
SOUTH AFRICA / JUDGMENT

Chitumbura and Another v S (A190/201) [2017] ZAGPJHC 274 (14 September 2017)

[2017] ZAGPJHC 274

COURT

South Gauteng High Court, Johannesburg

BEFORE

WHG van der Linde, MMP Mdalana

CASE / FILE NUMBER

A190/201

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A190/201

Not reportable

Not of interest to other judges

Revised

14 September 2017

In the matter between

Chitumbura, Gibson First Appellant

Ndareka, Wellington Second Appellant

and

The State Respondent

Judgment

Van der Linde, J:

Introduction

- [1] On 18 Nov 2013 four men robbed the home of Dr Mosheshe and her family. Of her family, her domestic helper Ms Faustina Magogo, her sister-in-law, her one son, and her gardener were at home with her when the robbery, a very violent one, was executed. Two of the robbers got away but two were apprehended, and each of them was subsequently charged with four counts of robbery with aggravating circumstances, and four counts of attempted murder. The latter counts derive from them having forced Dr Mosheshe and her family to drink Ratex, intending that it would kill them. Fortunately they survived.
- [2] The Regional Court of Johannesburg found the two accused guilty as charged and sentenced them each to 17 years imprisonment for the robberies and ten years imprisonment for the attempted murder. These sentences were not to run concurrently. On application to the court a quo, the two appellants were granted to leave to appeal, in the case of the first appellant against both conviction and sentence, and in the case of the second appellant against sentence only.
- [3] This distinction in their treatment springs from the following facts. Both appellants denied that they were on the scene at all. The second appellant was however, swiftly identified by Dr Mosheshe, Ms Magogo and the sister-in-law at a subsequent identity parade. The first appellant was not identified by Dr Mosheshe and her sister-in-law at a different, earlier identity parade, and although Ms Magogo identified him there she did say then, at least according to the officer who conducted the parade, although disputed by her, that she was unsure. The gardener did not attend that identity parade.

The approach of a court of appeal to an appeal against conviction

- [4] As regards the approach of courts of appeal to trial court findings of fact generally, the Constitutional Court has most recently in *Makate v Vodacom (Pty) Ltd*, [2016] ZACC 13 at [37] to [41], in a judgment handed down on 26 April 2016, restated the position. Trial courts have advantages that appeal courts do not have. The former are steeped in the matter; they observe witnesses, and they are able and required to assess probabilities as they manifest within the circumstances prevailing, and as they apply to the particular witnesses testifying.
- [5] In the result, unless the factual findings of the trial court are clearly wrong, or unless the trial court will have misdirected

itself, those findings are not to be upset on appeal. It is instructive to quote the relevant portion of the judgment of Jafta, J in *Makate*:

“[37]In these circumstances, interference with the factual findings made by the trial Court is neither necessary nor justified. Ordinarily appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. In Bitcon, Wessels CJ said:

‘[T]he trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men, but is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were.’

[38] In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it comes to factual findings. In *Powell & Wife*, Lord Wright formulated the principle thus:

‘Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.’”

- [6] Regard may also be had to judgments such as *S v Francis* [1991] 2 All SA 9 (C); 1991(1) SACR 198 (A), which said that there is a presumption that the trial court’s evaluation of the evidence is correct and it will only be disregarded if it is clearly wrong. Compare also *S v Mafaladiso en Andere*, 2003 (1) SACR 583 (SCA) at 595 b – d.
- [7] There is a comprehensive discussion, with reference to leading cases, of this topic at p30-39 of *Commentary on the Criminal Procedure Act* by Du Toit et al, Juta & Co, 1987, Supplementary Vol. There is also a pertinent analysis in Hiemstra, *Suid-Afrikaanse Strafproses*, 6th ed, Butterworths, 2002, by Kriegler and Kruger, at p 831. The iconic judgment is of course that of Davis, AJA in *R v Dhlumayo & another*, 1948 (2) SA 677 (A) at 705 – 706.
- [8] The principle that has remained throughout these years is that a court of appeal does not easily overturn the factual findings of a trial court. They would have to be plainly wrong; or, as it has been said, there would have to have been a “demonstrable and material misdirection” by the trial court. Absent these, those findings stand.

The approach of a court of appeal to an appeal against sentence

- [9] The threshold for interfering in sentences of a trial court is higher. Du Toit et al say at 30-41:

“The sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not exercised his discretion properly, or that it was in the public interest to alter it.”

[10]Regard may be had also to the judgment of Scott, JA in *S v Kgosimore*, 1999(2) SACR 238 (SCA), relied on by the State, where his lordship held that if the discretion of the trial court was properly and reasonably exercised, there was no scope at all for interference in the sentence. This collection of expressions of resistance to interference in lower court sentencing underscores just how jealously our judicial hierarchy protects the prerogative below, and it is difficult to add to it.

The appeal of the first appellant against his conviction

[11]The first appellant was implicated by all the complainant witnesses to the robberies. Dr Mosheshe, who testified how when she arrived at her house in Parktown West at midday a robbery was in progress, explained that she observed the first appellant over a period of about two hours while the robbery was being executed; that he was in the lounge with the other assailants; that he took money from her bag and put it in the pockets of his jacket; that Absalon – the first appellant’s brother and a principal role-player in the robberies – left the firearm with the first appellant when the former disappeared into the house; that Absalon asked the first appellant to help him pour the poison into the four cups; that the first appellant assisted the gardener to drink the poison because his hands were tied behind his back; and that the first appellant tied her feet.

[12]Ms Magogo corroborated the evidence that the first appellant took money from Dr Mosheshe’s bag and put it in his jacket pockets. She testified that she observed the first appellant and another assailant collecting items from the house; and of course she identified the first appellant at the first identity parade. She said she was certain about her identification of the first appellant at the identity parade, although when he testified, Warrant Officer Mashigo, who conducted that identity parade, said that Ms Magogo was in fact nervous and said she was not sure of her identification.

[13]Mr Mwantobe, the gardener, confirmed that four assailants, including Absalon, were involved in the robberies. He was not asked to identify the first appellant and regrettably, he did not attend the first identity parade at which the first appellant was present. It appeared too, from questions of the court, that he was not able in court affirmatively to place the first appellant on the scene.

[14]On the very day of the robberies, Dr Mosheshe’s husband, Dr Ratshikwava, accompanied a posse of police officers to the first appellant’s brother’s house in the area of Olievenhoutbosch. The first appellant and his mother arrived after

the brother, Eddie, called them. Dr Ratsikwava told them that in fact his wife had died of the Ratem. It appears that this news shook the mother and her sons. The police officers then interviewed them; and it was then that the first appellant’s mother admonished that he had better tell the truth of what had happened.

[15]The first appellant then said that he knew where the stolen phone, passports and other items were, and he took them to his mother’s

house and there, underneath clothes that he had removed from a laundry basket, he showed them the robbed items, being the two cell

phones, passports and other items. According to the first appellant, it was Absalon that had brought these items there.

[16]Thus far then the evidence that implicated the first appellant. The first appellant testified in his own defence. He said that on the day that he was arrested, his brother Absalon had come into the house, and had put a cell phone and other items in a plastic bucket; and said to him (the first appellant), not to touch his things. Absalon then left, never to be seen again.

[17]Cross-examined, he said that his brother (Absalon) had brought the items there the day he was arrested. When his mother became available, he showed her the items. He opened the passports and saw that they belonged to persons he did not know. He was concerned; and in fact later he said that he was suspicious that they had been stolen. His mother then phoned Absalon, who said he would be coming home; but he never did.

[18]He explained that before it got to him showing the police the items that Absalon had brought home, he was required first to take them to where his brothers usually have a drink. They went there, with Dr Ratshikwava, and the police there search people at random, obviously looking for items that had been stolen all.

[19]All the while when this was happening, he said, he began to think whether the items that the police were looking for were not perhaps the same items that Absalon had brought home earlier that day. He then volunteered, that if these were the things that they were looking for, he knew where they were; his brother brought them home earlier the evening, and he would show them where these items were. This was when Dr Ratshikwava slapped him, three or four times, and he was handcuffed by the police.

[20]When he got to the house, and had showed them the items, some of the policemen started hitting him. Still, no-one told him that Absalon had been involved in a robbery; and in fact, it was only when he was brought before the court that he learnt of this accusation. He denied that the police interviewed them at Eddie's house; he denied that he was told that Dr Ratshikwava's family had died; he denied that his mother had said to him better to tell the truth; but he could not explain why none of these issues were disputed in the cross-examination of the State witnesses, except to say that he did not know that he was supposed to have disputed it.

[21]He was not able to offer an explanation for why his mother, whom on his version he had told before about the items Absalon had put in the plastic bucket, and who had phoned Absalon about them, did not herself volunteer to the police that the items they were looking for were in fact at her house. So the thrust of this line of cross-examination was that his evidence on this score was untruthful; that he had not earlier disclosed to his mother the items that Absalon had stuck in the plastic bucket. His answer remained, "I do not know".

[22]The court a quo analysed this evidence. It dealt with the evidence of Ms Magogo and her identification of the first appellant. It dealt with her evidence that she said she was certain, whereas the police officer said that in fact she said she was unsure. The court a quo dealt with the evidence of Dr Mosheshe and her opportunities for identification during the robbery, and yet the inability to identify during the identity parade.

[23]The court concluded that if the evidence of identification were the only evidence against the first appellant, it would probably not have gone far enough to found the case against him. But having dealt with his evidence of the events surrounding the recovery of stolen items, it rejected his evidence as being untrue. It held that his failure to have volunteered the presence of the stolen items, was indicative of a guilty conscience.

[24]It reasoned further that the first appellant's ability to point out the stolen items so shortly after the robbery sufficed to warrant the inference that that he was involved in the robbery. The court reasoned that his identification by the two witnesses – Dr Mosheshe and Ms Magogo – served as corroborative value. In all, therefore, the court was not faced with Ms Magogo being a single witness, and with the caution that s.208 of the Criminal Procedure Act 51 of 1977 exacts. The court a quo concluded therefore that the case against him had been established beyond reasonable doubt.

[25]It was argued on appeal on behalf of the first appellant that the court misdirected itself by rejecting the first appellant's

explanation for being able to identify the stolen items as untrue. The submission was that in two respects the first appellant's

honesty was illustrated.

[26]The first was that he would not have accompanied his mother to his brother Eddie's house when told that the police and others were there. He would, instead, have escaped right there. And the second was that he would not have volunteered the existence at all of the stolen items when back at his mother's house; he would simply have remained quiet about them.

[27]But the first appellant's evidence was that when he went with his mother to Eddie's house, he did not know that the police were there; Eddie had not told them on the phone. And on the second point, the likelihood is rather, it seems to me, that he began to see the inevitable, that their house too would be searched, and that the items would inevitably be discovered. In those circumstances action that precipitated the drama that would accompany the discovery would be indicated.

[28]On the assumption that the submissions concerning identification would fail, and the first appellant was therefore involved in the robbery, the first appellant argued too that the conviction on the charge of attempted murder was misdirected, for two reasons: the first was that it had not been shown that the complainants actually drank Ratex, and second was that on the evidence Ratex could never have killed the complainants.

[29]In view however of the evidence of Dr Ratshikwava these arguments are not open to the first appellant. Dr Ratshikwava established the causative chain from the Ratex packet to the cold drink bottles to the cups to the contents of the substance that made its way into the complainant's stomachs. He established too that Ratex, in sufficient quantities, could kill a human being. Dr Pikolo's evidence was not in conflict with this. Dr Ratshikwava was not challenged on any of this part of his evidence.

[30]Quite apart then from the question whether or not the quantities of Ratex absorbed by the complainants could have killed them, and quite apart from the fact that undoubtedly on the evidence the perpetrators considered that the Ratex was sufficient to kill the complainants, and set out deliberately to attain that consequence, the two submissions advanced by the first appellant must be rejected.

[31]In my view the first appellant has accordingly not on appeal before us shown that the court a quo had misdirected itself. I have to add that the inability of Dr Mosheshe to have identified the first appellant at the identity parade does not, in my view, detract from her ability to have identified the first appellant in court. Dr Mosheshe had the four assailants under observation for a period exceeding two hours on the day. They traumatised her hugely.

[32]If she was uncertain shortly after the events, when the identification parade was held, that is not surprising. No doubt she would also have been wary on not falsely accusing anyone. The presence of other faces at an identity parade may have served to confuse her. Ultimately however their faces must have been etched in her mind. In any event her version in placing the first appellant at the scene was corroborated by that of Ms Magogo.

The appeal of both appellants against sentence

[33]The court a quo considered that this was a particularly violent and traumatic robbery of a vulnerable family. The violence was extended, vicious, and wholly gratuitous. The court recorded that it dealt with many house robbery cases, but that this was one of the worst cases that it had dealt with in a long time.

[34]The appellants are both relatively young, in their twenties, and both were first offenders. But those two facts do not of themselves

qualify the appellants for reliance on the presence of substantial and compelling circumstances that would on that account, justify the court deviating from the prescribed minimum sentences.

[35]The State submitted, and I agree with respect, that our courts have adopted the approach that in respect of violent crimes, deterrence and retribution were to be preferred above prevention and rehabilitation. The courts have to send a message to prospective

criminals that people are entitled to safe living conditions.

[36]There is no doubt that the effective term of imprisonment of 27 years is substantial. Should the ten years imprisonment in respect of the attempted murder have been imposed? S.18(1) of the Riotous Assemblies Act, 1956 provides that the attempt to commit a crime "against a statute"

renders the accused, when convicted, and unless there is express provision to the contrary, liable to the same punishment as that prescribed for the crime in question. The question which this case raises is whether a conviction of attempted murder invokes the provisions of the minimum sentencing legislation, thereby compelling a court, absent substantial and compelling circumstances, to impose the prescribed sentences for murder.

[37]In my view s.18(1) of the said Act in fact does not apply, and does not have that effect, because the crime of murder is a common law crime, and not a crime "against a statute". The fact that the statute imposes a minimum sentence for the crime of murder does not make it a crime "against a statute"; the crime of murder exists long before the minimum sentencing legislation made its way to the statute books.

[38]The court a quo was thus free to sentence the appellants to any appropriate punishment for the convictions of attempted murder. This consideration aside, and since the convictions of attempted murder - taken on their own - would ordinarily justify a sentence of in the region of ten years imprisonment, the real question is whether the court a quo should have directed that the two sentences run together; in other words, whether the overall effect of the sentences is shockingly inappropriate.

[39]The cumulative effect of the sentences is in my view stiff, but I cannot conclude that they are so wholly different from what this court would have imposed, that interference is warranted. The attempted murder, consisting as it did in forcing the complainants to drink Ratex intending that the poison should kill them, was not an act used to subdue them so as to commit the murder. It was a different act, unconnected with the robbery, and so in principle justifying separate sentencing treatment.

Conclusion

[40]In the result, the appeal by the first appellant against conviction and sentence, and the appeal by the second appellant against sentence, are dismissed.

Date of appeal: 11 September 2017

Date of judgment: 15 September 2017

WHG van der Linde

Judge, High Court

Johannesburg

I agree.

MMP Mdalana

Acting Judge, High Court

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Date judgment: September 2017

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