

SOUTH AFRICA / JUDGMENT

Mathole v S (A64/2016) [2017] ZAGPPHC 192 (18 May 2017)

[2017] ZAGPPHC 192

COURT

North Gauteng High Court, Pretoria

BEFORE

Holland-Muter, Khumalo

CASE / FILE NUMBER

A64/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: A64/2016

18/5/2017

Reportable:

No

Of

interest to other judges: No

Revised

In the

Appeal of:

ERIC

MATHOLE Appellant

and

THE

STATE Respondent

JUDGMENT

HOLLAND-MUTER AJ:

- [1] The Appellant was arraigned and convicted by the Regional Court in Soshanguve Gauteng on 14 December 2015 on a charge of robbery with aggravating circumstances and he was sentenced to 12 years imprisonment.
- [2] Leave to appeal against both conviction and sentence was granted by the Regional Court on 21 January 2016.
- [3] The Appellant was legally represented throughout the trial.
- [4] The State called one witness on this charge whilst the Appellant testified on his own behalf.
- [5] The Appellant was charged of a further charge of being in possession of suspected stolen goods but was acquitted on this charge. His fellow accused was acquitted on both charges.
- [6] The Appellant made the following admissions in terms of Section 220 of the Criminal Procedure Act, 51 of 1977 (hereto referred to below as "The Act"):

6.1 that he was at the St Francis Primary School in Soshanguve on 5 June 2014;

6.2 that he was there when the robbery took place;

6.3 that aggravating circumstances were present during the robbery in fire arms were used during robbery;

6.4 that one Godniver Segubela and /or the St Francis Primary School was robbed during the incident; and

6.5 that the amount of R 12 000,00 was robbed.

EVIDENCE FOR THE STATE:

- [7] The State only called Jabulani Manonga on the charge relating to the Appellant. The Appellant was the only witness for his defence.

- [8] The essence of Manonga's evidence is the following:

8.1 Manonga knows the Appellant as they reside in the same area. The Appellant and Manonga were at the station to collect Manonga's cell phone after repairs were done to the phone. Whilst at the station, a certain Sibu and another unknown man came to them, Sibu had a laptop that he wanted to sell. The Appellant assisted Sibu with the sale of the laptop. Manonga remained in his vehicle during the sale transaction. Two other persons, Sipho Masando and Cele, were also in the vehicle while the sale was done.

8.2 Sibú and the unknown person returned to the vehicle. They all with the exception of Sibú, left together in Manongo's vehicle to buy some food. On route the Appellant informed Manongo that the unknown person received a telephone call to go to Block P to collect money. Arriving at Block P they found a parked Corsa bakkie. They parked behind the bakkie and the Appellant and the unknown friend approached three men standing next to the bakkie.

8.3 The Appellant and Sibú's friend went to the three unknown men and although Manongo could see them talking to one another, he did not hear what was said by them. The Appellant returned to the bakkie. Two of the men left the scene. Shortly thereafter the bakkie made a u-turn and the Appellant, now driving the vehicle, followed the bakkie until the bakkie stopped next to the entrance of the school. The Appellant parked close behind the bakkie.

8.4 Less than five minutes later three armed men ran towards the vehicle driven by the Appellant, got into the vehicle and the Appellant drove off at a high speed. When Manonga asked the Appellant what was happening, the Appellant replied that he "did not know that some- thing like this was going to happen".

8.5 The Appellant drove to his parent's shack and the bakkie followed them. There an argument took place and Manonga asked about his petrol whereafter one of the other men gave him R 400,00. Manonga left with his vehicle.

EVIDENCE FOR THE APPELLANT:

[9] The Appellant was the only witness for the defence.

9.1 His version is to a large extent the same as that of Manonga, but for minor differences. He denies having anything to do with the robbery. He admitted that he met Manonga on that day and that they fetched the repaired cell phone when receiving the phone call from the other person after which they proceeded to Block P to collect monies owed to the person who had the laptop.

9.2 At this place in Block P they found the Corsa bakkie on the spot and a conversation took place between the waiting men and the other person who had the laptop. He admitted that the vehicles proceeded to the school where the men from the bakkie entered the school premises. After a short while these men came running out of the school premises and jumped into the waiting vehicle with the Appellant in the driver's seat. They instructed the Appellant to drive off.

9.3 His version of what happened at his house corroborates the version of Manonga.

AD CONVICTION:

[10] The court a quo found that the version of Manonga was to be preferred to that of the Appellant. The Magistrate motivated his finding and this Court has no reason to interfere with his finding. The improbabilities in the version of the Appellant as to why he was on the scene, what transpired between himself and the unknown men at the bakkie and why he, while waiting in the driver's seat of Manonga's vehicle kept the waiting vehicle idling. There is no logical explanation why the fleeing robbers did not go to the bakkie when leaving the scene after the robbery was completed.

[11] The proven fact as found by the magistrate that the Appellant indeed had the conversation with the unknown men at the bakkie before the vehicles left for the school valid the inference that the involved persons, including the Appellant could only have discussed the detail of the planned robbery.

[12] The magistrate went on and held that the Appellant was part of the robbery and applied the principle of common purpose. The Court agrees that there was an active association by the Appellant with the other unknown men and that he was part and parcel of the robbery.

"The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them is imputed to the others". See *Snyman Criminal Law 4th Ed* p 261.

[13] This was also echoed in *S v Mgedezi and Others 1989 (1) SA 686 A*.

[14] It is not for this Court to speculate as to why the prosecution witness was never warned in terms of Section 204 of The Act or why the other co-accused was acquitted by the court a quo.

[15] The probabilities of the evidence does not favor the Appellant's version that he was totally unaware of what was to happen. The sequence of incidents on the day in question where the Appellant is present is just too coincidental to be true. It is with respect highly improbable that he was only the wrong person at wrong place the whole day. His version of total innocence during all what happened was correctly rejected by the court a quo.

[16] This Court is satisfied that the conviction of robbery with aggravating circumstances is correct and that the guilt of the

Appellant was proved beyond reasonable doubt. There is no reason to interfere with the conviction.

SENTENCE:

[17] It is trite that a court of appeal will only interfere with a sentence if the sentence imposed by the trial court is "disturbingly inappropriate" or "shockingly harsh".

See *S v Salzwedel 1999(2) SACR 586 SCA*.

[18] Section 51 of the Criminal Law Amendment Act, 105 of 1997 introduced certain minimum sentences, vide a minimum of 15 years of imprisonment for a first offender of robbery with aggravating circumstances. For the trial court to depart from a minimum sentence the convicted person must show the existence of substantial and compelling circumstances.

What these circumstances are has been the subject of various case law from *S v Ma/gas 2001 (2) SA 1222 SCA* and other case law.

[19] When imposing sentence, a presiding officer has to consider all relevant aspects applicable on sentence. This would include the personal information of the accused, the prevalence of the crime and the interest of the community and to apply mercy to the individual to be sentenced. This is trite as far back as in *S v Zinn* 1969(2) SA 537 A. In *S v V* 1972(3) SA 611 A on 614 Holmes JA held that "mercy, a hallmark of a civilized and enlightened administration, should not be overlooked....true mercy has nothing in common with soft weakness, or maudlin sympathy for a criminal. It is an element of justice itself'.

[20] In this matter the trial magistrate considered all relevant aspects before sentence was imposed. A lesser sentence of 12 years

imprisonment instead of the prescribed minimum sentence of 15 years imprisonment was imposed, warranting the only inference that the magistrate in exercising his discretion came to the conclusion that there were substantial and compelling circumstances to deviate from the prescribed minimum to impose a sentence of 12 years of imprisonment.

[21] Under the circumstances the imposed sentence of 12 years imprisonment cannot be found to be disturbingly inappropriate or shockingly harsh. The contrary is true about the sentence.

[22] I therefore propose the following: The appeal against conviction and sentence be dismissed.

HOLLAND-MÜTER AJ

ACTING JUDGE OF THE GAUTENG

DIVISION, PRETORIA

I agree.

KHUMALO J

JUDGE OF THE GAUTENG DIVISION,

PRETORIA

It is so ordered.

HEARD ON: 18/5/2017

FOR THE APPELLANT: ADV LA VAN WYK

LEGAL AID SA

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FOR THE RESPONDENT: ADV P W COETZER

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Prepared on 27 October 2026 · Esheria