

SOUTH AFRICA / JUDGMENT

Nevhungoni v S (A30/2022) [2024] ZALMPTHC 22 (22 February 2024) [2024] ZALMPTHC 22

COURT

Limpopo High Court, Thohoyandou

BEFORE

T C Tshidada, M B Madavha

CASE / FILE NUMBER

A30/2022

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED.

CASE

NO: A30/2022

In

the matter between:

STEVEN

NEVHUNGONI

Appellant

And

THE

STATE

Respondent

JUDGMENT

TSHIDADA J et MADAVHA AJ

INTRODUCTION

1

Following refusal of leave to appeal by the trial court, the appellant petitioned this court and was subsequently granted leave to appeal and herein contests both conviction and sentence of fifteen (15) years direct imprisonment on one count of armed robbery with aggravating circumstances imposed by the Louis Trichardt Regional Court on 26 October 2020.

2

The appellant was arraigned for the crime of robbery with aggravating circumstances as intended in Section 1 of Act 51 of 1977, read also with the provision of Section 51(2) of the Criminal Law Amendment Act 105 of 1997.

3

In that upon or about 5 December 2015 at or near Bergwater Hotel in the Regional Division of Limpopo (Makhado), the appellant unlawfully and intentionally assaulted one Madei Zhou, did there and then and with force took the following items to wit, an amount of R39 175.00 and a tablet. The property which was in her lawful possession, of aggravation is that the appellant was pointed with a fire-arm during the commission of the alleged crime.

4 The provisions of Section 51(2) of the Criminal Law Amendment Act as amended and the ancillary sentences applicable to the charge were fully and comprehensively explained to the appellant by the trial court before he pleaded.

5

The appellant was legally represented for the entire duration of the trial. He pleaded not guilty to the charge against him.

APPELLANT'S GROUNDS OF APPEAL:

6

Ad Conviction:

6.1 Appellant argues that: the court a quo erred in finding that the respondent proved his guilt beyond any reasonable doubt, thereby admitting that his version was improbable.

6.2 The Court erred in finding that the appellant used a fire-arm during the commission of the offence on the following basis:-

6.2.1 that the State witness failed to describe the alleged fire-arm.

6.2.2 that second State witness testified he was attacked from behind and an object was pressed against his neck which he assumed to have been a fire-arm.

6.2.3

Lastly, that the appellant was not found in possession of a fire-arm when he was apprehended at the scene of crime.

6.3 The Court erred in finding that the state witnesses were credible and reliable witnesses to prove the State case against him.

6.4 The appellant further contended that the photo album presented as evidential material did not depict the keys allegedly recovered from him as per the witnesses.

7

Ad Sentence:

7.1 Appellant argued that: the court a quo misdirected itself when imposing a grossly harsh and disproportionate imprisonment sentence of 15 years which induced a sense of shock on him.

7.2 The court erred in finding no substantial and compelling circumstances justifying the court to deviate from imposing a prescribed sentence upon him.

7.3 The court erred in not finding the following factors to be mitigating and/or amounting to substantial and compelling circumstances in favor of the appellant:-

7.3.1 that appellant spent three months in custody awaiting trial.

7.3.2 that appellant was 28 years old at the time of commission of offence and currently 33 years old.

7.3.3 that appellant has 3 minor children.

7.3.4 that appellant is a first-time offender.

7.3.5 that appellant was a breadwinner, earning an amount of R2 000.00 per month.

7.3.6 that appellant sustained injuries during the commission of the offence.

7.3.7 that the degree of violence in the matter was minimal.

7.3.8 the court misdirected itself by failing to exercise a measure of mercy on him when imposing its sentence and failing to find that appellant had good prospects of rehabilitation.

7.3.9 the court a quo misdirected itself by over-emphasizing the interest of society, yet giving less consideration to the appellant's personal circumstances.

8

It is trite law that throughout a criminal trial, the onus to prove the guilt of the accused beyond reasonable doubt rests with the State, such duty need not be proof beyond all shadow of doubt. Yet the appeal court can only interfere with the finding of the trial court if that court erred and misdirected itself in fact or in law.

9

On the other end, the test to be applied on challenging the imposed sentence, is to establish whether the trial court misdirected itself on the sentence it imposed or if there is disparity between the offence committed and the sentence imposed vis a vis the sentence which the appellate court would have imposed. An appeal court can also temper with a sentence found to be startling or disturbingly inappropriate.[1]

10

The powers and approach of the court on appeal, either on findings of fact and/or the law was aptly summarized in,[2] as follows:

“The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection, the trial court’s conclusion, including its acceptance of witness’s evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness evidence. A reasonable doubt would not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and observing a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court’s evaluation of oral testimony”.

FACTUAL

BACKGROUND

11 The State adduced evidence of several state witnesses, however this court shall confine itself to the oral evidence of those witnesses whose testimony relates to the alleged crime committed in casu, the arrest of the appellant and the issues that gave rise to the current appeal.

12 Ms Madei Zhou was the first state witness and a complainant in the main count. She testified that on the night of her ordeal she was employed at Bergwater Hotel in Louis Trichardt town as a receptionist.

13 During the course of executing her duties, at around 23h00, she heard a knock whilst seated alone at the hotel reception desk. As she approached to open the entrance door, she observed two black males, one of them standing against a corner and peeping on her.

14 The gentlemen at the door informed her that they were there to book a hotel room, to her surprise, the same men immediately grabbed her by her neck, whilst the other pointed her with an object she observed to have been a pistol which she could not clearly identify the make or colour.

15 She testified that the two started demanding cash money from her, to which she responded was in the safe, however, she was not in

possession of the keys thereof. She indicated that one of the guys procured a piece of wire from outside which he then used to pull out the cash money from the locked safe.

16

Complainant stated that she could not observe her attacker's faces because she was instructed not to look at them, otherwise she would be killed.

17 She was then escorted and locked up inside hotel room number 36, where she remained for approximately 20-30 minutes. Moments later she heard someone screaming from outside before she could shout for help. Thereafter one of the hotel's security guard came to her rescue and unlocked her out of the room.

18 Upon further scrutiny, it was then discovered that her tablet computer and some substantial amount of money which was inside the safe was missing.

19 The former manager of the hotel, one Mr Els testified that he, at around 23h30, around midnight that day decided to drive to the hotel to conduct his usual inspection or random patrol.

20 Upon his arrival at the hotel parking area, he noticed a dark Volkswagen Golf reversing towards the entrance of the hotel with its boot open. From the said vehicle, there were two male black persons whom he initially assumed were hotel guests.

21 Soon thereafter, he strangely noticed a money safe laying on the floor of the hotel veranda and decided to go check why it was at its unusual place. Unbeknown he felt a pistol placed at the back of his head, followed by a voice instructing him not to try do anything or else he would be shot at. He was immediately pushed into a small office next to the reception area.

22 Within a short space of time, he was able to free himself and walk out of the office, just as he was about to, he saw the two men again running towards him. One of the men had his head, face and arms covered with a t-shirt, whilst the other charged at him pointing a fire-arm.

23 It was then that he fired a shot aiming at the one guy whose face, head and arms were covered. The gun man then fled back to the Volkswagen Golf vehicle and fled the scene leaving behind the one shot at by the witness lying on the floor.

24 He then discovered that the man who was shot was in fact one of the hotel's former temporary employees who was earlier discharged

from his duties by the hotel management after it was discovered that some monies went missing during his work-shift whilst he was mending the hotel reception. The injured person happened to be the appellant herein.

25 Mr Els denied ever arranging with the appellant that he should come and collect his arrear salary on the day of the incident, more awkwardly, at that time of the night. Worse because Els said he never used to pay any of the staff salaries. He further denied the appellant ever leaving any of his personal belongings at the hotel soon after his dismissal.

26 He further testified that the hotel outside lights were on, as a result, he was able to notice that the appellant was one of the gentlemen who accosted him on that late evening. He denied placing hotel room 36 keys inside the appellant's pocket as he laid shot on the ground.

27

Sergeant Lebago was the police officer who attended the crime scene after the police were summoned to the scene. He found the appellant lying on the ground bleeding from a gun-shot wound on his stomach. He proceeded to search his pockets and retrieved a hotel room key number 36 from his possession.

28 He, however indicated that it was erroneously indicated in his initial statement that the hotel room key retrieved on the appellant was that for room 23, instead of key to room 36 in terms of his second statement. He denied ever placing the said key inside the appellant's pocket.

29 Mr Ludwig Langbhen stated he was the security on guard at the hotel premises on that evening. He confirmed that he proceeded to the hotel soon after he was informed that there was a robbery at the premises and found the appellant shot and lying on the ground. He also saw a money safe outside by the porch of the hotel building. He lastly confirmed that the appellant was searched in his presence by the police and a key to room 36 was found in his pocket. It was the same key he used to open up room 36 to rescue the first state witness.

30 It is not in dispute that on the night in question, the appellant was at the scene of crime and that he was shot at just after 23h30pm.

However, his version is that he visited the place late that night to collect his personal belongings, as well as his outstanding salary that was owed to him before he was fired. He blatantly disputed committing the offence he is charged with.

31 His testimony was that he was surprised when he arrived to meet with Mr Els that evening, that instead of him giving him his money, for no apparent reason, Els started shouting at him, and in the process produced his fire-arm and shot him and ultimately got him arrested.

32 The point in dispute is whether the trial court correctly found that the State succeeded in discharging its onus of proving beyond a reasonable doubt that the appellant was one of the persons who broke into Bergwater Hotel and committed an armed robbery with aggravating circumstances.

33 On assessment of the evidence adduced by the State witness against the appellant's grounds of appeal, this court finds that the State presented satisfactory, credible, truthful, reliable and sufficiently corroborated evidence upon which a court can convict.

34 The possession and usage of a fire-arm at the scene was confirmed by two state witnesses. Ms Zhou stated that one of her attackers pointed her with a shot fire-arm, wielded it at her as they escort her to one of the hotel rooms where she was locked before the attackers went back to ransack the hotel administration office. She however could not identify the make or colour of the said fire-arm because she was instructed and ordered to look away from the assailants to evade their identity.

35 Mr Els was also held at gun point upon his arrival before he was whisked to one of the hotel store rooms to make way for the robbers to complete their mission. Moments after he freed himself, he again came face to face with the robbers at the porch of the hotel reception when they came charging at him, one of them pointing the same fire-arm at him. However, he was able to produce his pistol first and fired at one of the gentlemen causing the one who was pointing him with a fire-arm to turn around and flee the scene.

36 That would then make perfect sense to this court why no fire-arm was found on appellant's possession and why Ms Zhou could neither describe its colour or make. In spite, the above does not negate the fact that the appellant and his accomplice were in possession and armed with a fire-arm when they committed the robbery at Bergwater Hotel.

37 Mr Langbhen's evidence was also uncontested that upon his arrival at the scene, the appellant was searched by a police officer in his presence, and that a key to hotel room 36 was retrieved from his pocket.

38 The State presented an overwhelming chain of evidence clarifying all the points which the appellant sought to rely upon on the current appeal

39 This court therefore finds no material misdirection by the trial court in its findings of facts which could justify interference with the conviction of the appellant.

40

As a result, it is also this court finding that the state succeeded in proving the guilt of the appellant beyond a reasonable doubt,

consequently, his appeal on conviction falls to be dismissed. See in this regard.[3]

41 The appellant's version and failure to proffer a plausible reason why he decided to go collect his alleged outstanding wages at his former employer at midnight is inherently improbable. I find it as nothing but a mere attempt and an after thought explanation of what became a clear foiled or robbery by a disgruntled former employee that went wrong. An explanation which I reject for it cannot be reasonably possible be true.

42 This court also agrees that the appellant's personal substantial and purported compelling circumstances were fully considered by the trial court. However, the aggravating circumstances on the offence committed far outweigh the appellant mitigating factors that could have compelled the court a quo to deviate from imposing a prescribed imprisonment sentence.

43

The guiding principle dealing with appeal on sentence imposed by the lower court is set out in,[4] thus:

“An appellate court may not interfere with the discretion of the trial court merely because it would have imposed a different sentence, in other words, it is not enough to conclude that its own choice of penalty would have been an appropriate penalty. Something more is required. It must conclude that its own choice of penalty is the appropriate penalty and the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or erroneously when imposing it. Therefore, interference is justified only where there exists a ‘striking’ or ‘startling’ or ‘disturbing’ disparity between the trial court’s sentence and that which the appellate court would have imposed. And in such instance, the trial court’s discretion is regarded as having been unreasonably exercised.”

44 In casu, I found nothing striking, startling, disturbingly disproportionate on the sentence imposed for the offence committed. In fact, in my view, the appellant was spared extra charges of kidnapping and attempted murder by the State. I therefore align myself with the sentence imposed on the appellant by the trial court.

45 The appellant's ground that the trial court over-emphasized the seriousness of the crime committed and its prevalence is misplaced and untrue. The trial court balanced the common and all elements of punishment against appellant's common and usual personal circumstances. The peculiar circumstances of this case dictated imposition of no other sentence than a sentencing in terms of the Act.

46

Equally, this court finds no basis for it to alter or interfere with the sentence imposed by the court of first instance. I find the lower court to have exercised its sentencing discretion correctly.

47

Consequently, the following order is made:

47.1 The appellant's appeal on both conviction and sentence by the trial court is hereby dismissed.

T C TSHIDADA

JUDGE OF THE HIGH COURT

I agree:

M B MADAVHA

ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED:

Appearances: For appellant: Mr D T Mphaphuli D T Mphaphuli Attorneys For the State: Adv N C Molepo Director of Public Prosecutions Thohoyadou Heard on: 14 June 2023

Judgement

delivered on: 22 February 2024

- [1] See: S v Van der Venter 2011(1) SACR 238
- [2] S v Francis 1991(1) SACR 198(A) at 198j – 199a
- [3] S v Shackell 2001(3) SACR 185
- [4] S v Hewitt 2016 ZASCA 100; 2017(1) SACR 309 (SCA)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALMPTHC/2024/22.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/nevhungoni-v-s-unknown-topic-almpthc-2024--6a3ea50e3b1caa9129806f00>

Prepared on 11 October 2026 · Esheria