

SOUTH AFRICA / JUDGMENT

Da Silva and Another v S (A303-2016)

[2017] ZAGPJHC 55 (8 March 2017)

[2017] ZAGPJHC 55**COURT**

South Gauteng High Court, Johannesburg

BEFORE

L R Adams, C Sardiwalla

CASE / FILE NUMBER

A303/2016

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Source record**IN****THE HIGH COURT of south africa****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: A303/2016****DPP****REF NO: 10/2/5/1-(2016/0466)****DATE:**8th
March 2017**Reportable:**NO
Of
interest to other judges: NO
Revised.
In**the matter between:****REIS:**RICARDO DA
SILVA First
Appellant**COSSA:**MUTACATE
M Second
Appellant
-
and -
THE
STATE Respondent

JUDGMENT

ADAMS J:

[1]. The first and second appellants, who were legally represented, were charged in the Regional Court of Johannesburg, with 5 (five) counts each, namely 1 (one) count of robbery with aggravating circumstances (allegedly committed on the 14th March 2008), 1 (one) count of robbery with aggravating circumstances (allegedly committed on the 18th March 2008), 1 (one) count of robbery with aggravating circumstances (alleged to have been committed on the 8th April 2008), 1 (one) count of attempted robbery with aggravating circumstances (allegedly committed on the 17th April 2008) and 1 (one) count of possession of a firearm (also alleged to have been committed on the 17th April 2008). The appellants pleaded not guilty to all of the charges and elected not to give any statements and / or plea explanations in terms of the provisions of section 115 of the Criminal Procedure Act 51 of 1977 ('the CPA').

[2]. On the 22nd April 2013 the first appellant was convicted on counts 2, 3, 4 and 5, and on the 26th April 2013 he was sentenced as follows:

2.1 Count 2 (armed robbery with aggravating circumstances): 12 years imprisonment;

2.2 Count 3 (armed robbery with aggravating circumstances): 12 years imprisonment;

2.3 Count 4 (attempted armed robbery with aggravating circumstances): 10 years imprisonment; and

2.4 Count 5 (unlawful possession of a firearm): 3 years imprisonment.

The sentences on counts 2 and 4 were ordered to run concurrently with the sentence imposed in respect count 3, resulting in an effective sentence of 15 years direct imprisonment.

[3]. The second appellant was also convicted on the 22nd April 2013 on counts 3, 4 and 5, and on the 26th April 2013 he was sentenced as follows:

3.1 Count 3 (armed robbery with aggravating circumstances): 15 years imprisonment;

3.2 Count 4 (attempted armed robbery with aggravating circumstances): 10 years imprisonment; and

3.3 Count 5 (unlawful possession of a firearm): 3 years imprisonment.

The sentences on counts 4 and 5 were ordered to run concurrently with the sentence imposed in respect of count 3, resulting in an effective sentence of 15 years direct imprisonment. The court a quo also ordered 10 years of his aforementioned effective sentence to run concurrently with a 20 year sentence the second appellant was serving at the time he was sentenced.

[4]. This is an appeal by the first appellant against his convictions only, and is with the leave of the court a quo. The appeal of the second appellant is against both his convictions and the effective sentence, and is likewise with the leave of the court a quo. I pause here to note that, although the second appellant was granted leave to appeal his convictions as well as his sentence, the appeal against sentence was not pursued. At the hearing of the appeal, no submissions were made on behalf of the second appellant vis-à-vis his appeal against sentence. The second appellant's appeal against sentence therefore stands to be dismissed without further ado.

[5]. This appeal principally turns on the reliability of the evidence identifying the first and second appellants as the persons who robbed the 3 (three) individual complainants on the 18th of March 2008, the 8th April 2008 and the 17th of April 2008 respectively.

[6]. On the 18th of March 2008 and at La Rochelle at approximately 16H00 the first complainant, Dumisani Thebe, an Estate Agent, was robbed of his

Toyota Corolla motor vehicle, R54.00 in cash and a cell phone, by 3 (three) men, one of whom was armed with a firearm, which he used to threaten the first complainant with. The Toyota vehicle, as well as the cell phone and the cash, were never recovered by the first complainant, who was able to identify the first appellant as one of his attackers at an official South African Police Services identity parade on the 16th May 2008, that is less than a month after the date of the robbery. At the identity parade the first complainant recognised and identified the first appellant as one of the persons who robbed him of his vehicle, by his light complexion and his round face. He also made a 'dock identification' of the first appellant. The first complainant was adamant that the first appellant, whom he had ample opportunity to observe on the day of the attack because he was the one who had frisked him whilst standing very close to him, was one of the assailants. He sounded very sure of his facts and responded as follows to a question under cross – examination: 'Even if I be called to an ID parade five years after the incident I will still be able to point him out.'

[7]. In a similar modus operandi the second complainant, Thando Nthloko (a chauffeur), was robbed at Malvern at about 17H15 on the 8th of April 2008 of his car, also a Toyota Corolla, 2 (two) cell phones and his official RSA ID book. This complainant was accosted by 3 (three) male assailants, one of whom pointed a firearm at him whilst they were all demanding that he gets out of his vehicle, in which they drove off after throwing him out of the car. His vehicle was recovered some 45 minutes later in Rosettenville. The cell phones were never recovered. He did however recover his ID book and the keys to the car on Sunday, the 20th April 2008, when he was called to the Booysens Police Station, where the police handed to him these items, which the police had in turn recovered from the first and second appellants. At the ID parade the second complainant pointed out 2 (two) persons as 2 (two) of those who robbed him of his motor vehicle. One of the individuals fingered by the second complainant was the first appellant and the other individual pointed out was not involved in the matter at all. It must be said however that there was a striking resemblance between the first appellant and the other male person fingered by the

complainant. The second complainant testified that the first appellant was in fact the one that grabbed the keys of the car from him and drove off in the car.

[8]. The evidence of the third complainant, James Nako Keetse, who was a police officer at the time, was singularly telling. At Kenilworth between 18H00 and 19H00 on Thursday, the 17th April 2008, he was confronted by 4 (four) males in a white Isuzu light delivery vehicle. Three of them alighted from the LDV. One of them was brandishing a firearm and demanded the keys to his Toyota motorcar, which was in fact a state vehicle. With the gun held against his head, the third complainant was forced out of the vehicle. At some point his assailants attempted to body search him and he resisted because he was apprehensive that, once they discovered that he was a police officer, he would be in more trouble.

He drew his service firearm and advised them that he is a police officer, whereupon the first appellant instructed the one wielding a firearm to shoot the complainant. By sheer luck the gun jammed when the gun wielding attacker pulled the trigger. When the complainant

fired a warning shot into the air, they all turned around and made a run for it. At that stage the complainant fired two shots in the direction of the person who was carrying the gun, and he hit him in the lower leg. The two appellants and one of the other attackers were able to flee in the LDV, leaving behind their gun toting accomplice to fend for himself. The latter jumped over a boundary wall and was later found in a toilet on these premises, clearly severely injured and bleeding from his wounds.

[9]. The third complainant testified that he had a good look at his attackers, and he was able to identify the first and the second appellants at the identity parade on the 16th May 2008. Shortly after the attack on the third complainant, the injured assailant, who had been shot and wounded by the said complainant, was removed to and admitted at the Chris Hani Baragwanath Hospital under police guard. Whilst there, he gave the police information and particulars relating the first and second appellants, such as their residential addresses.

[10]. On Sunday, the 20th April 2008, the appellants were arrested at their homes in Regents Park. A search of their two places of abode produced the stolen ID book of the second complainant as well the keys of the Toyota Corolla of the said complainant. The foregoing conclusively linked the first and second appellants to the robbery of the second complainant. Police officer Khubeka ('Khubeka'), one of the arresting officers, testified that on searching the 'backroom' of the first appellant, being his residence, he found the ID Book of the second complainant. The original car keys belonging to the Toyota Corolla of the second complainant was found at the house of the second appellant after a search of the premises. The first appellant denies that the ID Book was found at his house. This denial however has a hollow ring to it, because, as noted by Kubheka in his evidence under cross – examination: 'I found that ID book in that room where he was staying. Will he want to tell that the ID Book flew from where it was to, it had come to my office. No ways, I got that ID book from his place and I showed him there and then'.

[11]. On the issue of identity it is necessary to consider the evidence of all three of the complainants who testified as well as the evidence of Captain Moodie, who conducted the identity parade. All the complainants positively identified the first appellant at the identity parade as one of the persons who attacked and robbed them. Captain Moodie, as well as the other police officers who assisted him at the identity parade, confirmed that proper procedures were followed when conducting the identity parade.

[12]. Despite some rigorous cross – examination, spread over a period of at least two days, the third complainant remained adamant that the first and second appellants were two of the group of four people who attempted to hijack him. When it was put to him that the first appellant denies any involvement in the attempted robbery, his response was simply: ‘But I know that I saw him at the scene Your Worship’.

[13]. The Regional Magistrate approached the evidence of the complainants concerning identity with the necessary caution required when dealing with the evidence because of a single witness on the robbery and identity (see *S v Mthethwa*, 1972 (3) SA 766(A) 768 a-b). He correctly held that their evidence was clear, satisfactory, sincere, honest and reliable and that sufficient safeguards existed for the acceptance of their evidence (see *S v Charzen and another*, 2006 (2) SACR 143 (SCA) at 147 (I – J)). I cannot find any fault with the Regional Magistrate’s findings. The safeguards lie therein that, through sheer coincidence the reign of terror of the appellants and their cronies, was thwarted by the botched hijacking of the third complainant, who happened to be a policeman, who shot one of them, who in turn led the police to the appellants, who were then linked to the other robbery by the real evidence of the possession of the ID Book and the Toyota Corolla car keys. All three complainants had sufficient opportunity to make a proper and reliable observation of the appellants. In most cases they were able to describe fairly accurately in our view the facial and other physical features of the appellants, such as the fact that all of the complainants described the first appellant as being fair in complexion, which, by all accounts, was an accurate depiction of the first appellant.

[14]. The complainants positively identified the appellants at the ID Parade, and there is no evidence or suggestion for that matter that the identification was rigged or that they had been coaxed by the police. The identity parade was held in accordance with sound procedural rules. The evidence of all the police officers on the integrity of the identity parade cannot be faulted. The contention that there were irregularities in the identity parade was rightly rejected by the court a quo as devoid of substance.

[15]. The evidence of the arresting officers and that of the investigating officer stand almost uncontested. Importantly, the ID Book of the second complainant, as well as the keys of his stolen vehicle, were found in possession of the appellants. This fact inextricably links the appellants to the robbery of the second complainant. Throw into the mix the discovery of the white Isuzu LDV, coincidentally the same type and colour vehicle used by the robbers in the attack on Mr Keetse, the third complainant, then the matter calls for a credible and cogent explanation from the appellants so as to avoid the drawing of an adverse inference.

[16]. The version of the appellants is one of general denial. They deny that they committed any of the offences which they were charged with. When the state witnesses were being cross – examined, it was put to them that the appellants would deny that they had robbed them. They in fact denied that they were at the scenes of the alleged crimes. For example, to the third complainant the following was put on behalf of the first respondent: ‘In closing Sir, accused 1 is going to deny having partaken in any robbery where you were involved’. On behalf of the second appellant the following was put to Mr Keetse: ‘My client will testify to this court that at no stage he was there at the scene’.

[17]. It is trite that the State bears the onus of establishing the guilt of the appellant beyond reasonable doubt, and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent (*R v Difford*, 1937 AD 370 at 373, 383). In *S v Van der Meyden*, 1999 (2) SA 79 (W), which was adopted and affirmed by SCA in *S v Van Aswegen*, 2001 (2) SACR 97 (SCA), it was reiterated that in whichever form the test is applied it must be satisfied upon a consideration of all the evidence. Just as a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt, so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. In similar vein the following was said in *Moshephi and Others v R*, LAC (1980 - 1984) 57 at 59F - H, which was cited with approval in *S v Hadebe and Others*, 1998 (1) SACR 422 (SCA) at 426f - h:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was

established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees’.

[18]. What is important is the overall picture. If the appellants’ denial is to be accepted, it would mean that the complainants, in concert with various members of the South African Police Services, concocted these stories from beginning to end. The suggestion is made that the complainants were robbed, which is common cause, and then in a manner of speaking drew the names of the appellants from a hat and resolved to have them charged criminally. This is not tenable. The first appellant claimed that at the relevant time he was employed by a company in the Regents Park area, which is in the vicinity where the appellants were arrested. He could quite easily have invited the police to verify this by furnishing them with an address for his alleged employers, who no doubt would have been able to verify the alibi of the first appellant.

[19]. Mr Penton, who appeared on behalf of the appellants, and who in that regard was surprisingly supported by Mr Mushwana, who appeared on behalf of the State, contended that this court is required to assess whether the complainants' identification of the appellants was reliable. He further argued that, in view of a number of discrepancies in the versions of the state witnesses relative to counts 2, 3, 4 & 5 and having regard to the fact that one or more of the complainants were singularly uncertain when making the identification at the ID parade, the identification was unreliable. He referred to the matter of *S v Charzen*, 2006 (2) SACR 143 (SCA) as authority for his submissions in that regard. By way of example, the second complainant had testified that he pointed out the first appellant and another person who were wearing numbers '14' and '15' at the ID parade, when in fact he had pointed out numbers '13' and '14'. Also, this same complainant had fingered a person not involved in these offences at all. The appellants all fingered the first appellant and the third complainant categorically and unequivocally pointed out the first and second appellants. It was also argued on behalf of the appellants that there was a material contradiction in the evidence of two of the arresting officers in that the one, Zitha, said that the second appellant, when the police arrived at his house, hid in the wardrobe, whereas Khubeka stated that the second appellant was in fact the one who opened the door for them.

[20]. We are of the view that the discrepancies in the versions of the complainants and the evidence on behalf of the State are not of such a material nature as to warrant the critique which should result in a rejection of the versions of the complainants, as corroborated by the evidence of the police officers.

[21]. I am of the view that the Regional Magistrate, after considering all the probabilities and improbabilities and particularly the fact that there is no onus on the appellants to convince the court of the truth of their explanations, correctly held that the appellants' evidence was inherently improbable and false beyond a reasonable doubt. The Regional Magistrate's finding that sufficient corroboration existed in linking the appellants to the crimes of robbery cannot be faulted. The improbability or implausibility of their version, particularly the fact that on their version the complainants and the police invented stories against them, is apparent.

[22]. I am accordingly unable to find any reason for disturbing any of the factual findings made by the court a quo. The case against the appellants was overwhelming and they were accordingly correctly convicted.

[23]. There is one other aspect which requires my attention and that relates to count 5 – unlawful possession of a firearm. The first and second appellants were convicted by the regional court of unlawful possession of a firearm in that on the 17th April 2008 and at Kenilworth they had in their possession a 9mm Parabelum firearm. This is the firearm that was used in the attempted robbery of the third complainant. The facts, as testified to by the complainant, were that he was attacked by the first appellant, the second appellant, one Mario and an unidentified fourth person. They demanded that he hands to them the keys to his Toyota Corolla motor vehicle. Of the four assailants only Mario was armed with a firearm, which is the 9mm Parabelum. The other three, including the appellants, were not armed and therefore they were not in physical possession of a firearm. During the scuffle between the complainant and his assailants, the first

appellant instructed Mario to shoot the complainant, and Mario thereupon proceeded to pull the trigger. As indicated supra, mercifully the gun jammed, which afforded the complainant an opportunity to go on the attack.

[24]. It was argued by Mr Penton on behalf of the appellants that because they were not in physical possession of the firearm, the appellants should not have been convicted on count 5 because it was not proven that the appellants intended to possess the firearm through the actual detentor, being Mario. In the matter of *S v Mbuli*, 2003 (1) SACR 97 (SCA), Nugent JA sets out the principles relating to 'joint possession' as follows at par [71]:

'[71] What is prohibited by both those sections is the existence of a state of affairs (ie having possession of an armament, or a firearm, as the case may be) and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article. Their contravention of the relevant section in those circumstances does not arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case. Perhaps Olivier JA had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in *S v Khambule*, 2001 (1) SACR 501 (SCA) at para [10] that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, but I do not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all of them will suffice for a conviction. In my respectful view, Marais J set out the correct legal position

(apart from a misplaced reference to common purpose) when he said the following in *S v Nkosi*, 1998 (1) SACR 284 (W) at 286h - i:

'The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a Court that:

- (a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and;
- (b) the actual detentors had the intention to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns.'

[25]. In the present case the trial court found, as a matter of inference, that those requirements had been fulfilled in respect of the appellants. I agree that the only reasonable inference from the evidence is that Mario possessed the firearm jointly with the appellants and their other accomplice. The evidence, in my view, established that all of the assailants were in joint

possession of the gun, as is evidenced by the fact that when there was a need to use it, the first appellant instructed Mario to shoot the complainant. The only inference to be drawn from the foregoing was that Mario was in possession of the gun on behalf of the collective, being the band of robbers.

[26]. It follows that the appeal against the convictions must fail.

[27]. As I indicated supra, although the second appellant was granted leave to appeal his sentence, such appeal was not pursued at all. In any event, it is

trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection entitling

this court to interfere. The robberies were planned and of a serious nature, perpetrated by a group of persons who invaded the

complainants' privacy. I do not consider there to have been any misdirection in the Regional Magistrate's full and careful judgment on sentence, which would entitle this court to interfere with the sentences imposed. It moreover cannot be said that the sentences are unduly harsh or inappropriate (see *S v Kgosimore*, 1999 (2) SACR 238 (SCA)). It follows that the appeal against sentence must fail.

I therefore make the following order:-

1. The first appellant's appeal against his convictions is dismissed.
2. The second appellant's appeal against his convictions and sentences is dismissed.

L R ADAMS J

Judge of the High Court

Gauteng Local Division, Johannesburg

I agree,

C SARDIWALLA AJ

Acting Judge of the High Court

Gauteng Local Division, Johannesburg.

HEARD ON: 6th March 2017 DATE OF JUDGMENT: 8th March 2017 FOR THE APPELLANTS: Adv J Penton INSTRUCTED BY: Johannesburg Justice Centre FOR THE RESPONDENT: Adv V T Mushwana INSTRUCTED BY: The Office of the Director of Public Prosecutions, Gauteng Local Division. Johannesburg

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Prepared on 13 October 2026 · Esheria