

SOUTH AFRICA / JUDGMENT

Khalaki and Another v S (A177/14)

[2015] ZAFSHC 2 (22 January 2015)

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COURT

Free State High Court, Bloemfontein

BEFORE

Rampai, Tsatsi

CASE / FILE NUMBER

A177/14

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IN THE HIGH COURT, BLOEMFONTEIN

FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A177/14

DATE: 22 JANUARY 2015

In the appeal between:

PHALLANG MOSES KHALAKI.....First Appellant

QUEWIN FRANCOIS COETZEE.....Second Appellant

And

THE STATE.....Respondent

CORAM: RAMPAI, AJP et TSATI, AJ

JUDGMENT: RAMPAI, AJP

HEARD ON: 1 DECEMBER 2014

DELIVERED ON: 22 JANUARY 2015

- [1] These were appeal proceedings. The appellants were convicted and sentenced by the district court. They were aggrieved. They came to us by way of an appeal with the leave of the trial court. They were granted leave to appeal against the conviction and sentence. The respondent opposed the appeal.

- [2] The first and second appellants were charged together with another person, accused 2. Their prosecution stemmed from an incident which took place in Bloemfontein on 23 March 2013. On that day the second appellant, Mr Quenwin Francois Coetzee, was released from Grootvlei Correctional Centre.
- [3] Following the aforesaid incident the first appellant, Mr Phallang Moses Khalaki, and accused 2, Ms Venisha Catleen-Anne McGlue, were arrested on 26 March 2013 and 28 March 2013 respectively. The second appellant was subsequently re-arrested on 18 April 2013.
- [4] The incident gave rise to a total of 4 charges; 3 against accused one, 1 against accused two and 1 against accused three. Only one of the four charges remained relevant for the purpose of these proceedings. That one relevant charge was charge number 4. It concerned the second appellant only. The prosecution alleged that Mr Q.F Coetzee, accused three, unlawfully escaped from custody at Grootvlei Correctional Centre in Bloemfontein on 23 March 2013 contravention of sec 117(a) Correctional Services Act 111/1998 read with section 1 thereof.
- [5] Before I proceed any further, I need to indicate, firstly that accused two, was discharged in terms of sec 174 Criminal Procedure Act 51/77. Secondly, I pause to point out that there was no appearance by or on behalf of the first appellant. Since he did not appear I shall say no more about him and the first three charges in respect of which he was convicted. The focus of these appeal proceedings, therefore, revolved around the second appellant only.
- [6] The second appellant was tried in the Bloemfontein District Court. On the 28 January 2014 he pleaded not guilty to the charge that he escaped from custody. This plea notwithstanding, he was found guilty on 1 April 2014. On the same day, a sentence of 3 years imprisonment was imposed on him. He successfully applied for leave to appeal on the same day.
- [7] As regards the merits, Mr Nel, counsel for the second appellant, conceded that it was proven that the second appellant gave instructions to his attorney to bail him out on the strength of new facts, but he contended that it was not proven that the second appellant was aware of the illegality of his release. Accordingly, counsel submitted that the second appellant lacked the requisite mens rea to commit the crime he was accused and convicted of.
- [8] However, Ms Moroka, counsel for the respondent, differed. She supported the conviction of the second appellant. Counsel contended that it was proven that the second appellant was fully aware that there was no new bail application whatsoever launched on the 22 March 2013 for his release from custody and that he was fully aware that he was not entitled to be released as he was on Saturday 23 March 2013. Therefore, counsel submitted that the second appellant did not lack mens rea, as he contented, to break the law.
- [9] The version of the state was narrated by Mr Mboliswe Patrick Seliwa, district court control prosecutor, Bloemfontein;

Ms Charmaine Coetzee, the second appellant's sister; Ms Venisha Catleen Anne McGlue, the second appellant's girlfriend; Captain Charles Johannes Jacobs, supervisor of court orderlies, Bloemfontein Magistrate Court; Ms Phiwo Desirè Vuko, clerk of the court, Bloemfontein Magistrate Court; warrant officer Eben van Zyl, member of the Hawks and police investigation team; Ms Alida Maria Obus, chief executive officer The Law Society, Free State Province; warrant officer Linda Steyn, member of the Hawks and the investigating officer.

[10] The evidence showed that the second appellant was arrested and detained on a murder charge. He unsuccessfully applied in the Bloemfontein Magistrate Court to be released on bail. He took the matter up on appeal to the Free State High Court. However, his appeal was also unsuccessful. The case was later transferred to the Free State High Court for trial. He did not give up. He then instructed the first appellant to have him released on bail. The first appellant then requisitioned the second appellant to appear in the Bloemfontein Magistrate Court for that purpose. Those arrangements were made with the control prosecutor Mr Seliwa.

[11] On Friday 22 March 2013 the second appellant was booked out of Grootvlei Correctional Centre and taken to Bloemfontein Magistrate Court. There was no such case on the roll of court G. As a result the second appellant never appeared in court on that day. Notwithstanding the fact that no formal bail application was made and no bail fixed for his release, at the end of the day the second appellant returned to Grootvlei Correction Centre with a purported warrant of liberation which indicated that he could be released on R4000 bail.

[12] The next day, Saturday 23 March 2013, his sister, Ms Charmaine Coetzee, travelled from Welkom to Bloemfontein and paid the R4000 to Grootvlei Correctional Centre. The second appellant was then released from custody on the strength of a fraudulent warrant of liberation which he had caused to be presented to Grootvlei Correctional Centre, the previous day. He walked away with his sister. She later gave him R650 before she returned to Welkom. The understanding was that he would use the money to buy a bus ticket to Plettenberg Bay. But he did not.

[13] Instead the second appellant went to Arthur Nathan Swimming Pool. From there he called Ms Venisha Catleen-Anne McGlue also known as "Nisa". He asked her to meet his sister there. She drove over to meet the second appellant's sister, Ms Charmaine Coetzee. On her arrival there, Ms Charmaine Coetzee was nowhere to be seen. Twice she heard someone calling her name out but she could not see who was doing so. Out of the blue the second appellant emerged. He was so disguised that she could not

instantly recognise him as he was approaching her car. All she could see was an unfamiliar man wearing a cap in such a manner that his face was concealed. She took him home at Fauna in Bloemfontein where he slept on Saturday 23 March 2013.

- [14] On Sunday 24 March 2013 the second appellant declined to go to church with his fiancé as they had seemingly agreed. His excuse was that he did not feel comfortable to face people. When everyone went to church he remained behind alone. He was not locked up but he chose to avoid the public.
- [15] A message posted in social media Twitter and Facebook was brought to the second appellant's attention after the church service. Ms Venisha Catleen-Anne McGlue read the message out to him. The second appellant was shaken. He panicked. He became very restless. Ms McGlue asked him to calm down and suggested they go to the nearest police station to prove that he was lawfully released on bail in order to refute the perception that he had escaped from lawful detention. The second appellant became so extremely restless, panicky and anxious that he, without saying goodbye to his fiancé, took the fiancé cellular handset and disappeared.
- [16] At 23:30 on Sunday 24 March 2013 the second appellant called his fiancé. He used her cellular phone. She told him that the police had been to her parental home; that they were looking for him; that they searched the house to find him and that they questioned her concerning his whereabouts. He asked her not to worry because he was fine. He told her he was in Welkom to fetch the bail slip from Charmaine and that from there he would travel to Plettenberg Bay by bus. Having heard that the police were hot on his heels, the second appellant never called his fiancé again.
- [17] Later that Sunday the second appellant resurfaced in Welkom. He asked his sister Ms Charmaine Coetzee for the bail receipt in order to disprove the allegation on social media that he had escaped from the correctional detention centre. She refused. He became very angry. He again vanished in Welkom as he did in Bloemfontein.
- [18] The second appellant was eventually arrested by warrant officer Eben van Zyl in Johannesburg, on 18 April 2013. He was found in a shack in the back courtyard of a certain residential property.
- [19] The crucial question in the appeal before us was whether or not the second appellant knew that he was not lawfully granted bail. On behalf of the second appellant, Mr Nel submitted that the answer to that question had to be in the affirmative. He accordingly urged us to uphold the appeal and to reverse the verdict.

On behalf of the respondent Ms Moroka differed. She submitted that the question had to be negatively answered. The submission she made was premised on the contention that the conduct of the second appellant was indicative of the second appellant's subjective knowledge that he was not lawfully entitled to be released from custody.

[20] Prior to his release, the second appellant knew:

- that he was facing a charge of murder;
- that he gave oral evidence in support of his bail application in the magistrate court;

- that his bail application was refused;
- that he took the regional magistrate's refusal on appeal;
- that the high court dismissed his bail appeal;
- that his case had already been transferred to the Free State High Court;
- that he had already appeared in the high court and that his case had been remanded for trial.
- that he was the only person who could tell the court about the new facts or changed circumstances; and
- that he testified in no court about the alleged new facts or changed circumstances.

[21] Given such prior knowledge, it should have struck the second appellant as odd that he was taken back to the district magistrate's court instead of the high court on 22 March 2013. Worse still he did not even actually appear in that district court to give evidence, as before, about the changed circumstances which dictated that, unlike on the previous occasion, his release from custody would be in the interest of justice. It appeared as if his release from custody was informally considered in absentia in haste and apparently in camera. Such radical departures from the standard procedure known to the second appellant would ordinarily have made an innocently ignorant person in those circumstances very sceptically about the legality of his release. The bail amount was predetermined. The high court was mysteriously circumvented. Bail was granted by a secret magistrate in a clandestine tribunal.

[22] Subsequent to his release, the second appellant's guilty knowledge could be deduced from the following facts:

- he told his sister that he wanted to get out of Bloemfontein on the same day on which he was released;
- he received bus fare money from her to travel to Plettenberg Bay where his parents lived but he never did;
- he was so disguised that his fiancé could not readily recognise him when they met at the recreational park in the vicinity of Arthur Nathan swimming pool;
- he avoided accompanying his fiancé to church;
- he became extremely anxious and restless when his fiancé read the postings on social media which claimed that he had escaped from custody;
- he started peeping through the window probably whenever he heard a sound of passing motor vehicles or strange noises outside before he vanished from Bloemfontein.

- he unceremoniously disappeared from Bloemfontein instead of going to the local police station to dispel allegations in the social media about his alleged escape;
- he resurfaced in Welkom with an excruciating headache and again vanished as quickly as he had appeared;
- he called his fiancé, told her he was taking a bus to Plettenberg Bay but he took a bus and went the other way instead;
- he heard from his fiancé that the police were looking for him yet he avoided the police and broke further contact with her;
- he was eventually arrested in Johannesburg in somewhat suspicious circumstances;

[23] There can be no reasonably doubt, on the mind of any objective person, that the entire conduct of the second appellant was certainly not consistent with the behaviour of an innocent person who knew that he had done nothing wrong and who knew that he had nothing to fear. On the contrary, his behaviour was akin to that of a fugitive from justice. “The guilty are afraid.” That saying appropriately applied to the second appellant. Every single move he made, every line of action he took and every word he said symbolised an ever increasing web of indications that he knew very well that he was not lawfully released.

[24] During the course of the judgment, the trial magistrate, Mr van der Merwe commented:

“His conduct towards his release is also indicative of the fact that he was aware that he was not lawfully released; he never contacted accused 1, who had been responsible for arranging his bail. His conduct towards his fiancé and his sister displayed a state of panic. His version that he had went to Johannesburg to go and sort out his pension also seems improbable, he conceded that the pension office was in Pretoria; however, he stayed in Johannesburg in the backyard of a person who is a complete stranger to him.”

[25] The trial court came to the following conclusion:

“The versions of accused 1 and 3 seem highly improbable in the light of the evidence as a whole. The only reasonable inference that can be drawn from the evidence as a whole is that both were instrumental and the planning and execution of the escape of accused 3, the escape could not have been executed without the cooperation of both accused.”

[26] If we accept, and I believe we have to, that the second appellant collaboratively conspired with the first appellant in order to secure and facilitate his release from lawful detention by fraudulently false representations, then there can be no reasonable doubt that, all along, the second appellant had the subjective knowledge that his release from custody was unlawfully orchestrated and that he was not supposed to be released. His subjective knowledge notwithstanding, he walked out of lawful custody. On the facts, I am not persuaded that the trial magistrate committed any material misdirection to warrant appellate interference. The entire network of the second appellant’s actions demonstrated beyond reasonable doubt that he had the requisite criminal intent to escape from lawful custody. I would, therefore,

dismiss the appeal and confirm the conviction of the second appellant.

- [27] As regards sentence, the issue was whether or not the trial court materially erred in not directing the sentence of 3 years to run concurrently with the sentence of 20 years imprisonment imposed on the appellant in respect of the charge of murder.
- [28] Section 48(2) Correctional Services Act 8/1959 provided that where a person had been convicted of the offence of escaping from lawful custody, a sentence imposed would commence after the expiry of any sentence the offender was already serving at the time. The statute has since been repealed.
- [29] Currently Section 117 Correctional Services Act 111/1998 which deals with the offence of escaping from custody, does not contain a provision similar to sec 48(2) of the repealed statute.
- [30] The second appellant was sentenced on 1 April 2014. On 27 May 2014 the trial magistrate filed a statement in terms of Rule 67(5) of the Magistrate Court Act. He commented as follows on the sentence he imposed on the second appellant:

“With regard to sentence I also refer to my judgment with regard to sentence delivered on 01/04/2014. I have to concede however that I may have misdirected myself with regard to the question whether a sentence of imprisonment imposed for escaping from custody may be served concurrently with any other term of imprisonment that such an accused may be serving. In coming to the

conclusion

that it was not possible I had mistakenly referred to my notes on the repealed Correctional Services Act, No 8 of 1959 and more specifically Section 48(2) which provided that “Any sentence or imprisonment imposed ... shall commence after the expiry of any sentence the prisoner is undergoing ...” The current Correctional Services Act, No 111 of 1998 does not contain a similar provision. It may therefore be possible for the current sentence to run concurrently with the sentence the 2nd appellant in (sic) currently serving.

Notwithstanding the misdirection referred to above, I am of the view that the imposed sentence of three years imprisonment is not shockingly severe in the light of the circumstances.”

- [31] To the extent that the trial magistrate reckoned that the repealed sec 48(2) was still operative he erred. It is clear from his subsequently statement that but for the error he would have directed otherwise. The error adversely affected the second appellant. The practical impact thereof is that the second appellant will serve 3 more years after he had served the twenty year term. In my view the trial court materially erred because it misapplied the law. Sec 111 is permissive and not prohibitive. It is clear that in an appropriate case, a trial court may exercise its discretion either to direct that the new sentence and the old sentence run concurrently or consecutively. In this instance the trial magistrate erroneously believed that the concurrent option was prohibited whereas it was not.

[32] In my view the misdirection justified appellate interference. The second appellant was already serving a twenty year term of imprisonment. In itself such a sentence was, by all accounts, very retributive. Therefore, the interest of society and the administration of justice would not have been undermined if the sentence relative to escaping was directed to run concurrently with the sentence relative to murder. I am inclined to interfere in that manner.

[33] Accordingly I make the following order:

33.1 The appeal fails as regards conviction;

33.2 The conviction is confirmed;

33.3 The appeal succeeds as regards sentence;

33.4 The sentence of 3 years imprisonment is confirmed but it is directed that it run concurrently with the sentence of twenty years imprisonment previously imposed in connection with the charge of murder.

33.5 The aforesaid direction must be deemed to have been made on 1 April 2014.

M.H. RAMPAL, AJP

I concur

E.K. TSATSI, AJ

On behalf of the appellant: Advocate P.W Nel

Instructed by: Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of the respondent: Advocate MMM Moroka

Instructed by: Director of Public Prosecutions

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Prepared on 12 October 2026 · Esheria