

SOUTH AFRICA / JUDGMENT

S v Soxunjwa [2010]

ZAECGHC 71 (20 August 2010)

[2010] ZAECGHC 71

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Chetty, Da Silva

CASE / FILE NUMBER

CA & R 69/2010

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA & R 69/2010

LUNGELO SOXUNJWA Appellant

And

THE STATE Respondent

Coram: Chetty J and Da Silva AJ

Date Heard: 18 August 2010

Date Delivered: 20 August 2010

Summary: Appeal – Evidence – Identification - Adequacy of proof – Appellant positively identified – Interference with trial court’s factual findings not justified – Appeal against conviction dismissed – Sentence – Armed robbery – Gun used – Custodial sentence of eleven years appropriate

JUDGMENT

Chetty, J

- [1] The appellant and two other persons, Luthando Madini (Madini) and Mncedisi Dyantyi (Dyantyi) were arraigned for trial in the regional court, Port Elizabeth on charges of robbery and possession of a dangerous weapon in contravention of s 2 (1) read with sections 1 and 3

of the Dangerous Weapons Act¹. The appellant and his co-accused pleaded not guilty to the charges and in amplification of his plea the appellant raised an alibi as the basis for his defence. At the conclusion of the trial the appellant was convicted on both counts, Madini only on the robbery count whilst Dyantyi was acquitted on both counts. The appellant and Madini were each sentenced to ten years imprisonment on the robbery charge and the appellant further sentenced to twelve months imprisonment on the dangerous weapons count. This appeal, with leave of the court below, is directed at both the convictions and sentences imposed.

- [2] The principal submission advanced on behalf of the appellant is that the court below erred in accepting the evidence of the complainant, Ms. Vuyolwethu Mtshakazi and Ms. Zandile Ngqumshe that the appellant was one of the two persons who robbed the complainant of her cellular phone. It was submitted that in as much

as these witnesses had conceded to having no prior knowledge of the appellant and admitted seeing him for the first time on the day of the incident, the court below misdirected itself in accepting their evidence identifying the appellant as one of the perpetrators. The argument advanced was that the court below paid lip service to the cautionary rules relating to evidence of identification, and wrongly rejected the appellant's alibi defence.

- [3] It is apparent from the judgment that the magistrate was alive to the fact that the evidence of identification had to be approached with a measure of caution. She considered the submissions advanced by the appellant's attorney and evaluated the evidence in its totality. She took cognizance of the various safeguards elucidated upon in *S v Mthethwa*², in particular the opportunity for making a proper identification, and, having concluded that exercise, approached the evidence in the manner postulated by Nugent, J, in *S v Van der Meyden*³. The record demonstrates, quite unequivocally, that the court below's conclusion that the state had discharged the onus beyond reasonable doubt to be unquestionably correct.
- [4] During argument before us counsel for the appellant sought to persuade us that the appellant's protest that he could have been mistakenly identified finds resonance in the judgment⁴ of Pickering J, (Revelas J, concurring) in the successful appeal by Madini against his conviction. The court of appeal approached the evidence on the basis that the complainant's evidence relating to Madini's identification was uncorroborated. It found that in essence she was a single witness and that although Ms. Ngqumshe had positively identified Madini the "the conduct by the police severely compromised whatever value Ms Ngqumshe's purported identification of the appellant may have had". It accordingly held that, given the shortcomings in Ms. Ngqumshe's evidence, the evidence adduced on behalf of the state was unreliable and the conviction could not be sustained.
- [5] The considerations which persuaded the court of appeal to uphold Madini's appeal finds no application in the appellant's appeal. The evidence adduced in the court below revealed that the appellant was in possession of the firearm and that he was the focal point of everyone's

attention. That factor in my view negates any suggestion that the opportunity to make a positive identification was compromised. The incident was moreover not of short duration and these factors differentiate between the case of Madini and the appellant. Consequently I am unable to find that there is any room to interfere in the court below's factual findings.

- [6] Sentence is pre-eminently a matter which falls within the discretion of the sentencing court. Absent recognized grounds warranting interference with the sentence imposed, it stands. This was a brazen daylight robbery, not only with scant regard for the rights of others but with contemptuous bravura. The sentence imposed was commensurate with the crime and entirely appropriate.

In the result the following order will issue:

The appeal is dismissed.

D. CHETTY

JUDGE OF THE HIGH COURT

Da Silva, AJ

I agree.

A.M DA SILVA

ACTING JUDGE OF THE HIGH COURT

On behalf of the Appellant: Adv K. Govender

Grahamstown Justice Centre

69 High Street

Grahamstown

On behalf of the Respondent: Adv M. September

Director of Public Prosecutions

1 Act No, 71 of 1968

2 1972 (3) SA 766 (A) at 768

3 1999 (1) SACR 447 (W)

4 Luthando Madini v The State, Case No CA & R 186/2009

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