellants contended that complainants conspired to falsely
implicate them – Evidence – Assessment

of –

Appellants evidence clearly contrived – Complainant's

evidence credible and reliable – Magistrate
convicting
appellants of robbery simpliciter Notwithstanding evidence that
firearm used – Judgment bereft of proper reasoning
–
Sentence – No basis to interfere

JUDGMENT

Chetty, J

[1] During the late evening of 26 January 2008, four young men, Anver Booysen(Booyesen), Warren Adams (Adams), Mureed May (May) and Stanton Draai (Draai) were walking in Timothy Valley when they were accosted by three persons. During the altercation, a firearm was brandished, the

complainants robbed of a cellular telephone, R150 in cash and a pair of earrings. Shots were fired but fortunately, none of the

complainants were struck. Approximately two months later, the three appellants were arrested on charges of robbery with aggravating

circumstances, the unlawful possession of a firearm and a contravention of section 120 (3) (b) read with sections 1, 103, 120

(1) (a), sections 121 read with Schedule 4 and section 151 of the Firearms Control Act¹ viz the offence of reckless endangerment of person or property. At the subsequent trial the three appellants pleaded not guilty and each raised an alibi as the basis of their respective defence. In addition to the testimony adduced from the complainants, the state led evidence of a clergyman, father Johnny Myburgh (Myburgh) of the Old Apostolic Church. The three appellants all testified, the first and second appellants called the girlfriend of the first appellant, Eloise Dieman (Dieman) as their alibi witness and the second appellant moreover called his mother, Mrs. Marie Norman (Mrs. Norman), to counter the evidence of Myburgh.

[2] Although the transcript of the evidence amounts to one hundred and thirty two pages, the magistrate's judgment is regrettably rather terse. Courts of law are required to hand down reasoned judgments and it is lamentable that the magistrate ignored this salutary practice for exigencies of time. This no doubt contributed to the obfuscation of the triable issues for the judgment proceeds on the assumption that the issue which fell for decision related to identification. Identity was not the real issue given the admitted common cause fact that the complainants and the appellants lived in the same area and were well acquainted with each other. The appellants' defence throughout was that the complainants, for reasons of their own, had conspired to falsely incriminate them. Consequently, the court was called upon to analyze and evaluate the evidence and make credibility findings. Be that as it may, I am

nonetheless satisfied that the magistrate's conclusion that the appellants' guilt had been established beyond reasonable doubt is undoubtedly correct.

- [3] Although there were numerous contradictions between the evidence of the four complainants, these were entirely inconsequential, given the fluidity of the scene and the obvious shock which the firing of the firearm must have occasioned. Some measure of inconsistency is to be expected. As regards the actual incident however, each corroborated the other in every material respect. The fact of the robbery and the involvement of the appellants therein was moreover clearly established by the testimony of Myburgh and, inadvertently, by Dieman.
- [4] The relevance and importance of Myburgh's evidence received scant attention in the judgment. It was not in issue that not only were the appellants well known to Myburgh but the first and second appellants were moreover members of his congregation. Myburgh testified that his ecclesiastical duties were not confined to only the church, but that he was actively engaged in resolving disputes in his parish and that it was in that capacity that he was approached by Booysen. The latter informed him that he had been robbed by the first and second appellants and enlisted his assistance to facilitate return of their belongings. As a quid pro quo for the return of their goods, they assured Myburgh, they would withdraw the charge which they laid against the appellants.
- [5] In order to amicably resolve the matter, Myburgh visited the appellants at their home, and, in the presence of their mother, Mrs. Norman, confronted the appellants with the allegations leveled against them by Booysen. According to Myburgh, both appellants immediately admitted complicity in the robbery, expressed remorse for their conduct and offered to return the cell phone to Booysen, a fact confirmed by Booysen subsequently. Although it was put to Myburgh and subsequently confirmed by the first and second appellants that they denied making the admission imputed to them, their denial is, on a conspectus of the evidence, clearly false.
- [6] As adumbrated hereinbefore, both the first and second appellants raised an alibi as the basis of their defence and, as corroborative evidence, called Dieman to verify that they were both at home during the course of that evening. Under cross-examination it soon became apparent that Dieman had been suborned. Although the second appellant had testified that he was at work during the day, Dieman, loyally placed him in the house the entire day and right with her and the first appellant. Inadvertently however, the truth emerged during her cross-examination concerning Myburgh. She confirmed Myburgh's presence at the house and the conversation with Mrs. Norman and the appellants and volunteered the information that the first appellant had told her that Myburgh had conveyed the gist of what Booysen had told him and that he, i.e. the first appellant, had resolved to return the cell phone to Booysen, which he later confirmed having done. That evidence proved the falsity of not only the first appellant's evidence but, moreover, his alibi defence.

- [7] Upon a conspectus of the entire body of evidence the participation of the three appellants in the commission of the robbery was clearly established and their guilt proven beyond a reasonable doubt. The appeal against their conviction must accordingly be dismissed.
- [8] A similar fate befalls their appeal against sentence. Although the magistrate stated in the judgment on the merits that the firearm was only used after the robbery had been effected, that finding is in direct conflict with the testimony adduced by the complainants. Their version was that the third appellant's action in pointing a firearm at them initially subdued them but the rapid firing of two shots induced them to part with their belongings. Although the evidence established that aggravating circumstances was attendant on the robbery, the magistrate ignored it and convicted the appellants merely of robbery. On appeal before us, counsel for the state acquiesced in the finding.
- [9] The issue for decision is whether interference with the sentence of six years imprisonment imposed upon the appellants is warranted. The offence of robbery, particularly where a firearm is used, is undoubtedly a serious offence and ordinarily attracts punishment in excess of that imposed. Had the magistrate properly analyzed the evidence the proper verdict should have been a conviction of robbery with aggravating circumstances which attracted a sentence of fifteen years imprisonment absent a finding of substantial and compelling circumstances.
- [10] The ordained sentence would clearly have been inappropriate given the facts of the case and its aftermath. The further question which arises is whether it can truly be said that a sentence of six years imprisonment is shockingly inappropriate. In my view, the sentence imposed is entirely commensurate with the nature of the offence and its method of execution. The real possibility that the complainants could have sustained serious if not fatal injuries given the number of shots fired cannot be ignored. Nor too the fact that this was a brazen robbery carried out with scant regard, not only for the complainants, with whom the appellants were acquainted, but for the consequences of their conduct. Their bravura in robbing persons whom they knew and could be identified by displays a contemptuous disregard for the rights of others and, in the final analysis, for law and order itself. The appellants can indeed consider themselves fortunate that the magistrate completely overlooked the fact of the second charge, and the evidence establishing the guilt of the appellants thereanent. Such a conviction in itself attracts a custodial sentence.

[11] In the result the following order will issue:-

The appeal is dismissed.

D. CHETTY

JUDGE OF THE HIGH COURT

Dambuza, J

I agree.

N. DAMBUZA

On behalf of the Appellant: Adv H.L McCullum

Instructed by the Justice Centre

Grahamstown

On behalf of the Respondent: Adv M. September

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1Act No 60 of 2000

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