

SOUTH AFRICA / JUDGMENT

Kamfer v S (A73/2024) [2024] ZAWCHC 256 (13 May 2024)

[2024] ZAWCHC 256

COURT

Western Cape High Court, Cape Town

BEFORE

Kusevitsky, Katz

CASE / FILE NUMBER

A73/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A73/2024

District Case No: GSH 100/2019

In the matter between:

DONOVAN KAMFER

Appellant

And

THE STATE

Respondent

Coram: Kusevitsky, J et Katz, AJ

Heard: 10 MAY 2024

Delivered: 13 MAY 2024

Judgment

KATZ, AJ

1 After pleading not guilty, the appellant, who was legally represented at his trial, was convicted on 30 September 2020 by the Regional Court, George with four counts of housebreaking with intent to steal and theft.

2 On 1 October 2021 he was sentenced to 5 years direct imprisonment in respect of each of the four counts. He accordingly received an effective twenty-year sentence.

3 The appellant's application for leave to appeal was refused by the Regional Court. On petition he was granted leave to appeal against the convictions and sentence.

4 The four counts consisted of a person or persons breaking into four separate residential premises in an upmarket area in the Wilderness, near Plettenberg Bay. iPhones and other electronic equipment was stolen from each house on 25 December 2018.

5 Whether the crimes were committed is not an issue in this appeal. The evidence concerning the four break ins and the fact that items were stolen from each of them was not challenged by the appellant at his trial.

6 The only issue is whether the appellant was involved in any or all the four housebreakings.

7 There were no eyewitnesses to the housebreakings and thefts.

8 Evidence by the owners (two by way of oral evidence, and the other two by way affidavits admitted^[1] by agreement with the appellant) of the residences broken into and the items stolen from those homes effectively proved the commission of the four housebreakings and the thefts.

9 The appellant testified on his own behalf.

10 The state witnesses linking the appellant to four housebreakings were Brandon Koopman and Salimino Kifaro.

11 Both Koopman and Kifaro were what is commonly known as "204 witnesses."^[2] A 204 witness is often party to the offence about which he or she testifies.

12 If the trial court is of the opinion that the 204 witness has answered all the questions put to him or her frankly and honestly the witness shall be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

13 The court a quo formed the opinion that Koopman answered the questions frankly and honestly and accordingly discharged him for the offences in issue.

14 Not so with Kifaro. The court a quo formed the opinion that Kifaro had not answered all the questions honestly and frankly.

15 In forming these opinions the court a quo exercised a discretion applying its mind to the facts. It is only in rare circumstances that an appeal court may interfere with the trial court's exercise of discretion concerning factual findings.

16 Also, the court a quo in his judgment said he approached the evidence of Koopman with caution as his evidence was that of an accomplice.

17 Koopman testified that the appellant came to his home at 4[...] V[...] Street requesting him to do a job “Hy het gevra om saam te gaan werk. Ek het toe ingestem.” Koopman accompanied the appellant to the home of Kifaro but was requested to wait at a distance. The appellant and Koopman went to the Wilderness.

18 The appellant and Koopman smoked tik, dagga and mandrax while sitting under a bridge. The appellant left, walking in the direction of the houses broken into. After a while he returned with a black backpack. Koopman did not see the contents of the bag. They continued smoking. The appellant left again and later returned with another bag (blue bag).

19 The appellant phoned one Cliff to pick them up. The appellant and Koopman walked in direction of the road and came across a male person who was interested in buying a cell phone. At that moment, Cliff phoned the appellant, informing him to wait at the road leading to Knysna.

20 Koopman continued to walk to Cliff’s white Opel Cadet.

21 Koopman, Cliff and his wife drove to the Caltex garage where Cliff and his wife alighted from the vehicle. The same person who was looking for a cell phone, accompanied by another male approached Koopman. An altercation ensued resulting in Koopman’s arrest.

22 Kifaro stated that on the day in question, he was driving back from the beach when he came across the appellant and gave him a lift to Craggs.

23 The appellant produced a bag consisting of four iPhones, a small Lenovo iPad, Bose earphones and a Diesel watch. He wanted to sell the items for R4000. Kifaro was not able to buy the items for R4000. He noticed the appellant was desperate and gave him R1000 with the ‘understanding’ that he would fetch the items the following day and pay R1200.

24 The following day, Detective Kibido enquired regarding the appellant and a photograph was shown to him to identify.

25 Kifaro informed the detective that the appellant left a bag with items with him. Detective Kibido’s response was that the items were stolen.

26 Kifaro testified further that the appellant phoned him while he was having a conversation with the detective, but he did not mention anything to the detective. He denied having any knowledge of the stolen items.

27 Formal admissions were made in terms of section 220 of Act 51 of 1977 regarding the items recovered by the investigating officer, Detective Sergeant Thando Kibodo, from the home of Kifaro on 26 December 2018.

28 The court a quo found that Koopman was an impressive and truthful witness and concluded that his evidence was satisfactory and reliable in all material respects.

29 It can hardly be suggested that were Koopman's evidence concerning the appellant to be accepted the State had not proved their case against the appellant beyond a reasonable doubt.

30 The appellant argues in this Court on appeal that Koopman's evidence lacked detail and that he failed to answer questions put to him frankly and honestly.

31 It is further argued by the appellant that the court a quo misdirected itself by disregarding any possibility of Koopman having a motive to falsely implicate the appellant as the mastermind behind the alleged housebreakings in the Wilderness area. And the court a quo disregarded the fact that Koopman was serving a sentence of imprisonment and that he was arrested on the alleged counts possibly facing another conviction.

32 Koopman's evidence should have been approached with caution for a variety of reasons.

The cautionary rule to be applied to accomplices was described in these terms by Holmes JA in *S v Hlapezula & others* 1965 (4) SA 439 (A) at 440D–H:

"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following

factors:

- 1) First, he is a self-confessed criminal;
- 2) Various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency;
- 3) By reason of his inside knowledge, he has a deceptive facility for convincing description, his only fiction being the substitution of the accused for the culprit."

33 The court a quo failed to exercise caution when evaluating the evidence of Mr. Koopman in that;

- (a) it failed to recognise the foregoing dangers (1 – 3 above) in accepting Koopman's version as reliable,
- (b) failed to safeguard and reduce the risk of a wrong conviction, and
- (c) ignored the lack of corroboration considering the objective facts tendered during trial.

34 But the court a quo in terms recognized that Koopman was an accomplice and did approach his evidence with caution.

35 The court a quo concluded that Koopman gave detailed evidence without any contradictions or shortcomings and his evidence was well corroborated. It was found that Koopman's evidence was truthful and was reasonably possibly true. Koopman gave clear evidence on how the housebreakings occurred and his involvement as a watchdog. His evidence was corroborated by time, date and place as well as the items seized from Kifaro. As a result, the court a quo concluded that the appellant did not falsely implicate the appellant.

36 The court a quo rejected the appellant's version. It found the version had inherent improbabilities, taking into account the appellants connection with Koopman and Kifaro. He confirmed his "drug smoking" relationship with Koopman. The court a quo found it highly improbable that the appellants whereabouts were a mystery to him on the day in question.

37 Turning to the role of this Court sitting as court of appeal, bearing in mind the only issues arising are factual in nature.

38 The Court's powers to interfere on appeal with the findings of fact of a trial court are limited. (R v Dhlumayo and Another 1948(2) SA 677 (A)).

39 In Masango v S (A175/2021) [2024] ZAGPPHC 64 (5 February 2024) the following was stated:

"The approach to be taken on appeal

[3] Well-established principles govern the hearing of appeals against findings of fact. An appeal court's powers to interfere with the findings of fact by the court a quo is limited. In the absence of demonstrable and material misdirection by the trial court, its findings of facts are presumed to be correct. Such findings will only be disregarded if the record shows them to be clearly wrong:

'In the absence of any misdirection, the trial Court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order 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.'

40 I am of the view that this is not an exceptional case in which it can be said that the court a quo wrongly accepted the evidence of Koopman.

41 In the result I am of the view that the appeal against the convictions cannot succeed.

42 Turning to the sentences I can appreciate why it may be suggested that the sentences imposed as a whole are somewhat harsh. But that is not the test. The inquiry is whether the sentence imposed by the trial court was shockingly inappropriate.

43 There have been different formulations of when a sentence is considered to be "disproportionate" or "shocking."

44 All these formulations are aimed at determining whether the court could reasonably have imposed the sentence that it did (see, S v Sadler 2000 (1) SACR 331 (SCA) at para [8]).

45 The essential inquiry in an appeal against sentence is not whether the sentence was right or wrong but whether the court, when imposing the sentence, exercised its discretion properly and judicially.

46 In *S v Pillay* 1977 (4) SA 531 (A) at 535E - F, Trollip JA stated that “a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably”.

47 The State correctly argues that the appellant has an extensive list of previous convictions. It argued that he has made a career out of breaking into the property of others and stealing their possessions. The offences for which appellant was convicted were well planned and executed with a particular degree of accuracy concerning their timing.

48 He had previously been sentenced to direct imprisonment and was on parole for the same offences at the time of his arrest.

49 The appellant’s personal circumstances are he is currently 34 years of age, having been born on 17 August 1989; he is not married; he has a twelve-year-old child with whom he has no contact. He was born and raised in Plettenberg Bay. He stayed with his father prior to his arrest. His father receives a disability grant every month. The Appellant attained grade 10 at school. He was unemployed at the time of his arrest.

50 The appellant argues that he was about 11 years old at the time of his first conviction and that his previous brushes with the law could be ascribed to factors, such as poorly defined life goals and a lack of positive role models.

51 It is argued that the court a quo misdirected itself and disregarded any potential for “complete rehabilitation” and that the circumstances surrounding the commission of the offences “appear to be opportunistic in nature.”

52 I disagree. The court a quo carefully weighed up all the mitigating and aggravating factors and properly exercised its sentencing discretion.

53 In the result I am of the view that the appeal against the appellant’s sentence should be dismissed.

Katz, AJ

I agree, and it is so ordered.

Kusevitsky, J

[1] In terms of section 220 of the Criminal Procedure Act 51 of 1977.

[2] Section 204 of the Criminal Procedure Act 51 of 1977 provides witnesses who are called by the State to be provided with indemnity in answering questions which may incriminate such witness.

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Prepared on 10 October 2026 · Esheria