

SOUTH AFRICA / JUDGMENT

Keswa v S (A955/2007) [2009]

ZAGPPHC 332 (29 September 2009)

[2009] ZAGPPHC 332

COURT

North Gauteng High Court, Pretoria

BEFORE

Webster, Ismail, Vorster

CASE / FILE NUMBER

A955/2007

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG: PRETORIA DIVISION)

CASE

NO.: A955/2007

DATE:

29 SEPTEMBER 2009

NOT

REPORTABLE

In

the matter between:

NTELE

ABEL KESWA

APPELLANT

VS

THE

STATE RESPONDENT

JUDGMENT**WEBSTER J**

1. The appellant, a [.....] aged [.....] years, together with two others were convicted in the local circuit division for the Northern Circuit by Maluleke J on the following counts, namely,
 - (i) two counts of armed robbery with aggravating circumstances (Counts 1 and 2);
 - (ii) one count of murder (Count 3);
 - (iii) nine counts of attempted murder (Counts 4 to 12);
 - (iv) contravention of section 2 of the Arms and Ammunitions Act No. 75 of 1969 (Count 13);
 - (v) contravention of section 36 of the Arms and Ammunitions Act No. 75 of 1969 (Count 14);
 - (vi) contravention of section 32(l)(a) of the Arms and Ammunitions Act No. 75 of 1969 (Count 15);
 - (vii) contravention of section 32(l)(e) of the Arms and Ammunitions Act No. 75 of 1969 (Count 16);
 - (viii) two counts of theft of motor vehicles (Counts 17 and 18).

He received various terms of imprisonment including life imprisonment on count 3. It was ordered that the sentences imposed run concurrently with that of life imprisonment. He appeals against both conviction and sentence to the Full Bench of this Court.

2. The trial Court gave a detailed judgment dealing with the issues which will be canvassed later in the judgment. It will serve no purpose to summarize the evidence of the various witnesses as this was dealt with adequately and succinctly by the trial Court. A brief synopsis will suffice for the purposes of this appeal.
3. It was common cause that the crimes set out in counts 1, 2, 3, 17 and 18 were committed on the relevant date. The appellant and his fellow co-accused pleaded not guilty and denied any participation in the commission of the various crimes. It was also common cause or at the very least not disputed, that a large group of men travelling in several motor vehicles including what was referred to as a Bantam/Mazda Bakkie ambushed a convoy of three motor vehicles belonging to a security company known as Cash Paymaster Services that was en route to a pay point of old age pensions in a place called Burgersfort. From a description of the attack in evidence, it was executed quickly and with utmost precision.
4. The three vehicles belonging to Cash Paymaster Services were fired at. The vehicle in which the cash was being transported was rammed and it overturned. An occupant was killed during this incident giving rise to the charge of murder. The attack which consisted of the use of firearms gave rise to the various charges of attempted murder. After the convoy had come to a standstill the occupants of the three vehicles were robbed of their property as well as a Good Samaritan who stopped shortly afterwards to render assistance: he too was robbed with the use of a firearm. Their mission accomplished, the robbers made good their escape.

5. It appears from the evidence that a large manhunt then ensued. Two police officers who took part in it drove past a filling station and observed a Bantam/Mazda Bakkie stationary at the filling station. They stopped to investigate. They approached the vehicle. There was a person behind the steering wheel with the engine running. On the seat they saw a jacket. Upon investigation it was found that a hand machine carbine was wrapped up in this jacket. There was a large sum of cash under the jacket. More cash was found behind the seat of the Bakkie. The person who was behind the steering wheel of this Bakkie was then placed under arrest. It was accused no. 2. He informed the police officer that he was travelling with two other men. He stated that one of those men had entered the convenience store of the garage whilst the second person had proceeded to the toilet. The police officer then entered the convenience store and found two persons inside the store. It was the person serving in the shop/cafe as well as a male who subsequently turned out to be accused no. 3. Accused no. 3 was approached by the police and arrested.
6. Whilst this was going on, another police officer who had been driving a different vehicle and following the police vehicle referred to above stopped shortly thereafter at the same filling station. He observed a person running along the side of the filling station

building in the direction of a toilet at the rear of the filling station. He parked his vehicle and immediately hastened to the toilet. He knocked on the door. The occupant would not open. He eventually had to use his police dog in order for the occupant to open the door. Having apprehended this person, he then handed over this person to the two police officers who had arrived at the filling station first. That person was the appellant. After their arrest, the three persons were conveyed to the Labowakgomo Police Station and detained in the cells.

7. A police officer, Ms Lizzy Lombard, learnt of the arrest of accused no.3 She had been requested by a colleague of hers to attend court on the day of this incident, the 20th June 2003, to take note of the postponement of a certain case in the Magistrate's Court. The accused in that case happened to be accused no. 3. Accused no. 3 was in default when that matter was called. A warrant for his arrest was authorised. In the course of the day she learnt that the 3rd accused had been arrested and was being detailed at the Lebowakgomo Police Station. She proceeded there to execute the warrant of arrest issued earlier that day. At the Lebowakgomo Police Cells she spoke to accused no. 3. Accused no. 3 informed her that he had been offered a lift from his home in Mamelodi in Pretoria, by accused no. 1 on the 19th of June 2003. He had accepted the offer of accused no. 1. The following day, that is 20 June 2003, accused no. 1 had picked him up earlier that day and they had then proceeded to Polokwane ostensibly for accused no. 3 to appear for the remand of his case but had been arrested. Inspector Lombard testified further regarding the theft of the motor vehicles referred to in the indictment.

8. The vehicle which had been stationary at the filling station was examined by finger print experts. A finger print on the frame of the vehicle between the front windscreen and the driver's door on the right side was lifted. When it was subsequently compared with other finger prints it was established that that finger print had been deposited by accused no. 3. The State's case against the appellant rested on the statements made by accused no. 2 and 3 to Superintendent Sebola and Sergeant Kgare, his arrest in the toilet,

identified by accused no. 2 and the evidence that he was seen running to the toilet where he was found. The clear impact of this evidence is that he was in the vehicle in which the stolen money from the robbery was found. The appellant did not testify in his defence. His fellow co-accused no. 2 and 3 did testify. Accused no. 3 denied having made the disclosures that Ms Lombard testified on. Their versions were rejected by the trial Court. The Court has considered their evidence and even-though no appeal has been noted by these two accused persons, the court is satisfied that the rejection of their evidence and their conviction are in order. The trial court found that the persons involved in the robbery had acted in concert and with a common purpose to rob (*S v Mgedezi and Others* 1989(1) SA 687 (AD); *S v Thebus & Another* 2003(2) SACR 319 CC at 335). It found further that the attack on the admissibility of the statements made by accused no. 2 and 3 which were made voluntarily and spontaneously before being arrested were "...premised on excessive adherence to form [rather] than to substance". The trial court found further that the appellant had not rebutted the evidence of Sebola, Selema, Kgare and Mpiyane which implicated him (*S v Boesak* 2001(1) SACR 1 at page 11).

9. The conviction of the appellant was attacked on four grounds. These are as follows:
 - (a) the cogency of the evidence regarding the arrest of the appellant;
 - (b) the admissibility of the "admission" by accused no. 3 which implicated the appellant;
 - (c) the appellant's failure to testify in his own defence and the inference drawn from such failure; and
 - (d) the splitting of charges.
10. It was argued that the evidence relating to the arrest of the appellant was contradictory and that the trial Court had erred in accepting such evidence more particularly with regard to finding that the appellant had been arrested in circumstances testified to by the various police witnesses.
11. It is now trite that in the absence of factual error or misdirection, the trial Court's findings on factual issues are presumed to be correct (*R v Dlumayo and Another* 1948(2) SA 677 at 705; *S v Robinson and Others* 1968(1) SA 666 (A) at 675).
12. It is indeed so that there are contradictions in the evidence of the three police officers who testified with regards to what transpired at the filling station. Amongst the issues testified to by Superintendent Sebola who confronted accused no. 2 was that accused no. 1 had been brought to him by the members of the police who had been manning a road block

approximately 150 metres away. Inspector Kgare who had been travelling in the same vehicle as Superintendent Sebola testified that he only saw the appellant after his arrest by the "Day Unit Force". Kgare also testified that accused no. 2 had informed him that the appellant was in the toilet. Neither of the aforesaid witnesses were aware of another police officer who ultimately arrested the appellant, namely Inspector Mpiyane who was the officer who testified that he saw the appellant running towards the toilet. His evidence was that he actually drove to the vicinity of the toilet and it is he who then ultimately got the appellant to come out of the toilet as set out above in this judgment. According to his evidence, no other police officers, and in particular, the dog unit was asked to come to assist with the arrest of the three suspects. He was questioned and confronted with his statement in which he had stated or written that he had "found the Bantam...and three guys inside it...". He explained that he was not fully conversant with English. He testified that his mother tongue was Sipeidi and that he had written that statement in the best English at his command. When what he had written was interpreted to him at the trial, he responded that it was because he could not have expressed himself more effectively in Sipeidi and that he would have done far better if he had had the right to record his own statement in Sipeidi.

13. The trial Court dealt with these contradictions and it is indeed so that the type of contradictions referred to above would manifest themselves particularly if one has regard to the fact that the incident occurred in 2003 whereas the trial only commenced in 2005. Two years may not be an extremely long time to the ordinary citizen but this court has to take a realistic view that police officers are generally busy on a daily basis with investigation of crime, arrest of suspects. The trial Court was correct in its conclusion that these contradictions are not material and in accepting the evidence of these witnesses. What is particularly significant with regard to the arrest of the appellant is the second point of the argument in the appeal, namely what accused no. 3 informed Inspector Lombard with regards not only to his failure to appear in court in Polokwane but that he had been with the appellant the previous day and that the appellant had offered him a lift to Polokwane and that, in fact, they had travelled to Polokwane on the 20th of June 2003 together. In my view, the trial Court correctly accepted the evidence of the State witnesses regarding the appellant's arrest.
14. Appellant's counsel had difficulty in convincing us that that statement made by accused no. 3 to Inspector Lombard was anything

other than an exculpatory statement by the accused in explaining his failure to appear at court earlier that day. It was argued on behalf of the appellant that accused no. 3 should have been warned of his constitutional rights before being addressed at all and that the failure to so warn him rendered whatever he said which implicated the appellant, inadmissible. This cannot be so on two grounds. Inspector Lombard was not investigating or a team member of the investigative unit. She had a warrant against accused no. 3. The latter was providing a reason for his failure to attend Court at Polokwane. Accused no. 1 was referred to as having provided accused no. 3 with transport to Court in the Bantam/Mazda Bakkie found at the filling station. The presence of the

appellant at the filling station was support for accused no. 3's explanation. Accused no. 3 in no way implicated the appellant in any of the offences that they were charged with. It is not clear from the explanation given to Ms Lombard whether, in fact, what accused no. 3 was implying was that they were still en route to the court when they were arrested. During the trial this issue was debated extensively between the Court and the counsel for the accused as well as counsel for the appellant. The trial Court correctly pointed out, in my view, that even if what accused no. 3 had disclosed to Lombard had been an admission that it could, under the circumstances, be regarded as the exception referred to in section 3 of Act 45 of 1998 and therefore admissible in evidence. Appellant's counsel valiantly attempted to equate the situation in this case with that in the well-known case of *State v Molimi* 2008(2) SACR 76 (CC). Of significance, this issue was raised and debated very early in the trial. It is not necessary to consider the various issues that were dealt with in the *Molimi* case as the fundamental difference is that accused no. 3 made no admission nor can it be said that what he said could be remotely considered as a confession. Insofar as what accused no. 3 said, can be regarded as hearsay evidence against the appellant, it went no further than merely stating that accused no. 3 and the appellant had travelled together in the vehicle that was found at the filling station. It can never, in my view, be contended that that evidence, standing alone,

would have in any way resulted in the conviction of the appellant. It is further so that accused no. 3 denied in his evidence having made this disclosure to Ms Lombard.

15. Hearsay evidence is now admissible in terms of section 3 of the Law of Evidence Amendment Act aforesaid. There are pre-conditions which are laid down in the Act for the reception of hearsay evidence. A perusal of section 3(1)(c) demonstrates clearly that what accused no. 3 said can in no way be deemed to fall within the eight conditions set out therein. As already stated earlier in this

judgment, what accused no. 3 said was solely intended to be an excuse for his non-appearance at his trial at Polokwane that day. There was no reference to the robbery, there was no reference as to what was found in that vehicle. It was submitted in this regard by State counsel that the exclusion of this evidence would have brought the proceedings into disrepute had such evidence been excluded (*S v Ndhlovu and Others* 2002(2) SACR 325 (SCA)). I agree with him.

16. With regard to the third point on the appeal namely the appellant's failure to testify and the inferences drawn by the trial Court there-from, it is important to note that the money that was found in the Bantam/Mazda vehicle, in which the three persons were travelling was identified as having formed part of the money which was being conveyed by the vehicle that was ambushed and robbed. The vehicle also fitted the description given by the various witnesses who testified that a vehicle similar to that found at the filling station had been used at the aforesaid robbery. These few strands of evidence perhaps innocuous in a sense, when viewed in the totality of the evidence, clearly called for an explanation from the appellant (*Boesak* case supra). His failure to do so leads only to one inescapable conclusion and that is that he was amongst the people who executed the robbery. This was the finding of the trial court.

17. Appellant's counsel weakly submitted that the robbery of the various victims at the scene of the incident constituted one continuous act and that therefore it constituted one act of robbery of various victims. The evidence is clear that the robbers set out to execute a heist and to rob the inmates of the vehicle carrying the money. Whilst it may have been within the contemplation of the conspirators that those who would be travelling in the vehicles forming that convoy could be in possession of personal valuables or money, there is nothing on record to suggest that the conspiracy to execute the primary robbery could have included the robbery of the occupants in the various vehicles. The robbers deliberately set about robbing the various people. The inference from this, in my view, is that there cannot be said to be a duplication of charges or multiplicity of charges. Each act of robbery of a victim as each act of attempted murder of the various victims, constitutes a separate and individual criminal act. It is clear from the evaluation of all the evidence on record that the trial Court in no way misdirected itself in any way with regards to the conviction.
18. Insofar as the appeal against sentence is concerned, appellant's counsel was hard-pressed to articulate the grounds on which the sentence imposed can be said to be inappropriate. All that he could say was that the totality of the sentence is shockingly inappropriate and unreasonable and that no other Court would have imposed it.
19. It is a well-accepted principle that the imposition of a sentence is a matter eminently for the trial Court (*R v Rabie* 1975(4) 855 at 857; *S v Kgosimore* 1999(2) SACR 238 at page 241(e-g)). A Court of appeal will only interfere with a sentence if the trial Court has misdirected itself or the sentence is "startlingly inappropriate or induces a sense of shock or where there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed".
20. The level of violent crime in this country and the regularity with which heists are executed virtually on a daily basis, have raised the ire of the South African society. The image of this country has been badly tainted. The level of violence has contributed to the emigration of many citizens of this country and it is no hyperbole to say that the whole world is aware of the wanton violence that pervades our society. The sentence imposed by the trial Court is a robust one. Having regard to the fact that it was imposed in 2005 its appropriateness is as fitting now as it was when it was imposed. It is the duty of the Court, in the exercise of its functions and responsibilities, to mete out sentences which not only take into account the personal circumstances of a convicted person but should reflect the interests of the citizenry of this country. Crime, and in particular, violent crime can never be tolerated. Indeed the legislature through the General Law Amendment Act No. 105 of 1997 gave direction to the Courts of the need for sentences involving i.e., violence to be visited with the sentences imposed by the trial Court.

21. I have considered whether the trial Court erred in any way or failed to have regard for any mitigating facts in favour of the appellant. I have sought for substantial and compelling circumstances or any factors that are mitigating and none lend themselves in this case. In the circumstances, my considered view is that the trial Court did not err in any way nor did it misdirect itself on the sentence. In my view the sentence was a proper one fitting the "criminal, the crime and the interests of society..."
22. The appeal against the conviction and sentence is accordingly dismissed.

WEBSTER

JUDGE IN THE HIGH COURT

I agree

ISMAIL AJ

ACTING JUDGE IN THE HIGH COURT

VORSTER AJ

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