

SOUTH AFRICA / JUDGMENT

Khuzwayo v S (CA25/2020) [2021] ZANWHC 17 (24 June 2021)

[2021] ZANWHC 17

COURT

North West High Court, Mafikeng

BEFORE

ME Mahlangu, M Leeuw

CASE / FILE NUMBER

CA25/2020

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IN

THE HIGH

COURT OF

SOUTH

AFRICA

NORTH

WEST DIVISION, MAHIKENG

Case

no: CA25/2020

DPP

REF NO: H280/13

In the matter between:

MANDLA
KHUZWAYO
Appellant
and
THE
STATE
Respondent

JUDGEMENT

INTRODUCTION

- [1] This is an appeal against conviction and sentence of the appellant. The appellant was charged with housebreaking with the intention to rob and robbery with aggravating circumstances being present. The appellant was convicted and sentenced to 7 (seven) years imprisonment.
- [2] On 16 April 2015, the appellant successfully applied for leave to appeal against conviction and sentence. Due to the administrative delay at the Magistrate Court, the appeal was filed in this Court out of time.
- [3] At the hearing of the appeal on 14 May 2021, this court reserved judgement and ordered the immediate release of the appellant from prison.

CONDONONATION

- [4] The Magistrate granted the appellant leave to appeal with the condition that the appellant prosecute the appeal within a period of twelve weeks.
- [5] The appellant, through the assistance of his attorneys issued and timeously served the notice of appeal with the clerk of Odi Regional Court on 26 May
- 2015. The appellant complied with both section 3098 of the Criminal Procedure Act 51 of 1977 (CPA) and Rule 67 of the Rule Regulating the Conduct of the Proceedings in the Magistrate Court, which prescribes as when and how notice of appeal must be filed. The Clerk of the Court delayed in transmitting the copy of the record to the Registrar of this Court.
- [6] Appellant's appeal lapsed due to the failure by the clerk of the court to transmit the copy of the appeal record to this Court. On 21 June 2020 appellant was arrested due to the lapse of his appeal. On 10 July 2020, appellant brought a bail application pending appeal, which was denied.
- [7] Appellant's attorneys enquired from the Registrar of this court if the appellant's appeal record had been filed. The attorneys discovered that the appellant's appeal record had not been filed. The attorneys took it upon themselves to file the record with the Registrar of this Court on 21 August 2020. The appellant re issued and served the record with the Clerk of the Court and the Director of Public Prosecutions, Mahikeng (DPP).
- [8] In the heads of arguments filed on behalf of the appellant, it is contended that 'The non compliance with the rules of court was mostly occasioned by poor administrative actions on the part of the clerk of the court, without forgetting the Applicant's role in the appeal process.' Adv Masike submitted that, the degree of lateness is not solely occasioned by the appellant and stands to be condoned.

- [9] There is no doubt that there has been a significant delay in the prosecution of the appellant's appeal in this matter. From the reading of the heads of argument and consideration of the submissions made on behalf of the appellant, the delay cannot be laid at the door of the appellant. It is trite that an appeal should be heard within a reasonable period of time after leave to appeal has been granted failing which the appellant will be prejudiced in circumstances where the appeal is upheld. In this matter, it has been 3 years since the appellant had been granted leave to appeal.
- [10] Condonation for the late prosecution of the appeal is granted.

FACTS

- [11] The complainant testified that the incident happened at around 18h45 during the month of June. The house was illuminated by electric bulbs so it was not dark. Immediately after the burglars entered the house, he was told to lie down. He was very frightened, and the incident happened quickly. The 2nd witness who is the complainant's girlfriend testified that the assailants on entering the house switched off the electrical main switch of the house and the house became dark.
- [12] The appellant testified that, on the day of the incident, he was at Moeka village where he is residing. He testified that he arrived at Moeka at around 19h30 coming from work at PG Glass in Pretoria. He denied ever being at the complainant's house.

SUBMISSIONS

- [13] It is the appellant's contention that, the State did not discharge its burden of proving the guilt of the Appellant beyond reasonable doubt during the trial.
- [14] Counsel for the appellant, argued that, the trial magistrate overlooked 'glaring' discrepancies and contradictions in the evidence presented by the State during the trial. The State did not even challenge the appellant's alibi.
- [15] Counsel for the respondent concedes that the Learned Magistrate in the court a quo misdirected himself by taking into consideration the evidence relating to the identity of the appellant and yet overlooked the material contradictions made by the witnesses during the trial.

ISSUES

- [16] The issue to be decided is whether the identity of the appellant was proved beyond a reasonable doubt by the State.

ANALYSIS

- [17] The respondent's counsel submitted in his heads of arguments that, the issue of visibility and the ability to identify the assailants by the complainant and his girlfriend was doubtful.

- [18] Counsel for the appellant argued that the State has failed to prove its case beyond reasonable doubt and that the appellant ought to have been found not guilty and acquitted.
- [19] During the bail application, the Investigating Officer testified that, the complainant and his witness confirmed that, they were in no position to identify the assailants with any special features but could only point them out at the identity parade. During the trial, the Learned Magistrate ignored this evidence presented at the bail application.
- [20] The procedure followed during the conduct of the identity parade was also marred with discrepancies. The identity parade was procedurally unfair. The complainant and his girlfriend contradicted each other with regard to where they were kept before the identity parade commenced. The complainant testified that they were kept in the same room whereas his witness testified that they were kept in separate rooms.
- [21] The respondent's counsel conceded that, the Learned Magistrate misdirected himself by accepting the evidence relating to the conduct of the identity parade which had put the appellant in a disadvantaged position.
- [22] The fact that the complainant and the state witness contradicted each other in relation to the visibility in the room, also casts doubt on whether they had sufficient opportunity to identify their assailant.
- [23] I am of a view that the State has not succeeded in proving the guilt of the appellant.

CONCLUSION

[24] I accordingly make the following order:

- (1) The appeal succeeds;
- (2) The conviction and sentence handed down on 12 March 2015 are set aside.

ME MAHLANGU

(Acting Judge,

North West High Court, Mahikeng)

I agree

M. LEEUW

(Judge President, North West High Court, Mahikeng)

APPEARANCES

DATE OF HEARING : 14 MAY 2021

DATE OF JUDGMENT : 24 JUNE 2021

FOR THE APPLICANT : Adv Masike

INSTRUCTED BY : RAMAFOKO ATTORNEYS

FOR THE RESPONDENT : Adv Nontenjwa

INSTRUCTED BY : Director of Public Prosecutions MAHIKENG

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Prepared on 13 October 2026 · Esheria