

SOUTH AFRICA / JUDGMENT

Livanje v S (A143/2017) [2017] ZAFSHC 221 (19 October 2017)

[2017] ZAFSHC 221

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai, Daniso

CASE / FILE NUMBER

A143/2017

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A143/2017

In

the Appeal between:

BERNARD
ANTONY
LIVANJE Appellant
and
THE
STATE Respondent

CORAM:

RAMPAI,
J et DANISO, AJ
HEARD

ON:

9 OCTOBER 2017

JUDGMENT

BY: DANISO, AJ

DELIVERED ON: 19 OCTOBER 2017

[1] The appellant and his co-accused appeared in the Hoopstad Regional Court where they were indicted on three charges, namely,

housebreaking with intent to commit a crime unknown to the state, attempted murder and illegally entering and/or remaining in the

Republic of South Africa. The state alleged that they committed the offences at Hoopstad on Tuesday 09th October 2014 and that the scene of the crime was on farm a known as Witpan.

[2] After pleading not guilty to the first and second charges, the appellant tendered a plea explanation. He admitted that he was indeed on the farm known as Witpan on the day in question. His admission was accordingly recorded by the regional magistrate in terms of section 220 of the Criminal Procedure Act 51 of 1977 “the Act”). With regard to the third charge, he pleaded guilty in terms of section 122 (2) of the Act.

[3] On 15th July 2015 all three accused were convicted on the strength of the evidence in respect of charge 1 notwithstanding their plea and on their own plea of guilty in respect of charge 3. Each of the accused was subsequently sentenced to 10 and 2 years imprisonment in respect of the first and the third charges respectively.

[4] The appellant was aggrieved by his conviction in respect of the first charge. He applied unsuccessfully for leave to appeal against his conviction and sentence. His application was dismissed by the court a quo on the 05th July 2016. However, leave to appeal was subsequently granted on 24 March 2017 by Lekale J et

Mbhele J on petition in terms of section 309C of the Act.

[5] The complainant was asleep in his house when at or about 1am his alarm went off. He woke up to investigate but found nothing peculiar. He went back to bed and slept. About an hour later, he was woken up by the noise of what sounded like a breaking window. He jumped out of his bed, got hold of his firearm and rushed to his mother's bedroom where his mother and sister were sleeping. He found them also awake and he realised that the window of his mother's bedroom was also broken. He then saw a shadow outside that window and then he also noticed that the curtain was moving. It appeared to him as if a person wanted to enter the house through that window. He immediately fired two shots while he was in the bedroom. Then there was silence.

[6] It was not in dispute that the appellant was the person who was shot by the complainant; that a few hours after the shooting he was found lying under a tree; that the tree in question was on the complainant's farm, a short distance from the farmhouse; that he was wounded

and also bleeding; that there was no trail of blood detected between the farmhouse and the tree in question; that his van was found parked in town approximately 12 km from the farmhouse and that his 2 co-accused were found hiding in the forest on another farm about 15 kilometres away.

- [7] The appellant however denied that when he was shot he was at the complainant's house. According to him when the bullet struck him he was about 500 meters away from the complainant's house. He and his co-accused were at that stage walking back to their vehicle after chasing a gold dealer who had conned them out of R14 000.00 by selling them fake gold.
- [8] As regards substantive merits, the appellant challenges his conviction on the following grounds:
- (a) The state's evidence failed to prove that the appellant is guilty of the crime of housebreaking with the intention to commit robbery, in that the state failed to prove that the appellant entered the house and/or what the intent of the appellant was;
 - (b) The trial court erred in finding the appellant guilty on circumstantial evidence, when in the circumstances it was not the only inference that could be drawn;
 - (c) The trial magistrate erred in finding that the circumstantial evidence against the appellant excluded any other conclusion;
 - (d) The trial magistrate erred in rejecting the appellant's evidence as being not reasonably true.
 - (e) It was also argued by the appellant's counsel that the fact that no blood was found next to the complainant's window supported the appellant's version that he was not standing next to the complainant's window when he was shot.
 - (f) He further argues that because the appellant's vehicle was parked in town far away from the complainant's house showed that their intention was not to rob, as they would otherwise have obviously needed the vehicle to transport the stolen goods.
- [9] The issue on appeal was whether the evidence established, beyond reasonable doubt, all the elements of the offence of housebreaking.

We were specifically called upon to determine whether the element of physical entry into the complainant's house by an intruder, whoever he might have been, and the element of criminal intent to rob were established.

- [10] It is trite law that a court of appeal will not interfere with or temper with the trial court's judgment or decision regarding

conviction unless it (court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law. See *R v Dhlumayo & Another* 1948

- (2) SA 677 (A). The principle was also reaffirmed in *S v Mlumbi* 1991 (1) SACR 235 (SCA) at 247g, as follows:
- (9) "Dit is gevestigde reg dat indien daar geen wanvoorligting op die feite is nie, die vermoede bestaan dat die verhoorhof se evaluering van die getuienis korrek is, en dat 'n Hof van appel alleenlik daarmee sal inmeng indien dit oortuig is dat daardie evaluasie verkeerd is".
- [11] On the facts germane to this matter, in convicting the appellant the court a quo relied on the evidence presented by the six state witnesses, namely: the complainant, Mr Etienne Le Roux, his sister, Ms Venter, and four police officers who responded to the housebreaking complaint.
- [12] The court a quo found that the state witnesses were good witnesses, that they corroborated each other in material respects and that there was no reason to doubt the veracity of their evidence. The proven facts showed that there were people outside the complainant's home during the night in question; that they first broke into the store room where they removed the spade before they proceeded to the farmhouse. They then used the spade to break the complainant's windows. Initially they smashed the window of the lounge. Later on they smashed that of the bedroom.
- [13] The evidence showed that the complainant had securely locked all the doors and securely latched all the windows the previous evening. However, one bedroom window was found open. One of the window panes of the same window was found broken after the incident. The spade was found lying down on the ground next the window. The regional magistrate deduced from those objective facts that a burglar must have smashed the window pane with the spade, inserted his hand or some kind of an instrument into the bedroom through the hole in the broken window pane, unlatched the window and pushed the window to the outside in order to get into the house. Since the window latch was on the inside, the burglar naturally had no option but to insert his hand into the house to turn it. That was the only manner to unhook it. The insertion of either the burglar's hand or instrument into the house in that manner constituted sufficient entry in law. The finding of the court a qua to that effect is one which I cannot, on appeal, hold to be wrong.
- [14] The learned author Snyman; *Strafreg* on page 547 of the Sixth Edition states the following:-
- "Die Binnetrede. Die blote oopbreek van 'n struktuur sender 'n binnetrede is nie voldoende om die misdaad daar te stel nie, alhoewel dit kan neerkom op paging om 'n misdaad te pleeg. Net soos "gebou of struktuur" en "die oopbreek", is ook "die binnetrede" 'n hoogs tegniese begrip. Die binnetrede is voltooi die oomblik wanneer X 'n deel van sy liggaam of enige instrument wat hy vir daardie doel gebruik, deur die opening steek met die opset om sodoende beheer oor die inhoud (of 'n gedeelte daarvan) van die gebou of struktuur uit te oefen."

I am in respectful agreement.

The appellant's contention that the complainant's mother or sister might have opened the window after the complainant had closed it was not borne out by the facts. Besides it was never put to Ms Venter or even to the complainant.

- [15] The appellant was the only witness who testified for the defence. However, he did not impress the trial court. The court found that he was not an honest witness; that he contradicted himself with regard to the exact spot where he was when he was shot and that his version was marred by inherent improbabilities. The court was of the view that if it were to accept his version, then it would have to accept that someone else broke into the complainant's property at the very same time that the appellant and his co-accused were pursuing their gold dealer in the same vicinity of the complainant's house. The trial court correctly found that such a proposition was, on the facts, highly unlikely.
- [16] It was highly improbable that the appellant and his accomplices would drive over hundred kilometres for the purpose of clinching a dubious gold transaction at a place they have never been before. The appellant had no constructive knowledge whatsoever of the personal particulars of the alleged seller. He hardly knew anything about the essential details of the product such as quantity, quality and the price. Moreover, he could not give any sound reason as to why they had to meet the mysterious gold smuggler on the property of someone else at such an awkward time of the night. The evidence that Hoopstad, unlike Welkom, was not known for illegal gold activities was uncontroverted.
- [17] It was quiet peculiar that the appellant had in his possession R15 000.00 cash which he carried all the way from Gauteng by share intuition, which amount ultimately happened to be the exact price that the seller asked for. All this despite the fact that he had never had any prior discussion with the buyer regarding the transaction. The appellant would not have been indifferent to the dangers of wandering about on strange farms during the odd hours of the night. The court a quo was correct in saying that the appellant probably knew or ought to have known that rural farming communities were troubled by farm attack offences which are often committed at night.
- [18] The state also relied on circumstantial evidence to prove that the appellant and his co-accused were the perpetrators who broke into the complainant's house. Such evidence consisted of three sets of shoeprints which the complainant and the police detected near the complainant's house. The appellant's shoeprints matched of the suspicious sets of shoeprints. Moreover, two of those shoeprints led the police the forest or woods on another farm. Believing that the suspects were hiding in the thick forest, the police set it alight. Lo and behold! Two men were flushed out of the forest by the heat of the fire. They turned out to be the wanted suspects, the appellant's companions. The patterns of the soles of their shoes matched those of the suspicious shoeprints found in the vicinity of the crime scene.
- [19] In the light of the shoeprint evidence, the court a quo was correct in finding that it placed the appellant and his co-accused on the scene of the crime. The conduct of his companions strongly militated against his alleged innocent presence on the farm in relation to the

occupants of the farmhouse. If they had no criminally evil intentions against the occupants, as the appellant wanted the court a qua to believe, they would probably have done all they could to help their wounded companion. Those pieces of circumstantial evidence seriously implicated the appellant. They justified an inference of guilt as correctly drawn by the regional magistrate. In my view the appellant's defence was correctly rejected as being not a reasonably true account of the circumstances underlying his presence on the farm.

- [201] As appears from *S v Mkhabela* 1984 (1) SA 556 (A) at 5638-F evidence of shoe/footprints is admissible. However, the court must be cautious in relying upon such evidence especially where it is the only evidence against the accused. The cogency of such evidence must depend upon all the circumstances of the case. In this matter the appellant has admitted that he was indeed in the vicinity of the complainant's house and that he was shot by one of the bullets there. It seemed quite improbable that the complainant would have ventured out of his house which was under siege to confront the appellant in the veld some distance away from his safe haven where the appellant was pursuing a swindler. The mere absence of a trail of blood on the concrete slap or paving around the farmhouse does not really assist the appellant. From experience, it is a known phenomenon that, at times gunshot wounds do not always cause their victims to instantly bleed. I suppose much depends on the part of the body actually wounded. In this instance, the appellant was shot in the hip.
- [211] The appellant contended that the evidence tendered by the respondent did not establish the requisite criminal intent to rob. In developing that argument further, Mr Peyper submitted that the fact that the appellant had left his light delivery van in town coupled with the fact that no weapons were found in his possession or in his companions', were indicative of lack of such criminal intent.
- [221] The fact that no weapons were found in their possession is immaterial as they were caught hours after the incident. As they took to flight from the crime scene, they had every reason to believe that the police would be on the lookout for them. Therefore, they had to get rid of whatever weapons they might have had in their possession because if they were found with weapons in their possession, the real purpose of their mission to Witpan Farm would have been relatively easy for the police to figure out. In other words weapons would have betrayed their state of mind. I have every reason to suspect that they were probably armed. About an hour before the shooting, they were well aware that the inmates were home. But that did not deter them. If they were not armed, they would probably have called off their mission. But they did not. Their audacious determination to break in at all costs, was a clear indication that they were adequately equipped to deal with any resistance by the occupants in defence of what was theirs. In the light of these considerations, my guess is that the appellant's companions stashed such weapons away somewhere in the forest where they were hiding.
- [231] The mere fact that the appellant and his companions walked instead of driving to the farm, was actually more incriminating than exonerating. An essential aspect of any criminal enterprise to rob is the element of surprise. Obviously, driving to a remote farm at night

would have defeated that purpose - hence the appellant's van was left in town some 12 long kilometres away from the targeted farmhouse. Those of us who have had many dealings with the so-called "farm attacks" know that farm attackers are not really interested in heavy pieces of household goods such as fridges, washing machines, plasma television sets, kists and so on. Almost invariably farm attackers always demand money, jewellery and firearms. No truck is required to ship any of those valuables away from the crime scene.

[24] In view of all these considerations, I'm not persuaded by the argument that the regional magistrate materially erred in coming to the conclusion that the evidence proved all the elements of the crime of burglary with intent to rob. It follows, therefore that the two issues were determined in favour of the respondent.

[25] In *S v Hlongwane* 1992 (2) SACR 484 (N) the essential elements of the offence of housebreaking were defined as follows:

"(a) the 'breaking,, of premises in the legal sense by the displacement of any obstruction to entry of a structure which forms part of the premises - such as a store room or outbuilding; that for 'breaking' to take place no actual damage to the structure need to be inflicted; so that even pushing open a closed or partially open door to enter, qualifies for 'breaking' in the legal sense if done unlawfully and with the intention of unlawfully breaking in and committing some other crime;

(b) the entry of the premises by means of any part of the person;

(c) the unlawfulness of the conduct complained of; and

(d) the intention to commit an offence."

[26] I am therefore, satisfied that the trial court was correct in finding that the state had proven, beyond a reasonable doubt, all the elements of the charge of housebreaking with intent to commit robbery. There was credible, reliable and probable evidence

which showed that all the doors and windows of the complainant's house and the store room were locked before the complainant went to bed. However, the appellant gained access to the store room. He removed the spade from there and proceeded to the farmhouse. He then probably used that spade to break the windows of the farmhouse knowing that the occupants were present in there. The burglary was certainly inspired by an intention on the part of the housebreakers to rob the occupants.

[27] I am not persuaded that the court a quo committed any material misdirection as regards the substantive merits. Therefore, I am inclined to dismiss the appeal on the merits.

[28] As regards the sentence, the principal ground of the appellant's appeal was that he was never informed that upon conviction he would face the prescribed minimum sentence of direct imprisonment. The offence the appellant has been convicted of attracts a prescribed minimum sentence in terms of section 51(2) of the Criminal Law Amendment Act, 105 of 1997 ("the CLAA") read together with Part IV of Schedule 2 thereto. The trial court was,

therefore, obliged to impose the said sentence unless it found substantial and compelling circumstances justifying the imposition of a lesser sentence as provided for in section 51(3) (a) of the CLAA.

[29] Punishment is pre-eminently a matter for the discretion of the trial court. The court of appeal must approach an appeal against sentence with due deference to the trial court. It may interfere when the discretion was injudiciously or improperly exercised. The discretion would be wrongly exercised if the trial court committed an irregularity, misdirected itself or imposed a sentence that is disturbingly inappropriate.

[30] In this matter, the main ground of appeal was that because the appellant was never informed of the prescribed minimum sentence of 10 years imprisonment, applicable to him, the trial court should have deviated from imposing such a prescribed minimum sentence. In support of this argument, the Appellant referred to *Mabite v S* (CAF 4/2016) [2016] ZANWHC 24; 2017 (1) SACR 325 (NWM), *Magano v S* (849/12) 2013 ZASCA 192

where sentences were set aside on the basis that the indictments did not refer to the prescribed minimum legislation and further that, the appellants were not forewarned about its applicability.

[31] In this matter the indictment stated the following;-

"COUNT 1: HOUSEBREAKING WITH THE INTENT TO COMMIT A CRIME

UNKNOWN TO THE STATE

IN THAT the accused are guilty of the crime of Housebreaking with the intent to commit a crime unknown to the State (read with the provisions of Section 262(2) of the Criminal Procedure Act 511977)

IN THAT upon or about the 09th October 2014 at or near Witpan in the District of Hoopstad in the Regional Division of the Free State, the accused did unlawfully and intentionally break open and enter the house of and/or property or in the lawful custody of Ettiene Le Roux with the intention to commit a crime unknown to the State."

[32] In *S v Legoa* 2003 (1) SACR 13 (SCA) the court, after an examination of its earlier judgments, concluded that under the common law it was 'desirable' that the charge-sheet should set out the facts the state intended to prove to bring the accused within the enhanced sentencing jurisdiction. At paragraph 20 the court held the following;-

"Under the common law it was therefore 'desirable' that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasized that under the new constitutional dispensation, the criterion for a just criminal trial is 'a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force'. The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the

Bill of Rights' criminal trial provision. One of those specific rights is 'to be informed of the charge with sufficient detail to answer it'. What the ability to 'answer' a charge encompasses this case not require us to determine. But under the constitutional

dispensation is can certainly be no less desirable than under the common law that the facts the State intends to prove to increase

sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet."

[33] The indictment in this matter clearly made no reference to the applicability of the provisions of section 51(2) of Act No 105 of

1997. However, in *S v Ndlovu* 2003 (1) SACR 331 (SCA) at paragraph 12 Mpati JA, endorsing the approach laid down in *Legoa*, supra went further and stated the following:

'The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had a fair trial. And I think it is implicit in these observations that where the state intends to rely upon the sentencing regime created by the Act, a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences.'

[34] The onus was, therefore, upon the appellant to show that this error or the omission to forewarn him had prejudiced him.[1] His notice of appeal contains no such an averment. On the available facts, I can discern no prejudice to the appellant as a result of the omission. The trial court was thus not precluded from sentencing the appellant in terms of Act 105 of 1997 notwithstanding that the fact that the indictment made no reference to section 51 (2).

[35] The proper approach where a prescribed minimum sentence is applicable is now well developed, it was illustrated by the Supreme

Court of Appeal in *S v Malgas* 2001

(1) SACR 469 (SCA), which has since been followed with approval in various matters.[2] In paragraph 9 it was held that:-

"it is impermissible to deviate from the prescribed sentence 'lightly and for flimsy reasons which could not withstand scrutiny' but, this apart, all factors relevant to determining sentence remain relevant when the Act applies and a sentencing court must look to the 'ultimate cumulative impact of all of these factors in order to determine whether a departure from the prescribed sentence is justified'. The court may impose a lesser sentence only when it is convinced that the imposition of the prescribed minimum sentence would be unjust or disproportionate to the crime, the criminal and the legitimate needs of society, *Malgas*, supra, (22).

- [36] In this matter the court a quo duly considered the traditional sentencing factors, namely, the nature of the offence, the personal circumstances of the accused, and the interests of society when deciding in terms of section 51(3) whether there were substantial and compelling circumstances.
- [37] The appellant's personal circumstances are purely generic.[3] He was 34 years old. He was a married man with two dependent minor children. He was self-employed as a motor vehicle dealer. His earnings fluctuated between R6000 and R10 000 per month.
- [38] It was indeed a mitigating factor that he had been in custody awaiting trial since he was arrested, that except for the damage to the windows of complainant's house, nothing was stolen and that, the occupants of the house were not injured. However, the offences of farm attacks are prevalent in rural communities of this province. They often cause wide public outrage. The general society looks up to the courts for the protection of the rural communities. The appellant did not express any response. Notwithstanding the verdict, he persisted with his protest that he was not guilty.
- [39] The aggravating factors were also considered. The court a quo took into account that the appellant was an illegal immigrant. He was not a first offender. He had a previous conviction of theft in respect of which he was sentenced to three years imprisonment on the 15th July 2015.
- [40] In my view, the court a quo was correct in finding that there were no substantial and compelling circumstances to justify a sentence less severe than the prescribed sentence. It cannot be said that the trial magistrate did not exercise his discretion judiciously or properly. I consider the sentence of 10 years imprisonment to be proportionate. I am not persuaded that it was disturbingly severe. In my view the court a quo committed no misdirection in sentencing the appellant.
- [41] Accordingly I propose the following order:
- 41.1 The appeal is dismissed;
- 41.2 The conviction and the sentence are confirmed

NS DANISO, AJ

I concur and it is so ordered

MH RAMPAI

On behalf of appellant: Attorney M Peyper

Instructed by:

Peyper Buitendag Ing

Bloemfontein.

On behalf of respondent: Adv. S Giorgi

Instructed by:

Director: Public Prosecutions

Bloemfontein

- [1] See also the unreported matter of *Moses Tshoga v The State* (635/2016) 2016 ZASCA 205 delivered on the 15th December 2016
- [2] *S v Dodo* 2001(1) SACR 594 CC, *S v Vilakazi* 2009 (1) SACR 552 SCA
- [3] See paragraph 58 in *S v Vilakazi* supra at 1; "in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the

background.

Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided."

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