

SOUTH AFRICA / JUDGMENT

Mbongwa v S (AR337/18) [2020] ZAKZPHC 50 (11 September 2020)

[2020] ZAKZPHC 50

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi, Mnguni

CASE / FILE NUMBER

AR337/18

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: AR337/18

In

the matter between:

STHABILE
SIDWABA MBONGWA
APPELLANT
and
THE
STATE
RESPONDENT
ORDER
On
appeal from: Pietermaritzburg

Regional Court (M A
Khumalo sitting as court
of first instance):

1.
The appeal against convictions is dismissed.
2.
The convictions and sentences imposed by the trial court are confirmed.

JUDGMENT

Delivered on:

Mngadi J (Mnguni J concurring):

- [1] The appellant appeals with leave of the trial court against his convictions only. The appellant was charged before the regional magistrate with five counts, namely: four counts of robbery with aggravating circumstances (counts 1, 2, 4 and 5) and one count of housebreaking with intent to rob (count 3). The appellant pleaded not guilty to all the charges against him. The regional magistrate, after hearing evidence, convicted the appellant on all counts. The appellant was sentenced to 12 years' imprisonment on each of the counts of robbery with aggravating circumstances, and to three (3) years' imprisonment on the count of housebreaking with intent to rob. The sentences on counts 3, 4 and 5 were ordered to run concurrently with the sentence on count 1. The effective sentence is thus 24 years' imprisonment. An order was made in terms of s 103(2)(a) of the Firearms Control Act 60 of 2000 that the appellant is declared unfit to possess a firearm.
- [2] The charges of robbery with aggravating circumstances were read with the provisions of s 1 of the Criminal Procedure Act 51 of 1977, and further read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997. The appellant, who was legally represented when the charges were put to him, pleaded not guilty to all the charges and elected to remain silent. However, during the course of the trial it transpired that the appellant was raising an alibi defence.
- [3] The incident giving rise to the charges took place during the early evening of 31 May 2013, when a gang of robbers attacked and robbed a family in their residence in which there was also a general dealer shop. They robbed Sikhumbuzo Makhaye (Sikhumbuzo), a taxi driver for the family, of a 9mm firearm, a cellular phone, a wallet and R1 500 cash. They robbed Kaveer Sookun (Kaveer), the shop owner, of a cell phone, airtime valued at R10 000, cigarettes valued at R6 000, a Vector 9mm firearm valued at R8 000, a 2005 model Toyota Tazz vehicle valued at R45 000, two laptops valued at R14 000, Mandela coins valued at R1 500, a bag valued at R100, jewellery valued at R50 000 and cash in the amount of R39 520.96. Sharleen Sookun (Sharleen), the wife of Kaveer, was robbed of one cellular phone and R1 700 cash. Indun Sookun (Indun), the mother of Kaveer, was robbed of one cellular phone. The charge of housebreaking with intent to rob relates to the breaking down of a bedroom door and entering the bedroom where Sharleen was in.
- [4] The State led the evidence of the above-mentioned persons who were robbed, the police officers involved in the holding of an identification parade (ID parade) and from Siphesihle Miya (Miya) an accomplice witness. The appellant testified for the defence. He also called one witness, namely Siphesihle Mkhize (Mkhize), one of the robbers. Both Miya and Mkhize, before they were called as witnesses in the case, had pleaded guilty to having been involved in some of the robberies. Miya was sentenced to 15 years' imprisonment, five (5) years of

which were suspended on certain conditions. Mkhize was sentenced to 12 years' imprisonment. They were both serving their sentences when they testified. They largely corroborated each other in their evidence, but they differed on whether the appellant was one of the robbers or not. Miya testified that the appellant was one of the six robbers, whereas Mkhize testified that there was a robber called Sidwaba, as the appellant is called in the proceedings, but he claimed that the said Sidwaba was not the appellant.

- [5] Sikhumbuzo testified that it was about 20h00 when he arrived at the residence in a kombi taxi which he was driving. The gate to the residence was locked. He parked the kombi in front of the gate, and waited for Kaveer to arrive with the key for the gate. Kaveer, after the shop had closed, went out to transport some employees to their homes. One man approached him from the driver's side, and asked him about the availability of public transport to Nottingham Road. Suddenly, other males approached from the passenger side, opened the unlocked doors of the kombi and got into the kombi. One assailant got

into the front passenger seat, pointed a firearm at him and demanded his wallet and cell phone, which he handed over to him. The assailant on the driver's side opened the door and forced himself into the vehicle. He searched Sikhumbuzo and found his firearm at his waist which he took. Sikhumbuzo was held by the assailants and removed from the driver's seat to the inside of the vehicle. He was assaulted and held down. One assailant behind him had a knife, who proceeded to cut him on the back of his neck. His shirt was pulled over his head, and he was bleeding from the injuries inflicted on him.

- [6] He further testified that after about two minutes, Kaveer who was driving a Toyota Tazz arrived and stopped behind the kombi. Four of the assailants exited the kombi and approached Kaveer. One of the two assailants who remained with him in the kombi ordered him to drive the kombi onto the premises, which he did. The two assailants took him out of the vehicle and held him down on the ground near a tank. They removed his belt and used it to tie his hands behind his back. After about 15 minutes, the assailants took him into the house. He was pushed into the room where the Sookun family members were held. They were locked in the room, and the assailants drove away in Kaveer's Toyota Tazz.
- [7] He was able to identify two of the assailants. The face of the one assailant was not covered. He wore a black jacket, jeans, a cap and glasses. He is the assailant who got in the kombi through the front passenger door. He also identified the assailant who approached him from the driver's side and had enquired about the availability of transport, as his face was also not covered. The other assailants were wearing balaclavas which covered their faces. He attended an ID parade on 22 October 2013, and identified the two assailants in the line-up. He had not seen them since 31 May 2013 when he was robbed. One of the two persons whom he had identified in the ID parade was the appellant. The appellant was the assailant who had approached him from the driver's side.

- [8] Sikhumbuzo testified that at the gate of the residence where he was parked, the premises and inside the house, were well lit. The appellant was not the one who was wearing a cap, jeans and glasses. The appellant was one of the two males who remained with him in the kombi when the others went to approach Kaveer. The assailant wearing a cap, jeans and glasses, was the one who got into the kombi through the front passenger door, who pointed a firearm at him, and took his cellular phone and money.
- [9] Kaveer testified that he operated a general dealer business, and a transport business from the premises where his residence is situated. Sikhumbuzo was one of his drivers. He arrived at his residence and saw his kombi parked in front of the driveway gate. He parked behind it. He noticed that there were some people in the kombi. Two people jumped out of the kombi and approached him. They were both armed with firearms. One assailant jumped into the Tazz at the driver's side on top of him. The other assailant got in through the front passenger door. Three other males approached the vehicle from behind and jumped into the vehicle. The assailants started assaulting him. They demanded money and his firearm. He was hit with a firearm in his face and he started bleeding. One assailant with a large knife cut him on his hands and on the back of his neck. They forced him to open the gate with a remote control. The Tazz and the kombi were driven onto the premises.
- [10] Kaveer testified that the assailants dragged him out of the vehicle and into the house. His mother came out to investigate when she heard the noise. They grabbed her and pushed her into the kitchen. The assailants demanded that he shows them where the safe was. His wife heard the noise and came out of the bedroom. She saw what was happening and ran back to the bedroom and locked herself and their two children aged six years and four months respectively in the bedroom. One assailant kicked the door and demanded that she opened the door. She refused to open the door. The assailant broke down the bedroom door and dragged his wife and the children out of the bedroom. He brought them to the room where he was with his mother. The assailants collected valuables and put them into two large canvas bags.
- [11] He testified that the assailants forced him to give them the key for the safe. They opened the safe and emptied out all of its contents, including cash and family jewellery. The assailants also took two laptops, an iPad, cash and cell phones. The total estimated value of the items taken was between R80 000 and R90 000. They dispossessed him of his firearm in the vehicle when they got into his vehicle. They pulled off the telephone connections. They took his mother's cellular phone. They removed his shoelaces and tied his hands behind his back. They then brought Sikhumbuzo where they were, and shoved him onto them. He was bleeding and his t-shirt covered his face. They were then locked in the office. The assailants went out and talked amongst themselves. One of them came back and wanted to be shown how to open the gate. He was shown and he locked the door again and left. They heard the vehicle speeding away. He and Sikhumbuzo freed each other. He thereafter contacted the security company through a cell phone which was hidden on his body.

[12] Kaveer further testified that he attended an ID parade on 22 October 2013. In the line-up, he pointed out two persons, of which one was the appellant. He testified that he remembers the appellant very well. The appellant was the main person as he seemed to be the one in charge. He was giving instructions, He threatened to kill him and his family. The appellant was the one who forced himself into the Tazz on the driver's side on top of him. The appellant was armed with a firearm, which he pointed at Kaveer. The

whole incident took between 20 and 30 minutes. The premises on the inside and the outside were well lit.

[13] Sharleen testified that she had heard a noise in the house. She was in the bedroom with her two children. She saw Kaveer being accosted with firearms by two unknown males. She ran back into the bedroom and locked herself and the children in. A person knocked on the door and demanded that she must open the door. She refused. The person kicked the door until it opened. He entered into the bedroom. He pointed a firearm at her and threatened her and her children. The older child cried and he instructed her to keep the child quiet and placed the firearm on her head. She managed to calm her daughter down. The assailant demanded cash and her handbag. She

gave him the handbag, which he emptied on the floor. He took cash in the sum of R1 700 and her cell phone. He grabbed her by her arm and took her to the office, where Kaveer and his mother were lying on the floor. She had her four-month-old son with her. There were two males with Kaveer and his mother. They were removing cash, laptops, cellular phones and cash, and putting it into two bags. The assailant who brought her into the office instructed her to take the baby back to the bedroom. In fact, he had wanted her to give him the baby. She refused and said she will take the baby to his cot in the bedroom. He accompanied her to the bedroom. She left the baby in the cot but could not see her daughter.

[14] She testified that the man took her back to the office. She noticed two males standing in the passage. One was carrying a knife, bags, and firearms. In the office, she was instructed to sit next to her mother-in-law. The men instructed them not to look at them. Sikhumbuzo was pushed into the office, bleeding and his head covered with a t-shirt. They were lying on the floor on their knees. The assailants kicked Kaveer and told him to take off his shoes. They took the shoelaces and tied both his hands. They demanded more cash and became more aggressive. Kaveer's mother gave them a bag to put more stuff in it because the bags they were carrying were full. Airtime vouchers were put into the bag. She was told to go back to the bedroom to fetch the baby. She did so, and the

same assailant accompanied her. She fetched the baby and she came back to the office. The assailants locked them into the office. They heard the assailants talking amongst themselves. She realized that they were leaving. One of the assailants came back and wanted to be shown how the remote for the gate worked. She showed him. He left after locking the door and taking the key with him. They thereafter heard a car speeding away. Kaveer and Sikhumbuzo untied themselves and sought help. They forced the locked door open. She found her daughter hiding in blankets in

the bedroom.

- [15] Sharleen testified that she also attended the ID parade on 22 October 2013. In the line-up, she identified two persons. One of them was the appellant. The appellant was the one who kicked the bedroom door down, and robbed her in the bedroom. He was the one who drove and accompanied her around in the house. She talked to him and he was close to her. The inside of the house was well lit.
- [16] In my view, it is not necessary to summarize the evidence of Indun Sookun. Her evidence perfectly dovetails with the evidence of the other witnesses. She did not attend the ID parade because she was not in a position to identify any of the assailants. Mr Mkhize, the defence witness, testified that he was in the ID parade line-up on 22 October 2013 with the appellant. The three witnesses, Skhumbuzo, Kaveer and Sharleen, identified him and the appellant as the persons involved in the robbery on 31 May 2013. The evidence of Captain van Veldhuyzen van Zanten, the officer who conducted the ID parade read with ID parade report, confirms that the three witnesses, after taking seconds ranging from 5 to 51, pointed out the appellant and Mkhize. The regularity of the ID parade is not questioned on appeal. The witnesses refuted the suggestions that photos of the appellant were shown to them before they attended the parade. They also refuted a suggestion that they might have seen the persons before they pointed them out in the ID parade.
- [17] Miya, the accomplice witness, testified as follows. He knew the appellant as they were friends. In May 2013, the appellant told him that there was a place that they could be robbed of cash. They were at Estcourt at that time. They were to go to Mooi River to meet with Mkhize, Nenene, Kadimo and Mxo. The place which was to be robbed was at Nottingham Road. They hiked to Nottingham Road. The place which they intended to rob was a shop and a residence. They waited, observing the premises until the shop closed. A taxi arrived and parked at the gate. He approached the driver and enquired about transport. The appellant approached the driver from the passenger side, and pointed a firearm at him. Miya searched the taxi driver and found a firearm on him, which he took.

He then pointed a firearm at the driver. He told the driver to move away, and got behind the steering wheel. All his companions entered the taxi. They waited for the shop owner to arrive.

- [18] He testified that the shop owner arrived in a Tazz. He and the appellant alighted from the kombi and approached the shop owner while pointing firearms at him. He searched the shop owner whilst he was still in the vehicle and found a 9mm firearm on him, which he took. They demanded the gate key, which the shop owner gave to them. He (Miya) opened the gate. Mkhize had told them that the shop owner would arrive in the Tazz. After he found the firearm on the shop owner, the shop owner was moved to the back seat. He drove the Tazz onto the premises. In the Tazz it was him, the appellant and the shop owner. The others were in the taxi. He alighted from the Tazz and went back to the kombi. He drove the kombi onto the premises. The others, except Mxo, alighted from the taxi and

entered the house with the shop owner. He remained outside and turned the Tazz to face the gate. After sometime, the others came out of the house. Kadimo and Nenene were carrying two bags. They all got into the Tazz. He opened the gate and they drove away. Before they drove away, Mxo took the taxi driver into the house. They drove towards Estcourt. He phoned his girlfriend to meet them on the freeway. She arrived in a bakkie and met them. She took the loot and the appellant to her place. He drove with Mkhize, Mxo and Kadimo to Wembezi where they burnt the Tazz. His girlfriend came to fetch them and take them to her place. They found the others and they shared the loot. He only received R10 000 because he had done nothing except to drive the vehicle.

- [19] Under cross-examination, Miya testified as follows. He knew the appellant for a period of two months prior to the commission of the crime. The appellant's name is Sidwaba, and resides in Loskop. He has been at the appellant's place. The appellant came to his place with the police.
- [20] The appellant testified in his defence. He testified that he was not involved in the commission of the crimes. He was not present when the crimes were committed. He did not know why Miya implicated him. He did not know Miya at all. The three eyewitnesses pointed him out in the ID parade because his co-accused informed him that when they appeared in court prior to the ID parade. The witnesses were in court and saw them. He denied that his name or nickname is Sidwaba. He stated that his co-accused in the case was Siphesihle Mkhize who pleaded guilty to the charges and was sentenced. He stated that he has never met Miya. He and Mkhize were approached by a police officer called Mbanjwa, who always accompanied the investigating officer, to plead guilty. He informed them that they would receive lighter sentences and be given money. Mkhize admitted to the charges but the appellant refused.
- [21] Mkhize testified that he was involved in the commission of the crimes. He admitted to his involvement, and pleaded guilty. He was convicted and sentenced to 12 years' imprisonment. They were six people who committed the crimes, namely; it was him, Miya, Nenene, Kadimo, Mxo and Sidwaba. He met the appellant in the cells and they were taken to the Howick Magistrates' Court. The appellant was not present during the commission of the crimes. He knows a person by the name of Sidwaba who was present when the crimes were committed but was never arrested. In his statement when he pleaded guilty, he mentioned that Sidwaba was involved in the commission of the crimes but that he was not referring to the appellant. In the ID parade, he and the appellant were pointed out by the three witnesses. On that day, they were transported in a Nissan vehicle with open windows. He saw the witnesses and he told the appellant that those were the persons who were robbed. He was surprised to be pointed out as he was wearing a balaclava during the robbery. He knew Miya. Miya was present during the commission of the crimes. Miya told him that he had been promised money and an early release. He told Mbanjwa, De Wet (the investigating officer) and other police officers that the appellant was not involved in the commission of the crimes. In the line-up in the ID parade suspects were only him and the appellant. The

persons who pointed them out saw them when they arrived for the ID parade, and they were in court when they appeared in the Howick Magistrates' Court.

- [22] Mkhize testified that after he was convicted and sentenced, he made a statement as an accomplice witness. He was to be a witness against the appellant. When he made the statement and referred to Sidwaba, he was referring to the appellant. He intended to implicate the appellant, although he knew that the appellant was not involved in the commission of the crime. He had been promised money by Mbanjwa and or De Wet. However, he reconsidered and changed his mind. Mkhize's statement indicates that he told the gang of the place to be robbed, which perfectly dovetails with the evidence of Miya, namely; that it was Mkhize who knew about the Sookuns. Mkhize stated that Sidwaba was armed with a firearm, which perfectly dovetails with the evidence of Miya. Mkhize states that Miya approached the taxi driver from the driver's side and Sidwaba approached from the passenger side with a firearm, which corresponds with the evidence of Miya and Sikhumbuzo. Sidwaba entered the taxi from the front passenger seat which corresponds with the evidence of Miya and Sikhumbuzo. Sidwaba and Miya approached the shop owner in the Tazz which corresponds with Kaveer's evidence. Sidwaba

was one of the assailants who entered the shop owner's house, which corresponds with the evidence of Miya, and the witnesses who

identified Sidwaba as the assailant who had robbed them in the house.

- [23] The learned regional magistrate found that the State witnesses gave their evidence in a very straightforward manner. The evidence must be considered in totality and not in a piecemeal fashion. He found that there were a few contradictions in the evidence of the State witnesses, for example: Miya stated that he searched Sikhumbuzo and dispossessed him of the firearm but Sikhumbuzo said it was the appellant who pointed a firearm at him, searched him and took away his firearm. Miya said that when the driver of the Toyota Tazz arrived, they went to accost him with the appellant, and he dispossessed him of the firearm, whereas Sikhumbuzo stated that the appellant remained with him. In my view, these inconsistencies in certain areas of the evidence of the State witnesses relating to the roles played by the robbers are to be expected. The incident unfolded over a period of time, and involved six assailants. It is expected that there would be areas that would show some inconsistencies. There would be aspects of the incident not seen by some witnesses while seen by others. Furthermore, the evidence of accomplices is notoriously of such a nature that the accomplices are not entirely honest; they carry favour with certain accused persons; have their own agendas, and invariably minimize their role in the commission of the crimes.
- [24] The inconsistencies do not justify the rejection of the eyewitnesses' evidence that the appellant was one of the robbers, but call for the exercise of extreme caution in approaching the entire evidence relating to the identification of the appellant as one of the robbers. In *R v Hlongwane* 1959 (3) SA 337(A) at 339G-H, the court held that:

'On 4th January, 1958(that is less than a month after the robbery) the three Bank employees, Snyman, van Vuuren and the Native Stephen, each picked out the appellant at an identification parade, as being one of the robbers. Now it is true that van Vuuren made a mistake at a previous identification parade in relation to another of the robbers. It is also true that Snyman and van Vuuren both say that

the appellant was armed with a revolver, whereas Stephen says that he threatened him with a knife, while van Vuuren says that it was another of the robbers who so threatened Stephen. What is important however is that all three of these employees agree that the appellant was one of the robbers, and that they individually picked him out at the parade.'

[25] The prevailing circumstances at the time of the incident; that it took place at the home of the eyewitnesses in an environment they were familiar with; that it took place over a long period of time; the witnesses seeing the same person a number of times; the witnesses seeing the person inside the house at close range; the house being well lit; and assailants interacting with the witness which draws the attention of the witness to the assailant, are all factors favourable for making an identification. The witnesses in the same ID parade correctly identified Mkhize as one of the robbers. The three eyewitnesses independently identified the appellant as one of the robbers, which serves as corroboration, and reduces to a certain extent the risk of a wrong identification. The evidence of the three eyewitnesses is evidence other than the evidence of accomplices connecting the appellant with the crime. See *R v Ncanana* 1948

(4) SA 399 (A) at 405. It also served as a further guarantee that the right man has been brought to trial. See *R v Mpompotshe & another* 1958 (4) SA 471 (A) at 476E.

[26] Both Miya and Mkhize are accomplice witnesses. The fact that after they were convicted and sentenced, they offered to give evidence against the appellant (although Mkhize later changed his mind) provides some comfort. Nevertheless, it does not change the fact that they are criminals, and would lie without thinking twice about it. They generally agree in their evidence on how the incident unfolded, and who of the six robbers were involved. In *S v Mthetwa* 1972

(3) SA 766 (A) at 768A it was stated that:

'Because of the fallibility of human observation, evidence of identification is approached ... with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested'.

The factors prevailing at the time of the incident and corroboration through other evidence, is of relevance. Mkhize's attempt to

exonerate the appellant is nonsensical. The appellant, except to rely on the evidence of a pathetic witness, did not attempt to either himself support his alibi or lead evidence in support of an alibi. Although there is no onus on an accused to prove his alibi, the correct approach is to consider the alibi defence in light of the totality of the evidence in the case. See *R v Hlongwane* (supra) at 340H & 341A.

- [27] The evidence, approached with the necessary caution is, in my view, overwhelming against the appellant. His version is not reasonably possibly true. The learned regional magistrate, in my view, correctly convicted him as charged.
- [28] It is contended in the application for leave to appeal on behalf of the appellant, that it amounted to an improper duplication to charge and to convict the appellant of four charges of robbery with aggravating circumstances. It is argued that the acts alleged in the charges were committed with a single intent in the course of a single criminal transaction. It is argued that the appellant and his accomplices intended to rob anybody they could find at the home. It is referred to in *R v Johannes* 1925 TPD 782 at 786 wherein the following criteria was laid down, namely: (a) whether the acts alleged in the charges were committed with one single intent or in the course of a single criminal transaction, and (b) whether the evidence necessary to establish one of the acts involves proof of other.
- [29] In my view, there is no doubt that the assailants assaulted Sikhumbuzo, and with violence dispossessed him of his property. It is not necessary to prove Sikhumbuzo's robbery in order to prove the other robberies. The fact that Sikhumbuzo's robbery was done to facilitate the robbery of the residence is only relevant to show that even those who did not actively participate in the robbery of Sikhumbuzo, formed a common purpose with those who actively robbed Sikhumbuzo. The same reasoning applies to the robbery of Indun Sookun and Sharleen Sookun. There is no infallible formula to determine accurately whether a duplication of convictions has

occurred. Each case has to be determined in the distinctive nature of its facts, based on sound reasoning and fairness to both the State and the accused. See *R v Kuzwayo* 1960

- (1) SA 340 (A) at 3448-C; *S v O/amini* 2012(2) SACR 1 (SCA) at paras 52-54. In my view, there is an overlap, but there is no duplication of convictions. The learned regional magistrate accommodated the overlap in the factual matrix, and avoided prejudice to the appellant by an order that the sentences imposed on counts 3, 4 and 5 be served concurrently with the sentence on count 1.

[30] In the result, I propose the following order:

1. The appeal against convictions is dismissed.
2. The convictions and sentences by the trial court are confirmed.

MNGADI J

I agree, it is so ordered.

MNGUNI J

APPEARANCES

Case Number

: AR 337/18

For the Appellant

: EX Sindane

Instructed by

: Legal Aid South Africa

PIETERMARITZBURG

For the respondent

: D Naidoo

Instructed by Deputy

: Director of Public Prosecutions

PITERMARITZBURG

Heard

: 28 August 2020

Judgement

delivered on

: 11 September 2020

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