

SOUTH AFRICA / JUDGMENT

Davies v S (A337/2015) [2016] ZAGPJHC 250 (1 April 2016)

[2016] ZAGPJHC 250

COURT

South Gauteng High Court, Johannesburg

BEFORE

Satchwell, Masipa, Mashile

CASE / FILE NUMBER

A337/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

number: A 337/2015

In

the matter between:

DAVIES,
ETHEN
RINALDO
Appellant
and
THE
STATE
Respondent

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Appellant was charged with robbery with aggravating circumstances but pleaded guilty to a lesser count of theft of a motor vehicle. He was convicted on those facts set out in his own section 112(2) statement made in terms of the Criminal Procedure Act, 51 of 1977. He was sentenced by the trial court to serve a period of five years imprisonment. With leave of the Supreme Court of Appeal, he appeals the sentence imposed upon him.
2. The background to the offence to which the appellant pleaded guilty was set out in the section 112 statement:

“The accused pleads guilty to the charge of theft and admits and states as follows:

1. I understand the charge against me and plead guilty of my own free will. I have not been influenced to plead guilty.
2. Having studied the case docket in this matter I admit the following events:
 - 2.1.1. At approximately midnight on 9 August 2012 Mr Jeffery Mohlopheki Selahle and Ms Thuto Morero were seated in a Mercedes Benz motor vehicle of Mr Selahle next to a street in Orlando;
 - 2.1.2. One Cecil Mafika Tshabalala and one Nathi Emmanuel Nyembe, each armed with a fire arm, approached the vehicle of Mr Selahle, pointed the fire arms at the two people in the vehicle and took control thereof, keeping the two victims in the rear seat of the vehicle, thus committing the crimes of robbery and kidnapping;
 - 2.1.3. The next day, the 10th August 2012, Tshabalala, Nyembe and one Vusimuzi Norris Nkosi made attempts to sell the vehicle;
 - 2.1.4. Nkosi, who knows me since I have done work for him on a motor vehicle called me and by telephone told me that he had a motor vehicle for sale and that it was a Mercedes Benz;
 - 2.1.5. I was not interested in the vehicle and declined the offer of Nkosi;
 - 2.1.6. During the same day one Patrick Tshabalala., for whom I had done work on motor vehicles such as servicing his cars, called me;
 - 2.1.7. Patrick Tshabalala indicated to me that he had been made aware of the Mercedes Benz which had been offered for sale and that Nkosi had told me thereof;
 - 2.1.8. He, Patrick Tshabalala indicated that he wanted to buy the vehicle but that he was in Durban and had made arrangements with William Diale to pay an initial amount of R30 000-00 over to the sellers and to collect the vehicle, requesting me to assist William Diale;
 - 2.1.9. It seemed suspicious to me that Nkosi would have a Mercedes Benz and admit that I foresaw the possibility that the Mercedes Benz had been stolen and, despite this I agreed to assist as requested by Patrick Tshabalala;

2.1.10. William Daile and I then made arrangements by cellular phones regarding the transaction regarding the Mercedes Benz namely where and when he will take possession thereof and I relayed the arrangements to Nkosi by cellular phone;

2.1.11. In terms of the arrangements the transaction would take place at the Shell garage in Naturena, Johannesburg and, as a result of these arrangements the following took place on the same day:

2.1.12. Nkosi, accompanied by Tshabalala and Nyembe, arrived in Naturena with two cars, one being the Mercedes Benz of Mr Selahle;

2.1.13. Diale arrived accompanied by his brother;

2.1.14. I took possession of the Mercedes Benz around the corner from the Shell garage and drive it to the garage itself, approximately 50 paces away;

2.1.15. There I received the amount of R30 000-00 from Diale and I walked back to where the other three were waiting.

2.1.16. When I reached them I handed the money over to them;

2.1.17. Diale took the Mercedes Benz and drove off while his brother drove the vehicle in which the two of them had arrived;

2.1.18. The other three took the money and Nkosi gave me R 500-00 for my efforts and drove off and I went home;

2.1.19. Subsequently Tshabalala, Nyembe and Nkosi were arrested and, upon being questioned they directed the police to me. When I was questioned I directed the police to Diale. Eventually, after Diale had given the police the run-around for a while the vehicle was recovered where Diale had parked it at his sister's house in Ruimsig.

3. In the mean-time other events had also taken place of which I was unaware:

3.1.1. The victims of the robbery and kidnapping had been taken to a shack;

3.1.2. Ms Morumo was raped by the person who was supposed to guard them;

3.1.3. Mr Selahle was taken to a veld near Noordgesicht where he was shot and killed.

4. I admit that, although I did not know it for a fact, I foresaw the possibility that the Mercedes Benz was a stolen motor vehicle and that, despite this I still assisted Nkosi in selling the vehicle and that I am therefore guilty of theft of this vehicle."

3. It is the decision by the learned trial judge not to impose a sentence of correctional supervision but to impose a sentence of direct imprisonment for a period of five years which has given rise to this appeal.

THE PRE-SENTENCE REPORT

4. The appellant did not give evidence. Neither the defence, the prosecution nor the court had any opportunity to enquire as to those matters which were raised on appeal or in respect of which the court was asked to make certain findings. I refer, for instance, to the averment that the appellant showed remorse by reason of his plea of guilty, that his employment should favourably impact on any sentence imposed when no one had any idea as to why he had taken an active part in this offence.
5. Instead a pre-sentencing report was obtained. Of course, that which is contained in the pre-sentencing report is hearsay – either as to that which the appellant said or believed or that which family members said or believed. The maker of the original statements were neither questioned nor cross-examined. The author of this report was merely repeating that which was said to her by third parties.
6. Similarly, the author of that report did not give evidence and was not available to clarify any of the issues which were left unexplored.
7. I note that the author of the report holds qualifications in journalism and labour relations and has been employed by the Department of Correctional Services since 1996. This perhaps explains the complete absence of any indication of critical thinking around the issues with which the report is (or should have been) concerned or critique of the statements made by the persons to whom the author spoke. This is no more than a compilation of information supplied by interested persons such as the appellant and his family with one comment from the one living victim.
8. The report was clearly directed to support one purpose only - “should the court decide to impose a sentence of Correctional Supervision in terms of section 276 (1) (h) of the Criminal Procedure Act, the following conditions are recommended” (para 1.4.2 at page 149 of the Record). There was no exploration of appropriate sentences imposed in similar situations, other sentences which might be considered or even why correctional supervision would be appropriate. The report essentially did no more than look at the conditions to be attached to an order of correctional supervision.
9. I note that the author of the report spoke to the rape survivor who was the surviving victim of the armed robbery and kidnapping. It is recorded that “Thuto does not mind supervision sentence if it would make the accused a better person who does not mingle with wrong people”. This recordal indicates one of two possibilities: either the author did ask Ms Morero about her experience, the impact upon her of these criminal actions and her view on sentencing options but failed to set them out in her report (one of the great disadvantages of hearsay) or the author did not ask Ms Morero about anything other than correctional supervision which indicates a report directed to one achievement only.
10. It was argued that appellant “would be a suitable candidate for a sentence of correctional supervision”. That is not correct. No enquiry was conducted. There was only a compilation of information to ascertain what conditions could be attached thereto.

SENTENCE OF THE COURT A QUO

11. In dealing with the submissions made on behalf of appellant which deal with certain of the comments of the learned judge in the court a quo, I will also be covering some of the reasoning which leads to my conclusion as to the appropriate sentence to be imposed on the appellant.

Misdirections

12. It is submitted that there are a number of material misdirections on the part of the sentencing judge which justify interference by this appeal court with the sentence which was imposed.
13.
 - (1) In the course of argument, the learned judge commented on the supposed value of the Mercedes Benz which was the subject matter of the theft to which appellant pleaded guilty. This is criticized as mere speculation on the part of the learned judge. In his judgment on sentence, the learned judge commented “no evidence was tendered regarding the value of the car, but it is common knowledge that the car is a luxury high performance German car which costs in the region of R 1 000 000”.
14. It is difficult to disagree that, by definition and human experience, a Mercedes-Benz is a luxury brand of motor vehicle. The value may range perhaps from R600 000 to R 2 million. The value itself is irrelevant to the crime of the theft of a motor vehicle. On the facts before us, as set out in the section 112 statement, a robbery with aggravating circumstances, kidnapping, murder and rape were committed by those who were after the motor vehicle with which appellant was entrusted to deal. Those engaged in this series of offences were concerned to acquire a motor vehicle of some value. I should point out that the learned judge made no reference to Act 105 of 1997 which would have led to a minimum sentence if the value of the vehicle was considered to be material. I cannot find that such comment (or speculation if indeed it was) leads to the learned trial judge having committed any misdirection.
15.
 - (2) The learned trial judge is criticized for having commented in argument that this offence appeared to involve a ‘syndicate’ – a “syndicate in the sense that it involves more than one person”. In his judgment on sentence the learned judge referred to the “meticulous planning and execution” involved which required a part to be played by no less than “7 or more persons”.
16. The section 112 statement of the appellant is of assistance. There, reference is made to the roles played by Cecil Tshabalala, Nathi Nyembe, Vusimuzi Nkosi, Patrick Tshabalala, William Diale and the brother of Diale as well as the appellant. Appellant interacted with each one of those persons - Nkosi telephoned him, Patrick Tshabala telephoned him,

appellant and Diale made arrangement by telephone, appellant met with Nkosi, Cecil Tshabalala and Nyembe and at the same time met with Diale and his brother. It is difficult to see how this conspiracy does not constitute a 'syndicate' as understood by the Oxford English Dictionary – "an association of business enterprises or individuals organised to undertake a joint project" or "any association formed to carry out an enterprise or enterprises of common interest to its members". This use of the word bears no relation to its own particular and peculiar definition as contained in the Prevention of Organised Crime Act.

17.

(3) The learned trial judge stated in his sentencing judgment that the 'purchase price' of R 30 000 was paid to the appellant. Of course, the learned judge was incorrect – it was, according to appellant, a deposit or 'initial purchase price' of R 30 000 which was paid over to him by the purchaser for the appellant to then hand over to the kidnappers, robbers, murderers and rapist.

18. But I have had to ask myself whether such incorrect statement of price is of any relevance or material. The appellant did not disclose the ultimate purchase price to be exchanged between criminals. There is no indication as to how the balance of the purchase price (if any) was ever to be paid. But where does this take the appeal? In his section 112 statement, the appellant said that "it seemed suspicious to me that Nkosi would have a Mercedes Benz and I admit that I foresaw the possibility that the Mercedes Benz had been stolen...". There is no indication that it was the amount of the deposit alone which led to the suspicions – indeed everything set out by appellant in his section 112 statement indicates suspicious activity.

19.

(4) The learned judge made reference at the hearing and during argument to certain photographs with which he had obviously been provided and which appear to have indicated that the Mercedes Benz was an AMG model. Such photographs had not been handed in as evidence and appellant's attorney placed this on record.

20. It is unfortunate that the learned judge had been given a file which may have contained this and other exhibits. The prosecution has an unfortunate habit of being too eager to prepare the court. But I have to ask what difference sight of these photographs could possibly have made to the sentencing process? It is common cause that the vehicle is a Mercedes Benz. Does it matter if it is an AMG or a GLE or an SLK model? I cannot see that it does. After all it is common cause that it was not a Ford Escort worth no more than R 5 000 which was hijacked and for which its occupants were to suffer so grievously. It was a luxury vehicle and

the initial deposit paid in cash within 24 hours was the sum of R 30 000.

21.

- (5) A further alleged misdirection on the part of the sentencing judge are his comments that appellant showed “lack of insight” by reason of his “persistence that he played only a small role because he had no knowledge of the hijacking, rape and murder and therefore he is guilty only by *dolus eventualis*”. The court commented that “he clearly does not take responsibility for his conduct” and therefore “rehabilitation

as a factor is therefore less likely. He is clearly not remorseful at all”. It is submitted that the comments by the learned judge fly in the face of the basis upon which the appellant pleaded guilty and which basis was accepted by the State.

22. The difficulty for both the trial court and this appeal court is that there is no ‘basis set out’ which explain why the appellant pleaded guilty. The section 112 statement and the absence of any evidence, fail to explain what is to be understood by this plea. I have had occasion in *S v M* 2007

- (2) SACR 60 W to discuss in great detail all the authorities which deal with a plea of guilty and speculation as to remorse. A plea of guilty may be no more than recognition of the overwhelming nature of the evidence against the offender, the ability to obtain a deal of

being convicted of a considerably lesser offence of theft (with no minimum sentence) as opposed to the main count of robbery with

aggravating circumstances (with a minimum sentence of 15 years). One does not know unless one has regard to the evidence before the court.

23. As to insight, the only apparent indication thereof is set out in the hearsay of the presentencing report where the comment is found that “he regrets his actions and feels bad about the deceased who died for his vehicle”. Appellant has expressed regret for the murder – but not for the kidnapping, robbery, rape or the theft in which he played the leading intermediary role.

Correctional Supervision

24. Appellant’s counsel has submitted that the learned trial judge never seriously considered either form of correctional supervision as a sentencing option in this matter. This appears from the remarks made the judge in argument - “since when has 276 correctional supervision ever been the going rate for car theft?”, it would be no more than a “slap on the hand”, “even if Jesus Christ committed hijacking he would never get 276” and (addressed to the prosecution) “why do you go and enter into an agreement where you give a sentence of 276 to Diale which is virtually a suspended sentence, which is like for shoplifting, just tell me?”.
25. I appreciate that the reference to Jesus Christ, who many consider to be the Son of God, was most unfortunate. However, the remainder of the remarks are apposite for the cut and thrust of debate which is the purpose of argument when each adversarial legal representative tries to persuade judge of a legal position.

26. The learned judge is correct to ask for authorities where other courts have found that correctional supervision is an appropriate sentence for cases of car theft in circumstances such as these. This appeal court asked for such guidance – but we could not be directed to any reported or unreported decision where correctional supervision was imposed in respect of car theft. Perhaps that is because our courts have repeatedly stressed that theft of a vehicle (in circumstances such as those set out in the section 112 statement) is taken very seriously indeed and correctional supervision would indeed be regarded as a mere ‘slap on the wrist’.
27. This appeal court was addressed on the need to ensure consistency and it was pointed out that Diale, a co-accused and co-conspirator of appellant, was given the opportunity to enter into a plea and sentence agreement in terms of section 105A of the Criminal Procedure Act. That agreement is a deal achieved as the result of negotiations referred to in the agreement. Diale pleaded guilty to theft and was sentenced to serve a term of five years imprisonment in terms of section 276(1)(i) of the CPA. I bear in mind the following. Firstly, each case must be decided on its own facts and each sentence must be personalised. Secondly, Diale negotiated both plea and sentence. Thirdly, Diale’s facts are different e.g. the purchase is stated to be R 30 0000. Fourthly, an agreement in terms of section 105A is a process imported from the United States, involves negotiations on facts and offences and sentence and other matters which usually pertain to the giving of evidence as a state witness in circumstances where the prosecution needs such a witness and, for that reason, is prepared to have a co-conspirator treated more leniently. Finally, exact congruence on sentence is never possible to achieve – not even when the court can weigh gram upon gram of cocaine with the years of imprisonment to be served. This may be unfortunate but it may also allow for individualisation of all circumstances, offences, offenders and victims.

Conclusion

28. I appreciate that the learned judge was not always temperate with his words, that he had insight into one or more photographs which were not evidence before the court, and that he was wrong on the purchase price as opposed to the deposit on the purchase price. But, I have had to ask in what manner these ‘misdirections’ (if they are indeed misdirections) are relevant to the outcome of the sentencing process? Did the supposed value of the luxury vehicle lead to an excessive sentence? Did the supposed purchase price of the luxury vehicle lead to a sentence out of all proportion to the offence? Did the rejection of correctional supervision as an appropriate sentence lead to a sentence which was unfair and unjust in all the circumstances?
29. I find it difficult to conclude that the learned trial judge misdirected himself on sentence.

30. When I have regard to the judgment on sentence, I cannot find any misdirection on the facts which he set out as the circumstances of the crime. I do not disagree that there were at least 7 persons playing “a vital role in executing the enterprise”. There is nothing to indicate that the learned judge was wrong in finding that appellant “remains unremorseful and maintains that he had no actual knowledge of the hijacking, murder and rape – he only suspected that the car was stolen. In my view he lacks insight of the seriousness of his crime”.
31. The learned judge found that imposition of a suspended sentence or correctional supervision will “bring the system of justice into disrepute [because appellant] played a vital link in the web of criminality involving the stealing or vehicle hijacking luxury motor vehicles and selling them to ready purchasers”.
32. It is against this view of correctional supervision that the appeal is mainly directed.

SENTENCE

33. The purpose of sentencing offenders is generally understood to be that of deterrence – both individual as to the offender and general as to members of the wider community, punishment or chastisement of the offender, and rehabilitation of the offender. To achieve such purposes, a sentencing court must take into account the offence which has been committed, the personal circumstances of the offender and the interests of the society against whom the offence has been committed.
34. It is accepted that wide range of possible sentencing options are always available and should be considered in respect of all offences. But equally so, it would not be necessary for a court to give full and proper consideration to each and every extant sentencing option where some of such options are grossly disproportionate to the purposes of sentencing or the interests to be taken into account. Thus, a sentencing court would not spend time discussing imposition of a fine in money on a person convicted of murder. There must be an innate coherence between the offence, the offender and the needs of society.
35. I need not repeat the many comments by our courts to the effect that vehicle theft is serious and prevalent and must be treated accordingly.
36. There was much argument on the import of the plea of guilty by appellant. As I indicated, I have previously dealt with this in great detail in *S v M* supra.
37. In the present instance, the lack of remorse on the part of appellant can be found in his actions. He acted as the intermediary between robbers and murderers and the purchaser of the stolen vehicle. Both sides of the equation dealt directly with him. He made arrangements with both sides, he handed over the money and took possession of the vehicle. Apparently, both sides felt he was essential to a satisfactory outcome of the acquisition and disposal of the vehicle.

38. Yet, what did the appellant do or leave undone? Once he was phoned by Nkosi and Tshabalala, appellant did not contact the SAPS regarding the possibility of apprehension of the persons in possession of a stolen vehicle. Once he had his suspicions, he took no steps to bring the perpetrators to justice – he did not enable the SAPS to set up a trap to capture the syndicate redhanded. Once he had enabled and overseen the handover of vehicle and money, he did not report to the SAPS and enable them to apprehend any of the persons involved. He did nothing at all. There was no remorse whatsoever. He accepted the monies he says he was given for his services. He carried on his life. It was only when he was arrested and he realised that the robbers had been arrested that he directed the SAPS to the purchaser. As is said “there is no honour amongst thieves”. Those were the circumstances and the factual background, against which this court is asked to speculate on remorse on the part of the appellant.
39. A plea of guilty does not always indicate remorse. In this case, appellant was able to evade a conviction on an offence which carries a minimum sentence of fifteen years imprisonment.
40. It can never be said that it would be a waste of the time of the court to hear a full trial – everyone has a Constitutional Right to a fair trial which includes confronting ones accusers – and no one can ever say that a fair trial is a waste of the time of a judge, prosecutor or anyone else; similarly no one can ever disadvantage a person who exercises his or her Constitutional rights by insisting on a trial.
41. The accused is a first offender. The accused has three children. The accused is in employment. He should have thought of all this before he engaged in criminal activity. First offenders do get sent to prison. Fathers and mothers with children who do (and do not) live with them do go to prison. Persons in employment are amongst the fortunate minority in this country who are not thereby relieved from the consequences of criminal actions.
42. Dolus eventualis is indeed a mitigating factor. It perhaps explains why the sentence imposed by the court a quo was not a sentence of 7 or 8 or 9 years imprisonment.
43. I see nothing to suggest that a sentence of 5 years imprisonment is shocking or inappropriate to the facts of this crime, the personal circumstances of this accused or the concerns of the community. I see nothing to suggest that this sentence is out of touch with the sentences imposed throughout the country and by the highest court in respect of theft of motor vehicles.

In the result an order is made as follows:

1. The appeal is dismissed; and
2. The appellant is to hand himself over to the SAPS by 12h00 on Monday 04th April 2016.

DATED AT JOHANNESBURG 01st APRIL 2016

SATCHWELL J

I agree.

MASIPA J

MASHILE J

Counsel for Appellant: Adv L Fick

Attorneys for Appellant: Johan Schaeffer Attorney

Counsel for Respondent: Adv VH Mongwane

Attorneys for Respondent: Director of Public Prosecutions

Dates of hearing: 18th March 2016.

Date of judgment: 01st April 2016.

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