

SOUTH AFRICA / JUDGMENT

Dube v S (A460/2016) [2021] ZAGPPHC 154 (9 September 2021) [2021] ZAGPPHC 154

COURT

North Gauteng High Court, Pretoria

BEFORE

Maumela, J T Leso

CASE / FILE NUMBER

A460/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

(1)

REPORTABLE: YES / NO.

(2) OF

INTEREST TO OTHER JUDGES: YES / NO.

(3)

REVISED.

Case No: A 460/2016

In

the matter of:

Ginger
Alucia Dube
Appellant
And
The
State
Respondent

JUDGMENT

Maumela J.

1. Before the Regional Court sitting at Mkobola, Benoni in the Regional Division of Mpumalanga, the court a quo, the Appellant Ginger Alucia Dube, who was, 38 years old at the time he was arraigned appeared. He was, together with two others namely; Lucky Edward Phadime, a male who was 45 years of age at the time he was arraigned, and Noah Shimane Mashile, a male who was 42 years of age at the time he was arraigned. The Appellant was charged with two counts as follows:

1.1 Count 1: Robbery with Aggravating Circumstances as intended in Section 1 of the Criminal Procedure Act No 51 of 1977 and;

1.2 Count 2: Contravening the provisions of section 120 (6) (a), read with section 1, 103, 120 (1) (a), section 121, read with section 151 of the Firearms Control Act 2000: (Act No 60 of 2000); Unlawfully pointing another with a firearm, an antique firearm or an airgun.

CHARGES AGAINST THE APPELLANT

2. On Count 1, the allegations were that upon or about the 20th of October 2011, at or near Velly's Store Kwaggafontein 'C', in the Regional Division of Mpumalanga, the Appellant did unlawfully and intentionally assault Sayam Haque and did then and with force take the following items, to wit: Cash in the amount of R 6000-00, airtime worth R 8000-00 and cigarettes valued at R240 00, from his person, protection or lawful possession; the aggravating circumstances being in that a firearm was used.
3. On Count 2, the allegations were that upon or about 20th of October 2011, at or near Velly's Store Kwaggafontein 'C', in the Regional Division of Mpumalanga, the Appellant and his co-accused did unlawfully point a firearm, whether or not it was loaded or capable of being discharged, at another person, to wit Velly Skhosana, a male who is 57 years of age, without good reason to do so.
4. When the charges were put, the Appellant understood them. They all exercised their right to remain silent and therefore did not disclose the basis of their defence. The state led evidence, much as the defence did. The court a quo upheld the version of the state and rejected that of the defence.

BACKGROUND

5. The crimes, in this case, were committed at 20h15, and the accused was arrested at 20h30 which was immediately after the offences were committed. The Appellant testified under oath in his own defense. In advancing his defense, the Appellant and his co-accused advanced an alibi in that they all maintained that they were never at the scene of the crime including at the time at which the crimes were committed. However, the Appellant and his

co-accused do not deny that they were in the vicinity of Kwaggafontein, at a place not far from the scene of the crime. He disputes that his identity was proven beyond a reasonable doubt before court a quo.

EVIDENCE

6. Sayam Haque was the first witness to be called by the state. Under oath, he testified that on the day of the incident he, together with his assistant, was at the shop when the person who was Accused number 1 before court a quo, entered the shop and asked after the price of a 25 kg bag of meal-meal. Eventually, he ordered a 12 kg packet of meal-meal. He produced a R 50-00 note purporting to make payment. When the assistant opened the burglar door, accused 2 and 3 before the court a quo entered the shop.
7. The complainant testified that at that time, the Accused number 1 grabbed him with the collars of his T/shirt. A struggle then ensued between him and Accused number 1. He fell, whereupon Accused number 2 pinned him to the ground with his leg. The complainant testified that as he lay face-up on the ground, a fourth person entered the shop and tied his assistant before taking him into the bedroom. At the same time, customers who meant to buy from the shop were chased out by one of the perpetrators. Using force, the culprits dispossessed him of an amount of R 5000-00 which he had on his person. They also took an amount of R 1000-00 which was on the counter.
8. All culprits then ran out towards a black City Golf vehicle which was stationary outside, which then drove off. The police were called and they arrived soon. They chased after the culprits in the direction to which he pointed them. He said that the police caught up with the black Golf in which the occupants still had the loot in their possession. It was the same loot which was robbed from his shop. He told the court that the Appellant fired shots as he and the culprits ran out of the shop towards the get-away car; the Black Golf and He also insulted him saying to him "voetsek!".
9. He said that he saw the Appellant and his co-accused clearly as the culprits left the shop. The Appellant was wearing an overall and the police found him in the overall.
10. Valley Skhosana, the owner of the shop also testified under oath. He testified that as the robbery unfolded, the Appellant pointed at him with a firearm. Shortly after the robbery, he flagged down a police vehicle which stopped. He reported the robbery which had just taken place. The police immediately chased after the culprits, heading towards the direction he gave. They pursued the black Golf vehicle until they caught up with it. Both the complainant and Valley Skhosana testified that the area was well illuminated by street lights which enabled them to see the faces of the culprits and their manner of cloth well enough. The police arrested the Appellant and his co-accused and after they were arrested.

11. David Sibanyoni, who is a member of the South African Police Services also testified under oath as a state witness. He told the court that he and his colleagues responded upon being called out to the scene of the crime on the day of the incident in this case. After Valley Skhosana related to him what took place, he gave chase after the Black Golf that had been described as the getaway car.
12. Elias Temba Giyane testified Under oath, that he is the one who arrested the Appellant's and his co-accused while the latter were attempting to flee. During the trial, the Appellant's co-accused told the court that at the time he was arrested, he had only hitched a hike from the Appellant and his co-accused.
13. Captain Malope told the court under oath that when he arrived at the scene, the Appellant and his co-accused were already been apprehended. He said that they searched the Appellant and found an amount of R 1 210-00 hidden inside some 'tekkies'[1] that Appellant had in his possession. The Appellant disputed the evidence by this witness but he stayed stuck to his version.
14. The Appellants testified in his own defence. The Appellants told the court that on the day of the incident, he and his co-accused drove to Kwaggafontein to visit his girlfriend. The other co-accused confirmed the contention by the Appellant to the effect that on the day of the incident, he had only hitched a hike from the his co-accused.

RE: CONVICTION.

15. The Appellant contends that before the court a quo, the state did not prove the cases against them beyond a reasonable doubt. It is trite that in criminal cases, the onus rests on the state to prove the case against the accused beyond a reasonable doubt. In the case of *Prinsloo v State*[2] the Supreme Court of Appeal enunciated the law as follows: "It is trite that the State bears the onus to prove the guilt of the Appellant beyond reasonable doubt and that there is no duty on the Appellant to convince the court of the truthfulness of any explanation which he gives. If his explanation is found to be

reasonably possible true, the court will have no reason to reject" it.

16. See also *S v Mbuli*[3]. See also *S v V*[4]; where the court went further to stated the following: "However, this does not require proof beyond any shadow of doubt by the State". See *S v Phallo*[5]. The same view was expressed by Slomowitz AJ in *S v Kubeka*[6]. It was therefore incumbent upon the state to prove beyond a reasonable doubt that the Appellants are the culprits who committed the robbery in this case.

17. Before the court a quo the Appellant put the identity of the culprits in dispute. None of the witnesses, in this case, had seen their attackers before the day of the incident in this case. Therefore, the state had to prove beyond a reasonable doubt that the identity of the culprits has been established beyond reasonable doubt. The court a quo found that the identity of the culprits has been proven beyond a reasonable doubt and thus, it found that the Appellants are the ones who committed the robbery.
18. In this appeal, the Appellant seeks for this court to interfere with the finding made by the court a quo. It is trite that appellate courts do not have wholesale powers to interfere with findings made by trial courts. In the case of *S v Fancis*[7], the court stated the following: “The powers of a Court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence is presumed to be correct. To succeed on appeal, the Appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness'

evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a

trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled

to interfere with a trial Court's evaluation of oral testimony.”

19. This was reiterated in the case of *S v Hadebe and Others*[8], where the court stated the following: “It was well to recall yet again the well-established principles governing the hearing of appeals against findings of fact, which

were, in short, that in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed

to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong.”

20. Before the court a quo, all the witnesses were seeing the Appellant and his co-accused for the first time on the day the crimes were committed. It was therefore vital that sufficient evidence be availed to prove the identity of the culprits beyond a reasonable doubt. In the case of *S v Mthethwa*[9], the court said the following concerning this aspect of identity: “Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are

applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R. v Masemang*[10], *R. v Dladla and Others*[11], *S. v Mehlaphe*[12].

21. In casu, the arrest was made shortly after the commission of the crimes. It was a result of what can be regarded as 'hot pursuit'[13]. At the same time, it is interesting that once the arrest was made, Valley Skhosana, the owner of the shop at which the robbery was committed noticed and therefore testified under oath that Accused Number 1 is still clad in the same attire in which he was during the robbery. It is further interesting that upon arrest, the Appellants were found in possession of goods that made for the precise loot that had been targeted in the robbery. Whereas the arresting officers did not have personal knowledge of the fact that the culprits they were pursuing committed particular offences, they did have personal knowledge of the fact that these culprits are on a flight because they are avoiding lawful arrest which flight constitutes an affront against the law.
22. Accused number 1 denied that the manner of cloth he was in at the time of his arrest precisely resembled the manner of cloth one of the culprits was clad in during the robbery. Evidence is to the effect that upon arrest, in their vehicle, the Appellant and his co-accused were found to be in possession of airtime and cigarettes. Concerning the goods found in the possession of the Appellant and his at the time of the arrest, the explanation they proffered was to the effect that they were en route to Pretoria to deliver cigarettes and airtime.
23. It is trite that in criminal cases the onus upon the accused is to provide an explanation that is reasonably possible. Upon initial

consideration, the court finds that it is reasonably possible that the Appellant and his co-accused could have been delivering goods to Pretoria which included cigarettes and airtime. However, it is also trite that evidence gathered in any given case ought not to be considered in isolation. In other words, such evidence as is gathered has to be considered and evaluated within the context of the totality of all the evidence that was accumulated. See again, *S v Mthethwa*[14], in the same paragraph as above, where the court emphasized upon the need to consider the evidence in its totality.

24. This was reiterated in the case of *S v Van der Meyden*[15] where the court stated the following: "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of the test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached must account for all the evidence."
25. While it may be reasonably probably true that the Appellant and his co-accused happened to have goods in their possession, being cigarettes and airtime, the evidence by Mr. Valley Skhosana also has to be taken into regard. Mr. Skhosana told the court a quo under oath that at the time of the arrest, which was shortly after the commission of the crimes, he noticed

that Accused Number 1 is still clad in clothes that resembled those which one of the culprits wore at the time of the robbery. It is common cause that at the time of arrest, the Appellant and his co-accused were in possession of cigarettes and airtime. They did proffer explanations for the goods found in their possession at the time of the arrest. When considered in isolation, the explanations provided by the Appellants can be considered to be reasonably and probably true.

26. However, the court also has to take into regard evidence to the effect that in the robbery, the victims were dispossessed of cigarettes and airtime. At the time of the arrest of the culprits, which was a short time at a distance from the time and place of the robbery, the culprits were found in possession of cigarettes and airtime. At the time of arrest, the Appellant proffered no explanation for the cigarettes and airtime found in their possession. Despite the fact that he had a right to remain silent, it begs the question why he did not simply reveal that they were en route to Pretoria to deliver the same cigarettes and airtime which seemed to bring them into loggerheads with the police and therefore the law at the time of the arrest.
27. During the course of the trial, the Appellant averred that at the time the police accosted him and his co-accused, he had receipts in his possession to prove that he bought the cigarettes and the airtime that was found in his possession. However, he states that the police might have taken and it destroyed the receipts he had in his possession.
28. There were several inconsistencies in the testimony of the Appellant. When contrasted against the totality of the evidence, the explanation by the Appellant to the effect that they were delivering cigarettes and airtime to Pretoria becomes much less probable and it therefore becomes prone to dismissal. Consequently, the court a quo rejected the version of the Appellant and accepted that of the state.
29. This court similarly finds that the version of the Appellant stands to be rejected and that of the state stands to be admitted. On that basis, the court finds that the Appellants' appeal against conviction falls to be dismissed.

RE: SENTENCE

30. This appeal is also against the sentence. The court has to determine the appropriateness and suitability of the sentences imposed upon the Appellant. It has to consider the nature and seriousness of the offences of which the Appellants stand convicted and to weigh them against the submissions made by the Appellant towards mitigation of sentence.

PREVIOUS CONVICTIONS

31. Before he was sentenced by the court a quo, the Appellant was found to have previous convictions recorded against his names. In that regard, the state submitted the following:

31.1. That on the 1st of October 1992 in Mamelodi, he was convicted of possession of dagga and drugs. For this offence, he was sentenced to pay a fine of R 150-00 or to undergo 30 days' imprisonment.

31.2. That on the 9th of July 1999, at Gaarsfontein, he was convicted of Theft. He was sentenced to pay a fine of R 150-00 or to undergo 30 days' imprisonment.

31.3. That on the 2nd of August 2000, in Kleinmont, he was convicted on Robbery. He was sentenced to undergo 13 year's imprisonment. Accused Number 3 admitted all the previous convictions

attributed to him.

32. The court a quo found that the previous convictions of the Appellant is relevant to the offences of which he stood convicted before it. It found that this ought to have an aggravating effect upon the sentence to be imposed on them. For these reasons, the state contends that the sentence imposed upon the Appellant by the court a quo is suitable and appropriate. The state contends therefore that there is no basis upon which this court on appeal may be justified to interfere with such sentence. The Appellant contends on the other hand that the sentence meted out to him by the court a quo is not appropriate in that they induce a sense of shock. They submit that taking into consideration all relevant factors, the sentence is disproportionate to the offences committed as contrasted to his personal circumstances. In the case of *S v Zinn*[16], the court laid down principles applicable in determining a fair, balanced and appropriate sentence to be imposed. In that regard, the court stated the following: "What has to be considered is the triad consisting of the crime, the offender and the interests of society."
33. The Appellant submit that contrasting the offences of which they stand convicted with the sentence imposed on him, this court has to find cause on the basis of which to justifiably interfere. In the case of *Bogaards v S*[17], the court stated the following regarding powers of appellate courts where it regards sentences imposed by trial courts: "Prospects of success are another relevant factor in determining the interests of justice. Ordinarily, an appellate court can only interfere with the sentence of a lower court where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.[18] in addition, this Court, ordinarily, will entertain appeals on sentence only if a fair trial issue is at stake.[19] Without the possibility of reliable proof that one of these grounds has been established there are no prospects of success."

THE PERSONAL CIRCUMSTANCES OF THE APPELLANTS

34. An appeal Court is entitled to interfere with a sentence imposed by a trial court in cases where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by the misdirection of nature which shows that the trial court did not exercise its discretion reasonably.
35. When they appeared for sentencing before the court a quo it became common cause between the state and the defence that the Appellant is not first offender. It also became a common cause that the minimum sentence legislation[20] is applicable for purposes of the imposition sentence upon him.

THE PERSONAL CIRCUMSTANCES OF THE APPELLANT

36. The Appellant was 40 years of age at the time he was sentenced before the court a quo. He has one child was mother has passed on, may her soul rest in peace. He too pleaded for concurrency to be infused into the sentences to be imposed upon him for purposes of the two counts on which he stood convicted. All three accused did not object to an order by the court a quo, as part of the sentence the effect of which shall render the ineligible to obtain firearm licenses in terms of section Firearms

Control Act 2000: (Act Number 60 of 2000) - Firearms Control Act).

37. The court a quo had to consider a fitting sentence to be imposed upon the Appellant. In doing so, it had to decide whether or not to apply the provisions of the CLAA in determining the sentence. In other words, the court a quo stood enjoined to consider the imposition of the prescribed minimum sentence against the Appellant. To be able to do that, the court has to weigh the personal circumstances of each accused against the gravity or otherwise of the offences of which the student convict. It also had to consider whether or not substantial and compelling are attendant to the person of each of them so as to decide whether or not to impose the minimum sentences prescribed for the offences of which they stood convicted.
38. Upon consideration of all relevant factors, the court a quosentenced the Appellant as follows:
 - 38.1. Both counts were taken as one for purposes of sentence. He was sentenced to undergo 15 years' imprisonment
 - 38.2. No order was made against all the accused in terms of Section of the Firearms Control Act 2000: (Act Number 60 of 2000) -Firearms Control Act).
40. The above also implies that the task at hand before this court is not one of considering whether put in the position of the court a quo, it would have imposed upon the Appellant the same, or different sentence compared to what was done. Its task is not to substitute the sentences imposed by the court a quo for sentences of its case and preference.
41. In the case of S v Malgas[22]; the court stated the following: "The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject, of course, to any limitations imposed by legislation or binding judicial precedent, a

trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasized that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may

not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial

court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.”

42. In the case of *S v Packerysammy*[23] Mthiyane AJ “Punishment is pre-eminently a matter for the discretion of the trial court. The court of appeal is not to erode such discretion; on appeal no general right exists to interfere with a sentence imposed by the trial court. It will interfere with the sentence only if the discretion has not been judicially and properly exercised. This will only be so where the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate.”
43. The crimes of which the Appellants were convicted before court a quo are serious. Robbery is acutely invasive. Victims in it are pounced upon when they least expect and find no fault on their part at all. Business robberies are perpetrated against members of the society who are providing a very vital service of availing commodities for the convenience of the society. When firearms are used to commit robbery, the victims get so traumatized that it takes them quite some time if at all, to restore their calmness. Their ability to happily serve communities gets adversely affected and their personalities are bound to change because they become overly suspicious and may in doing so, exude undue unfriendliness while at the same time feeling very unfortunate and sorry for themselves.

44. Usually, the crimes of robbery and the use of unlicensed firearms coincide upon commission. Both of them are overly rife. They both have the effect of stunting economic growth in families, villages, communities, countries, continents and the whole world over. They completely lack justification. They are both prone to becoming objects of recidivism because there is no justifiable cause behind them.
45. In this case, looking at the sentence imposed in respect of the Appellant, the court does not find that the court a quo has not exercised its sentencing discretion judicially and properly. It therefore finds no basis upon which to interfere. In the case of *S v Malgas*[24], the court stated the following: “The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence... The specified sentences are not to be departed from lightly and for flimsy reasons.”
46. The personal circumstances of the Appellant does not come across as being out of the ordinary. They resemble ordinary aspects and attributes that are attendant to an ordinary accused person who appears before our courts from day to day. There is therefore no cause on the basis of which this court can be justified to interfere with the sentence imposed by the court a quo. On that basis, therefore, an appeal against sentence by the Appellant is to be dismissed.
47. In the circumstances, the appeals against both conviction and sentence brought by the Appellant is dismissed and the following orders is made:

ORDER.

47.1. The appeals brought by the Appellant against conviction and sentence are dismissed.

I AGREE

J T LESO

Acting Judge of the High Court of South Africa

IT IS SO ORDERED

T.A. Maumela.

Judge of the High Court of South Africa.

DATE OF THE HEARING: 16 OCTOBER 2019

DATE OF JUDGEMENT: 9 SEPTEMBER 2021

APPEARENCES

FOR THE APPELLANT : ADV. ME TSHOLE

FOR THE STATE : DIRECTOR OF PUBLIC PROSECUTIONS

28 CHURCH SQUARE (ADV. KL MOHLAKA)

[1]. ‘Tekkies’ are sneakers.

[2]. (534/13) [2014] ZASCA 96 (15 July 2014) para [18], not reported.

[3]. 2003 (1) SACR 97 (SAC), at 110 D – E.

[4]. 2000 (1) SACR 453 (SCA) at 455B

[5]. 1999(2) SACR 558 (SCA) para 10.”

[6]. 1982(1) SA 534 (W) at 537D.

[7]. 1991 (1) SACR 198.

[8]. 1997 (2) SACR 641 at page 642,

[9]. 1972 (3) SA 766 (A).

[10]. 1950

(2) SA 488 (AD).

[11]. 1962

(1) SA 307 (AD) at p. 310C.

[12]. 1963

(2) SA 29 (AD).

[13]. In law, hot pursuit is defined as the immediate and continuous pursuit by police officers of a fleeing suspect where a possible escape of the culprit justifies the failure of the officers to obtain a warrant before making an entry, search, or arrest.

[14]. Supra.

[15]. 1999(2) SA 79 (W), at page 2 C to D.

[16]. 1969 (2) SA 537 (A).

[17]. 2013 (1) SACR 1 CC.

[18]. [2012] ZACC 23; 2012

(12) BCLR 1261 (CC); 2013

(1) SACR 1 (CC) at para 41.

[19]. Section 35(3) of the Constitution provides in relevant part: “Every accused person has a right to a fair trial”.

[20]. CLAA. See also S v Malgas ???.

[21]. 2001

(1) SACR 469 (SCA).

[22]. 2001 (2) SA 1222 (SCA), at page 1231.

[23]. 2004 (2) SACR 169 SCA at 171 f-g:

[24]. 2001 (1) SACR 469 (SCA).

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