

SOUTH AFRICA / JUDGMENT

Morris and Others v S (No: 04/12)

[2015] ZAWCHC 51 (4 May 2015)

[2015] ZAWCHC 51**COURT**

Western Cape High Court, Cape Town

BEFORE

Rogers, Yekiso

CASE / FILE NUMBER

04/12

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Source record**THE HIGH COURT OF SOUTH
AFRICA****(WESTERN CAPE DIVISION,
CAPE TOWN)****Appeal Case No: 04/12****Knysna Case No:** 201/11/2007
DATE: 04 MAY 2015

In the matter between: LIONAL
MORRIS.....FIRST
APPELLANT
NALON
JACOBS.....SECOND
APPELLANT
KLAAS VAN
WYK.....THIRD
APPELLANT
And
THE
STATE.....RESPONDE
NT
Coram: YEKISO & ROGERS JJ
Heard: 24 APRIL 2015
Delivered: 4 MAY 2015

JUDGMENT

ROGERS J

(YEKISO J concurring):

- [1] The appellants, to whom I shall refer by their surnames (Morris, Jacobs and Van Wyk respectively), were the first, second and third accused in the court a quo. They were tried on a charge of robbery with aggravating circumstances. They were convicted as charged. The magistrate found substantial and compelling circumstances to depart from the minimum sentence of 15 years' imprisonment. He sentenced Morris and Jacobs to eight years' imprisonment and Van Wyk to 12 years' imprisonment. All three appellants were granted leave to appeal against their convictions. It is unclear from the record whether only Van Wyk or all three were granted leave to appeal against their sentences. Morris and Van Wyk were in custody during the course of the trial and have remained in custody since being sentenced. Mr Odendaal and Mr Vismer respectively represented them in the appeal. Jacobs, who was granted bail after his arrest and whose bail was extended pending the hearing of the appeal, did not file heads of argument and did not appear personally or through counsel at the hearing.
- [2] The appellants were separately represented in the court a quo. Each of them elected to testify. Morris called one Ricardo Prins as a witness. It appears that Prins was at one stage charged as a fourth accused but the charges against him were withdrawn. Van Wyk called one Pieter Muller as a witness.
- [3] It is not in dispute that at about 04h00 on Thursday 8 November 2007 an armed robbery took place at the Total service station in Sedgefield, a town which lies on the N2 between George and Knysna. Because the service station was undergoing renovation, the cash office and convenience shop were temporarily located in a container. Janeigh Thompson, the cashier, and Howard Wagner, the petrol pump attendant, were on the night shift. The public entrance into the container was by way of a door which led to the service counter. This door was open. A side door, which was closed but not locked, led into the area behind the service counter. Thompson was seated behind the counter. Wagner was further back, sitting near the fridge.
- [4] Thompson and Wagner testified that a person, whom they identified as Van Wyk, entered through the side door and locked it. He demanded money from Thompson. When she refused, he began striking her with an axe. Wagner sprang to her defence and began wrestling with the assailant. At some stage they became aware of another person, Morris, who must have entered through the public entrance and was standing on the other side of the counter. Wagner testified that Van Wyk shouted to Morris to help him and tried to pass Morris the axe. Wagner was able to keep Van Wyk away from Morris. In the course of the tussle Wagner managed to unlock the side door and told Thompson to run. She fled followed shortly by Wagner himself. They saw Van Wyk and Morris running after them. Wagner said

that Van Wyk was carrying the cash box. Thompson could not recall which of the two had the cash box. The suspects then turned in the direction of the Spar.

- [5] Thompson ran in the direction of the Shell garage. She came across two patrolling police vans. One of these was being driven by Warrant Officer Pietersen. Constable Payle was in the other van. Both police officers testified. Thompson told the police that she had been attacked by two unknown men and pointed in the direction they had fled, ie towards Flamingo Street. She got into Pietersen's van. In Flamingo Street they spotted a man who started running when he saw them. The man jumped over a garden wall. Pietersen drove around towards the back of the property in order to cut off the suspect if he went that way. Payle meanwhile went in search. She found Morris in the garden and arrested him.
- [6] As Pietersen was driving towards the back of the property, he came across a white Toyota Tazz without its lights on. This vehicle took off in the direction of the N2 towards George when the driver saw the police. Pietersen pulled the Tazz over and arrested the driver (Jacobs) and the other occupant (Prins). Since the police could not re-start the Tazz (the front part of its ignition had been removed and there was no key), Pietersen left his colleague Constable Leneka to guard it while he went back to the Total garage with Thompson and the two suspects. At a spot near where the fleeing suspect had jumped over the wall, Pietersen found the cash box stolen from the Total garage. The money had disappeared.
- [7] From Pietersen's evidence it seems that Leneka must at some stage have abandoned his watch over the Tazz because when Pietersen returned the vehicle had disappeared. It is common cause that after the arrest of Jacobs and Prince, Van Wyk gained access to the Tazz by smashing a back window. He drove the Tazz back towards George. Later on 8 November 2007 he was arrested in Great Brak (which lies between George and Mossel Bay). He was still in the Tazz (it had broken down) and was in the company of his friend Muller. The police searched the Tazz and found dagga. Van Wyk and Muller were arrested. Some days later Van Wyk was charged in connection with the Sedgefield robbery.
- [8] It is not in dispute that the three accused and Prins arrived in Sedgefield together in the same Tazz in the early hours of 8 November 2007 and were in the vicinity of the Total garage at the time of the armed robbery.
- [9] It is also common cause that Morris was in the container at the time of the armed robbery. He says so himself. The only question in his case is whether he was there innocently or was a participant in the robbery.
- [10] As between the three accused and Prins, there was a dispute as to who was involved in the robbery. Morris' version was that while he was innocently at the container wanting to fill a 5-litre container with petrol for the Tazz, Van Wyk barged passed him with an axe, jumped over the counter and demanded money from Thompson. Morris fled when Van Wyk started

attacking Thompson. Morris called Prins as a witness. Prins stated that Morris had left the car to buy petrol and that a short while later Van Wyk got out of the car and went in the direction of the garage with an axe. Prins said that he and Jacobs remained in the car and were not aware of any plan to rob the garage. Jacobs' testimony was broadly in line with that of Morris and Prins, except that he claimed not to have seen an axe in Van Wyk's possession. Van Wyk said that Morris, Prins and Jacobs had ganged up to put the blame on him whereas he was innocent of the robbery. His version was that Morris and Jacobs had gone to the garage with a petrol container. They came back a short while later, saying that the staff in the container were asleep. Morris, Jacobs and Prins then

returned to the garage, Jacobs armed with an axe and Prins with a panga. Jacobs asked Van Wyk in the meanwhile to go to the municipal

camp to retrieve some copper which Jacobs had stolen and hidden on a previous occasion.

[11] In my view, no reliance can be placed on any of the evidence tendered by the accused and their witnesses. The accused and Prins were on their own evidence dishonest people who had no qualms about engaging in criminal activity. They regularly bought and used drugs. In giving their accounts of the night in question, they attributed to themselves and each other various criminal acts, while seeking to avoid responsibility for the armed robbery. For example, before they left for Sedgefield Prins stole a cellphone which they went to sell at Lawaai Camp in George in exchange for tik. Van Wyk said they sold it at Lawaai Camp because in Pacaltsdorp (where they lived) one does not get good value for phones. At one stage their plan for the evening was allegedly to steal ('strip') vehicle parts for another Tazz belonging to a friend of Jacobs'. Van Wyk testified that he loaded tools into Jacobs' Tazz for this purpose. Van Wyk's evidence was that Jacobs had stolen copper in Sedgefield and that both of them had gone to Sedgefield earlier on the night of 7/8 November 2007 in order to retrieve the copper but had been scared off by Chubb Security cars. Jacobs conceded that things like stealing car parts and copper were not unusual for him and Jacobs. All of them claimed to have smoked tik and mandrax on the day of 7 November 2007 and into the night, including while they were in the car en route to Sedgefield. A reading of their evidence does not inspire confidence. There were occasions on which each of them was evasive or unable to explain peculiar features of his version. It is unsurprising that they did not make a good impression on the magistrate.

[12] As noted, Thompson and Wagner identified Van Wyk as the man who entered the container through the side door and attacked Thompson with the axe. An identity parade was held on 14 November 2007. Both witnesses picked out Van Wyk from a line-up of seven. Van Wyk's attorney objected to the admissibility of the evidence of the identification parade. The objection arose from two alleged irregularities, namely (i) that Thompson and Wagner supposedly saw Van Wyk in the company of the investigating officer shortly before the identification parade; and (ii) a supposed remark, allegedly heard by Van Wyk over an intercom system connecting the line-up room and the viewing room, to the effect that Van Wyk was the police's suspect. There was a trial-within-a-trial in which Thompson, Wagner

and three police officers testified. The police officer who conducted the parade, Capt Michelle Lesch, was an officer with 27 years' experience who had overseen many identification parades. Van Wyk did not proffer evidence at the trial-within-a-trial. The State's evidence refuted the supposed irregularities. The magistrate correctly held that the evidence of the identification parade was admissible.

- [13] The magistrate formed a favourable view of Thompson and Wagner, which is confirmed by a reading of their testimony. There were minor points of difference but not such as to raise a reasonable doubt as to their honesty and reliability. Although Wagner described the light in the container as good whereas Thompson said it was weak, it is evident that they both regarded the light as sufficient to make an identification. They were in no doubt as to what they had seen. The court must always be alive to the risk that an honest witness who is convinced of the correctness of his identification might nevertheless be mistaken (*S v Mthetwa* 1972 (3) SA 766 (A) at 768A-C). Here the risk of honest error was reduced by the fact that two witnesses independently identified Van Wyk in a properly conducted identity parade. Moreover, they made this identification despite the fact that in the intervening period Van

Wyk had shaved his beard. (Something was made of the fact that Thompson remembered Van Wyk as having had a bushy moustache at the

time of the robbery. It was put to her that he had a full beard. It was not put to her that he did not also have a moustache, though Van Wyk subsequently claimed that he did not have a moustache. Wagner remembered a beard and a moustache.)

- [14] It is plain that the second person in the container (ie in addition to Morris) must have been one of Jacobs, Van Wyk or Prins. While the accused and Prins were not reliable witnesses, none of them suggested that Prins had ever been armed with an axe. He is unlikely to have taken a leading role, given that he was only 17 at the time whereas Morris was 26, Jacobs 27 and Van Wyk 40. Thus the question reduces to this: is it a reasonable possibility that Thompson and Wagner mistakenly identified the axe-wielding assailant as Van Wyk whereas in truth it was Jacobs? There was no cross-examination of Thompson and Wagner to establish that Van Wyk and Jacobs were confusingly similar in appearance. Jacobs was 27 whereas Van Wyk was 39. There are no photographs in the record which enable us to form our own view but the magistrate, who had the advantage of observing all of the accused, said in his

judgment

that Van Wyk's appearance was such that only the most careless observer could have made a mistaken identification, ie he regarded Van Wyk as having a distinctive face. Thompson and Wagner both testified that they had not seen Jacobs on the scene.

- [15] I have already summarised Van Wyk's version and explained that in general the evidence of the accused and Prins is inherently unreliable. I shall nevertheless refer to some weaknesses in Van Wyk's version. He sought to explain the mistaken identification on the basis that he had been at the container about two hours before the robbery. He said that earlier in the evening Jacobs had asked him to accompany him to Sedgefield to retrieve the stolen copper. They abandoned the enterprise because of the presence of the Chubb Security cars. They stopped at the Total garage. Van Wyk went inside to buy loose cigarettes. He found the two staff members asleep and dropped some coins on the counter to wake them up. Thompson told him that they did not sell loose cigarettes. He then left, and they returned to George.
- [16] When Van Wyk's attorney cross-examined Jacobs, he did not put to him that there had been two trips to Sedgefield that night. Of course, to explain how he had come to be at the container two hours before the robbery, Van Wyk had to claim that there had been an earlier trip. It was also not put to Jacobs that he (Jacobs) had stolen the copper on an earlier occasion and hidden it. If there is any truth to the story about the stolen copper, it seems unlikely that Jacobs would have been willing to make a second trip to Sedgefield on the same night, having been scared off just two hours earlier by the presence of security vehicles.
- [17] Furthermore, Thompson and Wagner denied that Van Wyk had been there earlier in the evening or that there was an occasion that night where someone had come asking for loose cigarettes. On Van Wyk's version, this earlier visit would have been well after midnight. Unsurprisingly, there was relatively little custom at the garage in the small hours of the morning. If, about two hours before the robbery, someone had arrived at the container, woken them up by dropping some coins on the counter and asked for loose cigarettes, they would have remembered this.
- [18] In regard to the 'second' trip to Sedgefield, Van Wyk denied the evidence of the other accused that they had stopped near the Total garage because the petrol warning light had come on. He did confirm, however, that Morris (together with Jacobs, so he claimed) had gone to the garage with a petrol container. On his version, which may in this respect be true, the petrol container was simply a ruse to legitimise their presence at the garage if they should be challenged. Be that as it may, he testified that upon their return they reported that the staff in the container were asleep and then armed themselves and returned to the garage with Prins. Van Wyk conceded that it was obvious that they intended to rob the garage but he claimed that there was no actual discussion to this effect. He testified that Jacobs asked him to go and retrieve the stolen copper. For several reasons, the strikes me as wholly implausible.
- [19] Firstly, Van Wyk's version was that the reason for going to Sedgefield on the second occasion was, once again, to fetch the copper. However, on this version there was no plausible explanation for the presence of Morris and Prins. Furthermore, Van Wyk could not explain why, if their purpose was to retrieve the copper, Jacobs stopped the car near the Total garage, some distance from where the copper was allegedly hidden. He said that to reach the copper he had to walk a little distance to the N2, go cross the highway, and then walk a

little further. If the purpose of the trip was to fetch the copper, one would have expected Jacobs

to take the car to where the copper was hidden. That is what (according to Van Wyk) they had tried to do earlier in the evening.

The presence of security patrols would be as much risk to Van Wyk on foot as it would to Jacobs' Tazz. On Van Wyk's version, he must have set out for the copper without knowing whether it would be safe to retrieve it. If he was able to retrieve it, he would be at considerable risk of apprehension because of the distance he had to traverse to get the copper back to where the Tazz was parked. He would have been able to offer no explanation for his possession of the stolen copper.

[20] Second, if – as Van Wyk on his version conceded was obvious – Morris, Jacobs and Prins were heading back to the Total garage for a nefarious purpose, it must have been equally obvious to Van Wyk that his friends would need to make a quick getaway after robbing the garage. Van Wyk would not have wanted to take the risk that Jacobs and the others would take off before he got back with the copper. Conversely, though, Jacobs and the others would not have been willing to wait around for Van Wyk after perpetrating an armed robbery.

[21] Third, if Morris, Jacobs and Prins were the robbers and Van Wyk was not involved, it is surprising that Thompson and Wagner did not see a third perpetrator on the scene. It is also surprising that Jacobs and Prins, but not Morris, were able to make it back to the Tazz. (On Van Wyk's version, one would have to accept that Jacobs and Prins got back to the car after the robbery, because they were arrested while driving the car.) The more plausible explanation is that the persons at the container were Morris and Van Wyk, that Jacobs (who was the owner of the Tazz and the driver) and Prins (a relative youngster) remained behind, ready

to speed away when Morris and Van Wyk returned, but that in the event neither Morris nor Van Wyk succeeded in getting back to the car before Thompson alerted the patrolling police vans.

[22] Fourth, Van Wyk's conduct subsequent to the robbery was not that of a person innocent of complicity. He broke into the Tazz belonging to Jacobs and drove off with it. Instead of going to his home in George, he collected Muller and then went (on his version) to Mossel Bay and Great Brak, where he was arrested. He did not go to bed at all. This is the conduct of a person seeking to evade detection. It is far more plausible that, after fleeing from the robbery but not getting back to the car before the police spotted and apprehended the Tazz, Van Wyk remained hidden until the opportunity presented itself for him to make off with the car.

[23] I thus consider that the State proved beyond reasonable doubt that Van Wyk was the axe-wielding assailant. In reaching this conclusion, and for reasons I have explained, I do not attach weight to the evidence of Morris, Jacobs and Prins, though in the event their testimony was to this extent true. Van Wyk was thus correctly convicted.

- [24] I turn now to consider Morris' conviction. As noted, it is his own version that he was present in the container at the time of the robbery. The only question is whether he was there to assist in the robbery or was innocently wanting to buy petrol when Van Wyk alone perpetrated the robbery.
- [25] Thompson testified that the two men came in to the container at about the same time. She denied that she and Wagner were asleep. She said they were chatting. She was first aware of Van Wyk's entry and then noticed Morris. She could not say that Morris committed any positive acts in support of the robbery. Wagner testified that Van Wyk arrived first and that he only became aware of Morris' presence after he started wrestling with Van Wyk. He testified, further, that Van Wyk called on Morris to help him and attempted to pass the axe to Morris. The latter was trying to clamber over the counter to get to the area where Wagner and Van Wyk were engaged in a tussle. Both Thompson and Wagner testified that they fled the container first, followed by Morris and Van Wyk who were running together and in the same direction. This is also what Thompson immediately told the police.
- [26] The evidence of the State witnesses is thus inconsistent with Morris' version (supported in this respect by Prins and Jacobs) that he had gone off to the garage several minutes before Van Wyk. The evidence of the State witnesses indicates that Van Wyk and Morris arrived at the container at about the same time, probably simultaneously, though Van Wyk probably walked in first. Since Van Wyk was armed with an axe, Morris must have been aware of his intentions. On Wagner's evidence, Van Wyk evidently saw Morris as his accomplice. Furthermore, the evidence of the State witnesses is contrary to Morris' testimony that he fled once Van Wyk started hitting Thompson with the axe. They testified that Van Wyk and Morris ran away together, after Thompson and Wagner had fled. Van Wyk must have grabbed the cash box after Wagner let him go, and he and Morris then ran off together.
- [27] The version advanced by Morris is not only inconsistent with that of the State witnesses whom the magistrate found to be credible; his exculpatory version is also inherently implausible. He, Prins and Jacobs claimed that Jacobs (the driver) had stopped the Tazz a short distance from the Total garage because the petrol warning light had gone on. For this reason, so they claimed, Jacobs had given Morris a container and asked him to go to the garage to get petrol. Morris said he had R30 in cash. The entire story about the need for petrol has the hallmarks of fabrication. Morris and the other witnesses could not explain why Jacobs had not used Morris' R30 to put in petrol at Burger King in George (where they had allegedly stopped for a while before driving towards Sedgefield) or at several filling stations along the way before Sedgefield. Even if the warning light was not showing at that stage, Jacobs as the owner and driver must (on their version) have been aware that petrol would be needed. The police did not find R30 in cash on Morris when they arrested him.
- [28] Morris, Jacobs and Prins also had difficulty in explaining why they did not drive to the Total garage to get petrol. One knows that a car can generally travel some distance after the petrol warning light goes on. The precise distance to the garage from the point where they stopped does not appear from the evidence but one's general impression is that it could not have

been more than a few hundred metres. The worst that could have happened, if Jacobs had continued driving towards the garage, is that the car would have run out of petrol a little closer to the garage than the place where they actually stopped. There was some suggestion that they also wanted to smoke some more tik and that Jacobs had to make a new pipe (or 'bulbie', a tik pipe made from a light bulb), something they could not do in a public place such as a garage forecourt. This is not at all convincing. If there is any truth to the version that they wanted to smoke more tik, there was no reason not to fill up at the garage and then find a secluded spot.

[29] No empty petrol container was found at the petrol station or in Morris's possession when he was arrested. If he had a petrol container with him when he went to the garage, I have no doubt that its purpose was to provide some plausible explanation for his presence at the garage if he should be challenged.

[30] There is also the question as to why Morris, if he was innocent, fled the scene and why he tried to escape over a garden wall when he saw the police.

[31] In my opinion, the magistrate was right to find beyond reasonable doubt that Morris was an accomplice in the robbery. He made common cause with Van Wyk by accompanying him to the garage with knowledge of the plan. In all probability they entered through different doors so as to trap the employees in the container. Mr Odendaal submitted that it does not suffice, for a conviction based on common purpose, that the accused was present when the crime was perpetrated or even that he subjectively approved the perpetration of the crime. He referred in that regard to *S v Khanye & Others* [2004] 1 All SA 662 (T). That case in turn referred to the leading authorities on common purpose, namely *S v Mgedezi* 1989 (1) SA 687 (A) and *S v Thebus* [2003] ZACC 12; 2003 (6) SA 505 (CC). However, Morris' situation is distinguishable from that of appellants 1 and 3 in *Khanye*. Although the fact that those appellants had arrived at the crime scene together with the other appellants might have inclined one to think that they acted in concert with them, this was not the only reasonable inference on the facts of the case. Among those facts was that no immediate criminal activity took place upon the arrival of the appellants at the scene. In the present case, by contrast, the

conclusion

is justified beyond reasonable doubt that Morris went to the container with Van Wyk with the intention of robbing the garage. In *Khanye* the court referred to *R v Jackelson* 1920 AD 486 where Jutta JA, in dealing with accomplice liability, said that a person could assist or facilitate a crime 'if he stands by ready to assist although he does no physical act' (at 491). Put differently, Morris' conduct in accompanying Van Wyk to the container with the common intention of robbing the occupants and his presence on the scene, with a view to assisting Van Wyk if necessary, was conduct by which he associated himself with the purpose of committing armed robbery.

[32] Insofar as the convictions are concerned, this leaves Jacobs. As mentioned at the beginning of this judgment, no heads of argument on his behalf were filed and there was no appearance for him at the appeal. It has been held that where an appellant does not appear the court may in its discretion strike the appeal off the roll, postpone it or decide it (R Mokwena 1954 (1) SA 256 (A)). Since the State has applied to strike the matter from the roll, this is the course we intend to follow. If we had formed a

clear view on the record that Jacobs' conviction was unsound we might in the interests of justice have upheld his appeal despite his non-appearance but that is not the position. We do not have Jacobs' bail conditions before us. There is authority that where an appeal is struck from the roll because of non-appearance, bail granted pending an appeal lapses (S v Govender 1955 (2) SA 130 (N) at 131; S v Ramakolo 1997 (2) SACR 749 (T) at 751g-752f). However, that will be a matter for the State to take further.

[33] As noted earlier, it is unclear from the record whether Morris was granted leave to appeal against his sentence. Mr Odendaal, who understood his client only to have leave to appeal against conviction, made no submissions in regard to the sentence. On the assumption that an appeal on sentence is before us, I am satisfied that there is no basis for interference. The robbery was obviously a heinous act which called for a minimum sentence of 15 years' imprisonment in the absence of substantial and compelling circumstances. This was not Morris' first brush with the law. He had three prior convictions for housebreaking and one for assault. In respect of the most recent conviction, which was during 2002 for housebreaking, he was sentenced to 18 months' imprisonment. The magistrate nevertheless found there to be substantial and compelling circumstances, namely (i) that Morris had spent about four years awaiting trial; (ii) his lesser role in the robbery; and (iii) substance abuse. I am somewhat dubious about the second and third considerations but overall, and particularly having regard to the period awaiting trial, the magistrate was right to depart from the minimum sentence. If anything, though, the sentence of eight years was on the light side.

[34] Van Wyk, who was sentenced to 12 years' imprisonment, had a lamentable record. He had 11 prior convictions for theft, housebreaking and possession of stolen property, three for assault (two of which were with intent to cause grievous bodily harm), one for attempted rape, and two for robbery. His most recent conviction was in 2004, for theft and for which he was sentenced to six months' imprisonment. The magistrate found there to be substantial and compelling circumstances to depart from the 15-year sentence, namely (i) the four-year period awaiting trial; and (ii) substance abuse. Given the aggravating circumstances (the use of the axe and Van Wyk's string of prior convictions), the magistrate cannot be criticised for not giving Van Wyk full credit

for the four years awaiting trial (see Radebe & Another v S

[2013] ZASCA 31, where the court rejected a mechanical approach to the effect of time awaiting trial). Indeed, I regard the sentence in all the circumstances as being somewhat lenient.

[35] For these reasons the following order is made:

- (a) The appeal of the second appellant, Nolan Jacobs, is struck from the roll.
- (b) The appeals of the first appellant (Lionel Morris) and the third appellant (Klaas van Wyk) against their convictions and sentences are dismissed.

YEKISO J

APPEARANCES

For First Appellant MR WA Odendaal

Instructed by Cape Town Justice Centre

For Third Appellant Mr JL Vismer

For Respondent Mr MZ Seroto

Office of the Director of Public Prosecutions

Western Cape

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