

SOUTH AFRICA / JUDGMENT

Mayile v S (CA& R 12/2019) [2022] ZAECBHC 35 (2 November 2022)

[2022] ZAECBHC 35**COURT**

Eastern Cape High Court, Bhisho

BEFORE

Govindjee, Chithi

CASE / FILE NUMBER

CA& R 12/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, BISHO)****NOT****REPORTABLE****Case****no: CA& R 12/2019****In**

the matter between:

VUYOLWETHU

MAYILE

Appellant

and

THE

STATE

Respondent

EX-TEMPORE

JUDGMENT

Govindjee J

Background

[1] The appellant was found guilty of the following counts:

Count 1: Robbery with aggravating circumstances;

Count 3: Possession of a prohibited firearm.

- [2] The convictions relate to an incident that occurred on 2 February 2014, in which the owner of a store was robbed by three persons. The appellant was found to have wielded a firearm and inflicted grievous bodily harm during the commission of the robbery, constituting aggravating circumstances. The serial number of the firearm in question had been removed without authorisation, in contravention of the Firearms Control Act, 2000 (Act 60 of 2000), resulting in the conviction on count 3.
- [3] The appellant was sentenced to 12 years imprisonment in respect of the robbery conviction and to 15 years imprisonment in respect of the possession of the prohibited firearm, ten years of which was to run concurrently with the other sentence.
- [4] The conviction was attacked on various grounds. It was argued, for example, that the state had failed to show that the evidence of the appellant was 'completely false and misleading'. The evidence of the main state witness, Constable White, was analysed without appreciating that he was a single witness to the possession of the firearm. That evidence was in any event not satisfactory in all material respects and there were discrepancies in the recording of the firearm in the SAP 13 register. The court a quo had failed to appreciate that Sergeant Zono had made a statement indicating that the firearm had been found in the shop

where the robbery took place. The state ought to have been criticised for failing to send the firearm for fingerprint analysis. It had also omitted to conduct gunpowder tests or test the blood found on the money bag. The magistrate had furthermore erred in permitting video footage of the robbery to be aired in court and had not questioned why the constable who had accompanied Constable White had not been called as a witness. No witness could identify the appellant as one of the armed robbers. The court a quo had failed to provide reasons for the conviction. The sentence was criticised for inducing a sense of shock and for being inappropriate.

Conviction

- [5] There is a presumption that the trial court's evaluation of the evidence is correct. It will only be disregarded if it is clearly wrong.[1] The mere fact that a trial court has not commented on the demeanour of the witness can hardly ever place the appeal court in as good position as that court. It is accepted that the trial court might well be in a better position than an appellate court in drawing inferences, or in estimating what is probable or improbable in relation to the witnesses that have been observed during the trial.
- [6] Nevertheless, where a court of appeal is satisfied that the trial court has made a wrong finding of fact it must rectify this. This may result either from the reasons provided being unsatisfactory on their face, or where the record shows them to be such or where other facts or probabilities have been overlooked. In that case it is open to the appellate court to disregard the findings on fact according to the nature of the misdirection and the circumstances of the particular case, and to come to its own

conclusion

on the matter.

- [7] On occasion an appellate court may be in as good a position as the court a quo to draw inferences, where they are either drawn from admitted facts or from the facts as they have been found by the presiding magistrate.
- [8] Where there has been no misdirection on fact by the trial court, the presumption is that their conclusion is correct and the appellate court will only reverse it where it is convinced that it is wrong. In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, that conclusion will be upheld. An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial court. Judgments frequently omit certain information, which does not necessarily imply that that material was erroneously ignored.
- [9] The magistrate's judgment provides a summary of the evidence led, as well as the magistrate's observations of the video evidence led. The magistrate adds the conclusion that '... there is overwhelming [evidence] against the accused' before the appellant is convicted. There is little explanation for the reasons for this conclusion, no appreciation that the convictions are based on circumstantial evidence, no real engagement with the appellant's version or application of the correct approach to the contradictions between the appellant's version and White's version. No overt credibility assessment is offered, although it is apparent that the appellant's version is ultimately rejected.
- [10] The Court a quo's approach conflicts with the proper manner in which the Court must assess the evidence and provide a reasoned

conclusion. As De Villiers JP held in *Schoonwinkel v Swart's Trustee*:^[2]

'This Court, as a court of appeal, expects the court below not only to give its findings on the facts, but also its reasons for those findings. It is not sufficient for a magistrate to say, "I believed this witness, and I did not believe that witness". The Court of appeal expects the magistrate when he finds that he cannot believe a witness, to state his reasons why he does not believe him. If the reasons are because of inherent probabilities, or because of contradictions in the evidence of the witness, or because of his being contradicted by more trustworthy witnesses, the Court expects the magistrate to say so...'

- [11] The judgment ought to have reflected the merits and demerits of the State witnesses and the appellant's testimony, in the context of the probabilities of the case before arriving at a conclusion whether the appellant's guilt was established beyond reasonable doubt. All of this should have been apparent from the reasons for judgment provided, including the reasons for the acceptance and the rejection of the respective witnesses' testimony.^[3] In the circumstances it is open for this Court to revisit the factual findings and conclusion of the court a quo, based on the available record of proceedings.

- [12] White's testimony is a convenient starting point. He and Monde had been patrolling when they observed Mohammed. He was known to White, carrying a firearm and bleeding profusely. He pointed in a direction and White observed 'a certain young man who was carrying a money bag or sack. And on the other hand he was also carrying a firearm'. This individual, who was walking away from the direction of the shop, was continuously observed until he stopped walking, placed the firearm a distance away from him and put the money bag down, before laying on his stomach. He was searched, the firearm was taken, he was placed under arrest and taken to the police station. White, who was 40 to 50 paces away from the man when he first observed him, was able to describe the manner in which the firearm had been carried, and had noticed that the man had been limping. White identified the man as the appellant. He had observed him at close quarters at the time of his arrest, and asked him his name, which matched that of the appellant.
- [13] At the police station, White tried to read the serial number of the firearm to Yozi and noticed that it had been erased. Mazomba, the standby detective, was present. When Mazomba and White took the appellant to the shop, the owners had identified the money bag as their property and indicated that the appellant had been one of the people that had robbed them.
- [14] The version put to White was that the accused would deny that he was arrested carrying money or a firearm. Other than minor issues related to the written statements he had made, his evidence was left unchallenged.
- [15] Mazomba confirmed that Monde had since resigned. He had been called to the police station after the appellant's arrest, shown the firearm and a white ABSA money bag. He confirmed White's testimony that they had proceeded to the shop with the accused, who had been identified by the owner as one of the robbers. The money bag had also been identified as the property of the shop owners. When Zono was taken to the shop sometime later, Mazomba viewed the video footage and identified the appellant as one of the men in the video. Zono later took the various exhibits for analysis, including the firearm and money bag. Ballistics results linked the firearm to a projectile found on the scene.
- [16] Yosi testified that he had given Zono the items that had been brought by Monde and White and which he had booked into the records under SAP 33/2014. This included the firearm and money bag. Zono had brought additional items when he returned from the scene. Yosi confirmed that the serial number of the firearm was scratched and not visible.
- [17] Madinda testified that he had been called to the scene and had downloaded the relevant video footage onto a flash drive. Two DVD videos and photographs were then made from this download. No tampering had occurred and the footage observed in the court a quo emanated from one of the DVDs that had been downloaded by Madinda. Mazomba was recalled and confirmed that two DVD disks had been made from the flash drive, one had been given to the prosecutor and the other kept in a safe at the police station as an Investigating

Officer's 'original copy', containing the CAS number. It was this DVD, which had been kept in the safe and had not been sent away for any form of analysis, or handled by other persons, that had been viewed in the court a quo.

[18] Zono testified that he had collected various exhibits at the scene. He had observed on the SAP 13 that the firearm without the serial number had already been booked in. He booked out the firearm, four empty cartridge cases, one bullet fragment and the money bag, which contained traces of blood, for this to be sent for analysis, together with another firearm Mazomba had brought to him the following day. He confirmed, despite an initial written statement to the contrary, that he had not personally found any firearm on the scene. A second written statement, made a few days after the original statement, had clarified the point. Had he found it on the scene he would have photographed it. The firearm had been at the police station and not yet on the SAP 13 upon his arrival.

[19] The appellant's version was that he had been an innocent bystander who had been arrested without reason. A bakkie had been parked with its rear towards the shop, preventing his entry. He heard gunshots from inside the shop and walked towards the garage. He then noticed that his leg was numb and that he was bleeding. He then heard a car behind him and saw that he had been pointed with a firearm by a person inside a moving bakkie. He waited, and could still hear gunshots at a distance. He denied that he had

been found in possession of a firearm or money bag, or that he had been taken to the shop after his arrest, where the money bag had been identified. The appellant could not explain why he had not run from the shop when he had heard the gunshots.

[20] The presiding officer accepted, also based on statements from the shop owners accepted into evidence, that a robbery had taken place at the shop, and that White had recovered the money bag and firearm from the appellant close to the scene of the robbery. The firearm was proved to have been used in the shop, and the shop owner identified the bag. The court a quo placed little reliance on the video footage or the testimony of Mohammed in arriving at its findings.

[21] The court a quo unhelpfully concluded that there was 'overwhelming evidence' against the appellant. In respect of the robbery, it ought instead to have considered that it was basing its conclusion on circumstantial evidence, drawing a justifiable inference of guilt from facts that had been objectively established, with due allowance made for reasons why the appellant may have dishonestly denied certain facts. The objective facts are that a robbery took place, that the appellant was found near the scene, that a firearm had been recovered and linked to shots fired inside the shop.

[22] The court a quo was faced with two mutually destructive accounts as to whether the appellant was found by White in possession of the firearm and money bag. As the SCA confirmed in *Kotze v S*,^[4] where a trial court is faced with two mutually destructive accounts, logic dictates that both cannot be true. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the

credibility of the witnesses, but also the reliability of such witness. Evidence that is reliable should be weighed against the evidence that is found to be false and, in the process, measured against the probabilities. In the final analysis the court must determine whether the State has mustered the required threshold proof beyond reasonable doubt.

- [23] Although the court a quo failed to reflect its application of this process in the reasons for its decision, it must be accepted that it arrived at the conclusion that the appellant's version was false. It is trite that the trial court enjoys the substantial advantage of seeing and hearing the witnesses, and in being steeped in the atmosphere of the trial. The presiding magistrate had the opportunity to observe the demeanour of the witnesses and a court on appeal will always be reluctant to upset factual findings. It is well-known that the mere fact that a presiding officer has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position to resolve issues of fact. Even in drawing inferences, it must be accepted that it is the trial court that is likely to be in a better position than the appellate court to estimate the probabilities in relation to the testimony of witnesses

who have been observed during the trial. On occasion, however, the appellate court may be in as good a position as the trial court to draw inferences, where they are either drawn from admitted facts or from the facts as found.

- [24] Although the trial court provided insufficient substantiation of the reasons for its decision, particularly in respect of the manner in which it resolved the mutually inconsistent version of White and the appellant, it cannot be said that the court a quo committed a misdirection of fact, or that it overlooked other facts or probabilities. For example, there is no suggestion that reliance was placed on Zono's testimony, or that the video footage accepted into evidence skewed the outcome. Mohammed's testimony too, correctly carried little weight. It must be accepted that no judgment can ever be all-embracing and that merely because various matters have not been mentioned implies that those factors had not been considered. Appeal courts have been cautioned not to seek anxiously to discover reasons adverse to the conclusions of the trial court.

- [25] There appears to be no basis for disregarding the trial courts conclusions on fact, even though those conclusions may have been articulated more fully. As a result, the presumption is that the conclusion of the court a quo is correct, and an appellate court will only reverse it where convinced that the conclusion was wrong. This case does not warrant such a reversal. White's testimony was compelling and his identification of the appellant as the person arrested close to the scene unchallenged. His version as to his handling of the firearm is corroborated to an extent by Mazomba and Yozi. Their testimony supports the finding that there was one firearm recovered by White and his partner when they apprehended the appellant. This had been taken to the police station where it was discovered that that firearm's serial number had been scratched off. That firearm was later linked to shots fired inside the shop at the time of the robbery. While the conviction relating to the firearm was based on the evidence of a single competent witness, I am satisfied from

the record that White's testimony, while containing minor deficiencies of the kind that might be expected, was trustworthy and truthful so that the conviction must stand. It would not be in the interests of justice for the presiding officer's mere failure to articulate this to warrant overturning the conviction.

[26] The totality of available evidence supports the inference that the appellant was guilty of robbery with aggravating circumstances, as charged. That inference is consistent with all the proved facts and those facts are such that they exclude any other reasonable inference. It must be accepted that the appellant had participated in the robbery and that he had wielded the firearm found in his possession while doing so. The appellant failed to put material aspects of his version, including the reversed bakkie and the distant gunshots to White. He failed to challenge any of the witnesses who testified that he had been taken back to the shop after

his arrest, where the money bag had been identified. Analysing the available evidence, including various apparent improbabilities in the appellant's version of events, results in the conclusion that the appellant's guilt was established beyond reasonable doubt, and his version was not reasonably possibly true. Neither the failure to conduct additional fingerprinting-, blood- or gunpowder tests, nor the decision not to draw an adverse inference from the failure to call Monde, alters that conclusion. If anything, and as an aside given the absence of a cross-appeal, the appellant may consider himself fortunate not to have been convicted of the remaining count as well.

Sentence

[27] It is trite that the imposition of sentence is pre-eminently a matter for the discretion of the trial court. This means that the trial court is free to impose whatever sentence it deems appropriate provided that it exercises its discretion judicially and properly.

Accordingly, the trial court must impose a sentence on the correct facts and must take the correct legal position into account. The test in a criminal appeal is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. As the Court held in *S v Pillay*:^[5]

'As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong but whether the Court in imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence: it must be of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence.'

[28] It remains open for a Court of appeal to interfere with a sentence that is excessive or disturbingly inappropriate. The manner in which the Court evaluates this possibility is to consider all the relevant circumstances as to the nature of the offence committed and the person of the accused, before determining what a proper sentence ought to be. If the

difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence.[6] If the cumulative effect of a sentence is too severe, that will also constitute a sentence that is disturbingly inappropriate.[7]

- [29] The appellant was convicted of being in possession of a prohibited firearm. Section 4(1)(f) (iv) of the Firearms Control Act, 2000, prohibits the possession or licensing of any firearm where the serial number or any other identifying mark has been changed or removed without the permission of the Registrar of Firearms. This is an offence in terms of that Act with a maximum period of imprisonment of 25 years.
- [30] The court a quo correctly considered the act of possession of the prohibited firearm to be an independent offence, but ordered part of the fifteen-year sentence imposed for that offence to run concurrently with the sentence for the crime of robbery with aggravating circumstances. That was the proper approach to adopt when considering the cumulative effect of the sentence. There is no basis for concluding that the presiding officer's sentence is vitiated by irregularity or misdirection or that the sentence imposed is disturbingly inappropriate when considering the nature of the offences, the appellant's circumstances and the interests of society.

Order

[31] The appeal is dismissed.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

I agree, it is so ordered

M. CHITHI

ACTING JUDGE OF THE HIGH COURT

Heard:02 November 2022

Delivered:02 November 2022

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Bisho

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- [1] S v Francis [1991] 2 All SA 9 (C); 1991 (1) SACR 198 (A).
- [2] Schoonwinkel v Swart's Trustee 1911 TPD 397 at 401.
- [3] S v Singh 1975
- (1) SA 227 (N) at 228.
- [4] Kotze v S [2017] ZASCA 27 para 17.
- [5] S v Pillay [1977] 4 All SA 713 (A) at 717; 1977 (4) SA 531 (A) at 535F-G.
- [6] S v Salzwedel [2000] 1 All SA 229 (A) para 10.
- [7] S v Whitehead [1970] 4 All SA 340 (A).

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