

SOUTH AFRICA / JUDGMENT

Meyer v S (A011/2016) [2017] ZAGPJHC 399 (13 September 2017) [2017] ZAGPJHC 399

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala, Cambanis

CASE / FILE NUMBER

A011/2016

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG

CASE: A011/2016
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED.
13/9/17
In

the matter between: MEYER
CHRISTOPHER APPELLANT
AND
THE
STATE RESPONDENT

JUDGMENT

TWALA J

- [1] The central issue raised by the appeal is whether the appellant was positively identified as the perpetrator of the robbery for which he was convicted by the Regional Magistrate Court sitting in Alexandra. The appellant was on the 1st February 2013 convicted of robbery with aggravating circumstances and sentenced to an effective term of 18 years imprisonment.
- [2] This appeal concerns the conviction only since the Court a quo refused leave to appeal against the sentence. However, counsel for the appellant enjoined the Court to invoke the provisions of section 304(4) of the Criminal Procedure Act, Act 51 of 1977 (CPA) and deal with the issue of sentence imposed by the magistrate. I intend to deal with this issue later in this judgment.
- [3] It is common cause that on the 19th May 2011 the complainant and her friend were at a farm when she was robbed of her vehicle by unknown persons with registration number MPX 494 GP valued at R100 000. It is not in dispute that weeks later she attended the identification parade conducted by the police wherein she pointed out the appellant as her assailant.
- [4] It appears from the record that the complainant attended at a farm to buy vegetables. Her friend got out of the vehicle to buy from the vendor. Immediately after her friend got out of the vehicle, she was confronted by an unknown person pointing a firearm at her and demanding that she leaves the vehicle. This unknown person occupied the front passenger seat next to her. She got out of the vehicle and went to take her bag from the boot of the vehicle. As she was taking her bag, her assailant drove away with her vehicle. She saw this person clearly as he was seated next to her in the front passenger seat whilst pointing the firearm at her.
- [5] Two weeks after the robbery, Ms Sentlatla, who was manning the vegetable stall, while working at the farm saw the appellant at the back of one of her customer's vehicle looking inside the vehicle. She realised that this is the same person who robbed the complainant of her vehicle and immediately called the police. The police arrived at the scene and arrested the appellant. She

recognised the appellant for she knows him. She was three meters from the incident when he robbed the complainant of her vehicle. She observed the whole incident which took about five minutes.

- [6] The appellant testified that he was never at the scene of the crime on that day. He was at home cleaning his room and doing some washing. He once attended at this place to buy some fruits. He called his sister to confirm his version that he was at home on the day in question. His sister testified that she lives with the appellant but he occupies a back room in the yard. She does not see him from the house but confirms that he was in his room because he plays his music loud. She heard him playing music on the day in question and therefore

assumed that he was at home. She could not say if he left the house at some point on that day.

- [7] It is trite law that the burden is on the State to prove the guilt of the accused beyond reasonable doubt. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version and acquit the accused.
- [8] In the case of *S v Jackson* 1998 (1) SACR 470 (SCA) at 476 the court stated as follows:

"Burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."

- [9] In the case of *S v Ntsele* 1998 (2) SACR 178 (SCA) Eksteen AJA (as then he was) stated the following:

"Prove guilt beyond reasonable doubt – not beyond a shadow of doubt – if only remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt."

- [10] In the case of *Shackell v S* 2001 (4) ALL SA 279 (SCA) Brand AJA (as then he was) stated the following:

"A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

- [11] As indicated above, the issue to be determined by this Court is whether the accused has been positively identified as the perpetrator

of the robbery on the complainant on the day in question. It is trite law that the evidence of identification should be approached with caution.

- [12] Counsel for the appellant contends that the two state witnesses contradicted each other in identifying the appellant. One said he had a scar on his face and he was tall and dark in colour. The other testified that he was light in complexion. Further, there was no physical evidence to identify the appellant except the description given by the two witnesses.

- [13] In the case of *S v Mthetwa* 1972 (3) SA 766 (AD) the Appellate Division (as it then was) stated the following:

"Because of the fallibility of human observation evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility;

the accused's face, voice, build, gait, and dress; the result of identification parades if any, and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities;....."

[14] I am unable to agree with counsel. The issue of colour and height of a person differs from person to person. It is not the only thing that the Court should look at when the identity of the person is considered. The contradictions of the witnesses in this regard shows that they did not discuss the case and or conspire to implicate the appellant. Therefore in my view the contradictions of the witnesses in this regard are not material to the extent that their evidence must be rejected.

[15] It is trite law that the Court in considering the evidence, it must not take a compartmentalise approach but to consider the evidence in its totality. In the case of *S v Van der Mayden* 1999 (1) SACR 450 (WLD) this division (as it was then) stated the following:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[16] It is my considered view that the testimony of both the complainant and the witness pass the muster of the principles laid down in the Mthetwa case quoted above. Both the complainant and the witness were in close proximity with the appellant, they spent about five minutes with him, the complainant looked at him in the eye when he was seated next to her in the front passenger seat and pointed a firearm at her. The witness knew him from previous encounters and the complainant identified him at an identification parade conducted by

the police some weeks later. I am therefore satisfied that the Court a quo correctly found that the appellant was positively identified as the perpetrator of the crime against the complainant in this case. Therefore, the appeal falls to be dismissed on this ground.

[17] It is a well-established principle of our law that where an alibi is raised by an accused, there is no onus on him to prove his alibi. His is merely an onus of rebuttal which he discharges by denying guilt under oath and exposing himself to cross examination.

[18] In the case of *R v Hlongwane* 1959 (3) SA 337 (A) the Court stated the following:

"The legal position with regard to an alibi is that there is no onus on an accused to establish it, and if it might reasonably be true he must be acquitted. R v Biya 1952 (4) SA 514 (AD). But it is important to point out that in applying this test, the alibi does not have to be considered in isolation...."

The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses. In the Biya's case supra, Greenberg JA, said at page 521....'if on all the evidence there is a reasonable possibility that his alibi evidence is true it means that there is the same possibility that he has not committed the crime'".

[19] It was again emphasised by the Appeal Court in the case of *S v Shabalala* 1986 (4) SA 734 (A) where the Court stated the following:

“It is trite law that where an alibi is raised there is no burden on the accused to prove his alibi. The onus rests on the State to prove his alibi is false..... The effect of the falseness of an alibi on an accused’s case is to place him in a position as if he had never testified at all”.

[20] In the case of *S v Liebenberg* 2005 (2) SACR 355 (SCA) which case was quoted as authority in the case of Steven Malcom Musiker

(272) [2012] ZSCA 198 (30 November 2012) the Supreme Court of Appeal stated the following:

“Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the appellant of the offences. The acceptance of the prosecution’s

evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false.”

[21] I cannot agree with counsel for the appellant that his alibi was corroborated by his sister who testified as an alibi witness. I am mindful that the testimony of his sister was not subjected to cross-examination but on the questioning by the Court she conceded

that she did not physically see the appellant in his room but assumed that he was in his room because she heard the music coming from his room. She conceded that he could have left his room on that day and she would not have seen him. It is my considered view that the prosecution did not cross examine the sister to the appellant because her evidence did not take the appellant’s case any further.

[22] The two witnesses for the prosecution placed the appellant at the scene of the crime. Ms Sentlatla testified that she knows the appellant by name and the appellant could not explain how does she know him if he was never at the farm. She immediately called the police when she saw the appellant recognising him as the person who was involved in the robbery of the complainant two weeks ago. Her evidence is corroborated by the fact that the complainant identified the appellant in the identification parade.

[23] Having regard to the conspectus of the evidence in this case, it is my respectful view that the appellant’s alibi is not corroborated by his sister’s evidence and therefore cannot be accepted as reasonably possibly true and falls to be dismissed as false. I am satisfied that the prosecution has proved its case against the accused beyond reasonable doubt. Therefore, it is my considered view that the Court a quo correctly found the appellant guilty of the offence of robbery with aggravating circumstances and therefore the appeal falls to be dismissed on this ground.

[24] As indicated supra, leave to appeal was granted against the conviction only by the Court a quo. However, counsel for the appellant submitted that this Court has the power in terms of Section 304 (4) of the CPA to entertain the issue of sentence imposed by the

trial Court since it deviated from the prescribed minimum sentence without furnishing reasons therefore. Section 304 (4) provides as follows:

“If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance

with justice, such court or judge shall have the same powers in respect of such terms of section 303 or this section.”

[25] It is trite law that when a Court imposes a sentence, it is necessary for it to give reasons in its judgment for the kind of sentence it imposes. It becomes more important for the Court to furnish the reasons in its judgment when imposing a sentence which is higher than the prescribed minimum sentence. Absent such reasons for imposing such higher sentence, the conclusion that is inescapable is that such a decision is arbitrary or that the discretion of the Court was not properly or judicially exercised. (In this regard see the case of *S v Mathebula* 2012 (1) SACR 374 (SCA).

[26] Counsel for the respondent contended that this Court should not entertain the issue of sentence since the Court a quo refused leave to appeal against the sentence. The appellant should have petitioned this Court for leave to appeal the sentence rather than to bring the appeal through the back door. There are processes to be followed when the Court refuses the application for leave to appeal and the appellant has failed to follow these processes. Entertaining the appeal under these circumstances would open the flood gates for other appellants to take advantage of the provisions of section 304 (4) of the CPA.

[27] I am unable to agree with counsel for the respondent. Section 304(4) is in my view peremptory in that, once it is brought to the attention of the Court that the proceedings in which the sentence was imposed were not in accordance with justice, the Court shall have the power to review those proceedings. The Court need only to be made aware that the proceedings were not in accordance with justice and then it is obliged to invoke the provisions of section 304(4) of the CPA. It is my respectful view therefore that this Court cannot shy away from the responsibility imposed upon it by section 304(4).

[28] I am unable to disagree with counsel for the appellant that the magistrate did not furnish the reasons in his judgment for the sentence he imposed in this case. It is a well-established principle of our law that the Courts speak to the public through their judgments which contain reasons for the conclusions they reach. Therefore, it is my considered view that the failure of the

magistrate to furnish such reasons in his judgment for imposing a higher sentence than the prescribed minimum sentence resulted in the failure of justice. The most important person in a criminal trial is the accused person and that is the person who should know why certain decisions are made against him. The appellant was entitled to know why the Court is handing him a particular sentence and this did not happen - thus rendering the proceedings not being in accordance with justice.

[29] Counsel for the appellant further contended that there are compelling and substantial circumstances present in this case. The appellant has three previous convictions which date back to 1999. He has spent one year awaiting trial. The complainant was not injured in the robbery since this was not the most aggressive robbery. All these factors taken cumulatively, it is contended, amount to compelling and substantial circumstances which should justify the Court to deviate from imposing the prescribed minimum sentence.

[30] In the case of *S v Mhlakazi* 1997 (1) SACR 515 (SCA) the Supreme Court of Appeal stated the following:

“The object of sentencing is not to satisfy public opinion but to serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the Court’s duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public.”

Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence. Retribution may even be decisive.”

[31] In the case of *S v Obisi* 2005 (2) SACR 350 (WLD) this division as it was then, stated the following:

“It is true that traditionally mitigating factors, including the fact that the accused is a first offender, are still considered in the determination of an appropriate sentence..... the nature of the crime, the brazenness, the callousness and the brutality of the appellant’s conduct show that he attaches no value to other people’s lives, or physical integrity, or to their dignity.”

[32] However, as it was stated in the case of *S v KHUMALO* 1973 (3) SA 697 (A) that:

“Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.”

[33] Robbery with aggravating circumstances is a serious crime. The appellant robbed the complainant of her vehicle at gun point. That in my view shows that the appellant has no regard for the physical integrity and dignity of other people. He saw that the people who were at the scene of the crime at the time were woman but still produced and pointed the defenceless complainant with a firearm and took her vehicle against her will. It is immaterial that the complainant did not suffer any injuries during the robbery. The conduct of the appellant against the complainant and those who witnessed this episode was itself

traumatic. Ms Sentlatla testified

that she was frightened by the experience. She was shaking when she saw the appellant behind the vehicle of another person looking inside it and decided to immediately call the police.

[34] The Courts have been enjoined in a number of decisions not to shrink in imposing appropriate and heavy sentences for violent crimes otherwise society will lose confidence in the courts and take the law into their own hands. It is my considered view therefore that the aggravating circumstances in this case, the fact that a firearm was used against a defenceless woman in committing the robbery, the fact that the appellant has had brushes with the law on three occasions previously although it was a long time ago, far outweigh the mitigating factors. I therefore cannot find the existence of compelling and substantial circumstances justifying the Court to deviate from imposing the prescribed minimum sentence.

[35] In the circumstances, I propose the following order:

I. The appeal against the conviction is dismissed.

II. The sentence of 18 years imposed by the Court a quo is set aside.

III. The appellant is sentenced to 15 years imprisonment which sentence is antedated to 5 June 2012.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree,

CAMBANIS AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date of hearing:

24 August 2017

Date of Judgment: 13 September 2017

For the Appellant: Advocate: AJ. Greyling

For the Respondent: Advocate: P. Marasela

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