

SOUTH AFRICA / JUDGMENT

Phiri and Another v S (A726/2016) [2017] ZAGPPHC 854 (20 November 2017)

[2017] ZAGPPHC 854

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen, P D Phahlane

CASE / FILE NUMBER

A726/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Case

Number: A726/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

PROFESSOR

PHIRI First

Appellant

ADMIRE

MOLEA Second

Appellant

AND

THE

STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1]The appellants were convicted in the Nigel Regional Court, on a charge of housebreaking with the intent to rob and robbery and were sentenced to 12 years' imprisonment.

[2]The appellants were granted leave to appeal both the conviction and sentence on petition to this court.

[3] At the inception of the hearing, Mr Botha, counsel for the appellants, informed the court that the Legal Aid Board did not receive a power of attorney from the second appellant to prosecute the appeal. In the result, the appeal of the second appellant was postponed sine die.

[4]The first appellant will infra be referred to as "the appellant".

CONVICTION**Facts**

[5]The evidence relied upon by the State for the conviction was to a large extent common cause or not in dispute. On Thursday, 18 November 2011 at approximately 8:00, five men entered the house of Mr Reynders. One of the five men assaulted Mr Reynder's father who was 75 years of age at the time. Mr Reynders senior was thereafter tied up and his personal belongings including, inter alia, a biltong knife bought by his two sons as a present and on which the word "biltong" was engraved, were taken from him. Ms MM Motaung, the domestic worker, initially hid in a cupboard, but exited the cupboard and was also tied up.

[6]The only issue in dispute is whether the appellant was one of the perpetrators.

[7] From the evidence it emerged that the appellant was employed by Mr Reynders junior at his maize factory. The appellant resided on the premises, which premises is adjacent to the farm where the robbery occurred.

[8] On the day of the robbery, Mr Reynders arrived at the factory at approximately 8:00 only to find that the appellant had literally

vanished overnight. Without informing Mr Reynders junior the appellant had simply packed his things and had left. I pause to mention that the appellant would have received his salary on the Saturday, some two days after his sudden departure.

[9] In the meantime, the robbery was in full swing on the farm. During the robbery, Ms Motaung heard the name "Professor". One of the perpetrators was in actual fact having a conversation with "Professor".

- [10] Warrant Officer Grobler testified that he received information on the Friday, the day after the robbery, as to the whereabouts of the people who committed the robbery. He informed Mr Reynders junior and asked him to accompany him as Mr Reynders junior would be able to identify the perpetrators. Mr Reynders junior accompanied Warrant Officer Grobler to search for the perpetrators.
- [11] They proceeded to an informal settlement known as Bram Fischerville in the company of Constable Morefe. Whilst driving around, Mr Reynders junior spotted the appellant walking next to road carrying two containers filled with water. As soon as the appellant saw Mr Reynders junior, he dropped the water containers and started running.
- [12] He was eventually accosted by Warrant Officer Grabler and brought back to the vehicle. He was informed that he is placed under arrest for the robbery and his constitutional rights were explained to him.
- [13] The appellant volunteered to take the police to the place where he had slept the previous night. The place was searched and a bag containing clothing and a biltong knife was discovered. Mr Reynders junior was shown the knife and he immediately identified the knife as the one that was given by himself and his brother as a present to their father.
- [14] Sometime after the arrest an identification parade was held and the appellant was identified by both Ms Motaung and Mr Reynders senior as one of the perpetrators who committed the robbery.

Appellant's

submissions

- [15] Mr Botha submitted that the identification of the appellant at the identification parade has no evidentiary value. In support of this submission, he referred to various portions of Ms Motlaung's evidence, which was contradictory and inconsistent insofar as the identification of the appellant at the scene of the crime is concerned.
- [16] Mr Botha further pointed out that the appellant was known to both Ms Motaung and Mr Reynders senior. It appears from the evidence of Mr Reynders senior that he pointed the appellant out, because Ms Motaung informed him that the appellant was present at the scene of the crime.
- [17] Mr Botha then referred to various decided decisions dealing with the cautionary rules applicable to identification
- [18] I agree with Mr Botha that Ms Motaung and Mr Reynders senior in all probability did not physically see the appellant on the day of the robbery.

[19] That is, however, not the end of the matter. In evaluating the evidence, the court must have regard to the evidence in its totality. Although it is questionable that Ms Motaung actually saw the appellant, her evidence that she heard his name was accepted by the court a quo and I see no reason to interfere with this factual finding.

[20] This evidence is corroborated by the fact that the knife of Mr Reynders senior was found in the possession of the appellant the following day. The appellant's explanation for his possession of the knife is simply untenable. According to the appellant, Mr Reynders junior gave the knife to him two weeks prior to the robbery to use at the factory. Mr Reynders junior denied this and testified that he bought cheap knives to be utilised at the factory.

[21] The appellant's version leads to various questions, to wit why would Mr Reynders junior be in possession of his father's prized

possession; why did the appellant not return the knife after utilising it, why did he, well knowing that the knife does not belong

to him, take it with him when he cleared out his room?

[22] The appellant's explanation for his sudden departure from his place of employment is even less plausible. The appellant testified that he left to find better employment opportunities that pay a higher salary. Notwithstanding the aforesaid, he did not wait to receive the salary he had already earned, but disappeared like the proverbial "thief in the night". All of this coincidentally on the day of the robbery.

[23] Having had regard to the probabilities and improbabilities, I agree with the court a quo that the appellant's version is not reasonably possibly true and in the result, the appeal against conviction stands to be dismissed.

SENTENCE

[24] In sentencing the appellant to 12 years' imprisonment, the court a quo deviated from the prescribed minimum sentence of 15 years' imprisonment.

[25] It is trite law that sentencing is pre-eminently a matter for the discretion of the trial court. Consequently, a court of appeal will only alter the sentence of the court a quo if the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. (See: *S v Rabie* 1975 (4) SA 855 AD at 857 D-F].

[26] Mr Botha could not point to any irregularity or misdirection by the court a quo. In respect of the length of the sentence, Mr Botha submitted that the appellant played a lesser role in the robbery and that the sentence should be reduced to ten years' imprisonment. In *S v Pieters* 1987 (3) SA 717 A at 734G-H the Appellate Division (as it then was), however, warned against the mere reduction of a term of imprisonment without sound reason:

"Dit sou onrealisties wees om nie die feit onder die oe te sien nie dat die bepaling van 'n spesifieke tydperk van gevangenisstraf in 'n gegewe geval nie volgens enige eksakte, objektief-geldende maatstaaf kan geskied nie, en dat daar dikwels 'n area van onsekerheid kan bestaan waarbinne menings oor die gepaste termyn van gevangenisstraf geldiglik kan verskil, in so 'n geval, selfs al sou hierdie Hof meen dat hy 'n hee/wat ligter vonnis sou opgele het, sou hy nogtans nie ingryp nie, omdat die nodige oortuiging sou ontbreek dat die Verhoorregter nie redelikerwys die vonnis kon opgele het waarop hy besluit het nie..... "

[27] The sentence is, in the circumstances in casu, not shockingly inappropriate and consequently the appeal against sentence should also fail.

ORDER

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

The appeal against conviction and sentence is dismissed.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree.

P.D. PHAHLANE AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

It is so ordered.

DATE HEARD 13 November 2017

JUDGMENT

DELIVERED 20 November 2017

APPEARANCES

Counsel for the Appellant: Advocate M. Botha

Instructed by: Pretoria Justice Centre

Counsel for the First Respondent: Advocate A Roos

Instructed by: Director of Public Prosecutions

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Prepared on 10 October 2026 · Esheria