

SOUTH AFRICA / JUDGMENT

Sibeko and Others v S (A499/2016) [2017] ZAGPPHC 439 (10 August 2017)

[2017] ZAGPPHC 439

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse van Nieuwenhuizen, Rautenbach

CASE / FILE NUMBER

A499/2016

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IN

THE HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH

AFRICA

Case Number: A499/2016

10 August 2017

Not reportable

Not of interest to other

judges

Revised.

In the matter between:

GOODLUCK

BEHIKISISI SIBEKO

First

Appellant

DUMISANE

TWALA

Second

Appellant

MZWANDILE

MAWANGA

Third

Appellant

and

THE

STATE

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

On the evening of 25 March 2016, a truck with its cargo was taken by the three appellants from the lawful possession of the driver of the truck, Lawrence Mabaire (“Mabaire”). It is common cause that the first appellant was in possession of a firearm.

The three appellants were duly charged and convicted on a charge of armed robbery and sentenced to 15 years imprisonment.

The appeal is only against conviction.

The three appellants made certain admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977 (“the Act”) and further provided a plea explanation in terms of section 115 of the Act. In terms of the plea explanation, the appellants admitted that they took the truck from the lawful possession of Mabaire, but alleged that the crime was pre-arranged with a certain Jonas and that Mabaire was part and parcel of the arrangement.

The first and third appellants also, freely and voluntarily, deposed to a confession before a magistrate. These confessions were admitted as evidence in the State’s case.

The State presented the evidence of Mabaire to the effect that he was robbed at gunpoint of the truck and its cargo.

The appellants chose not to testify in their defence.

Conviction

The court a quo, having due regard to the cautionary rule applicable to the evidence of a single witness, accepted the evidence of Mabaire. Ms Maoke, counsel for the State, relying on *S v Hadebe* 1997 (2) SACR 641 SCA at 645 e-f, submitted that a court of appeal will only interfere with the factual and credibility findings of the court a quo, if there was a demonstrable and material misdirection.

In this instance, the appellants did not point to a demonstrable and material misdirection by the court a quo in the evaluation of the evidence of Mabaire.

Consequently, the State did establish a *prima facie* case against the appellants, which called for an answer from the appellants. As stated *supra* the appellants decided not to provide an answer to the State’s case.

It is trite that an accused may exercise his/her right to remain silent, not to testify and not to incriminate himself/herself. This right is entrenched in section 35(3)(h) of the Constitution of the Republic of SA Act, 108 Of 1996.

Such a choice does, however, have consequences as aptly stated by the Constitutional Court in *S v Boesak* 2011

(1) SACR 1 CC at 11 e-f, to wit:

“The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.” (own emphasis)

The plea explanation provided by the appellants does not constitute evidence and was not taken into account by the court a quo in considering the evidence in its totality. The second appellant's choice not to testify resulted in the prima facie case of the State becoming conclusive evidence against him at the end of the trial.

The test to be applied in respect of the first and second appellants is somewhat different. As alluded to earlier, they made confessions before a magistrate which confessions were submitted as evidence in the State's case.

The exculpatory portions of their confessions should therefore be taken into account in evaluating the evidence in totality. Having regard to their respective confessions, the first and third appellants deny that they had the necessary intention to commit armed robbery. In view of their prior arrangement with Jonas, their sole aim was to unlawfully take possession of the cargo and to sell it. Consequently, so the argument goes, they are at best guilty of theft.

I do not agree. The totality of the evidence points overwhelming to a clear intention to rob the truck and its cargo.

Ms Fraser, counsel on behalf of the appellants, lastly submitted that the court a quo erred in not having regard to the inherent improbabilities favouring the version of the appellants. Ms Fraser listed several improbabilities in her heads of argument and reiterated same in her address.

The court a quo was fully aware that in considering the version of the State and that of the defence, all probabilities should be taken into account. This much is clear from the following portion of the judgement:

“Die geskilpunte wat daar is het die staat bo redelike twyfel bewys dat die vragmotor van die getuie, Mabaire geroof was in omstandighede wat verswarend van aard was aldan nie of slegs het die staat net diefstal bewys. Om dit te kan bepaal moet die hof ook na die waarskynlikhede en onwaarskynlikhede van die beskuldigdes sowel as die staat se weergawe in oënskou neem en al twee weergawes in samehang met mekaar beoordeel.” (own emphasis) [Record, 181-182]

I am satisfied that the court a quo evaluated the probabilities and improbabilities in respect of both the version of the State and that of the appellants correctly.

In the result, the appeal against conviction must fail.

ORDER

The first, second and third appellant's appeal against conviction is dismissed.

N JANSE VAN NIEUWENHUIZEN J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

RAUTENBACH AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

Counsel for the Appellants: Advocate L Fraser (013 243 5964)

Instructed by: Legal Aid South Africa/

Counsel for the Respondent: Advocate BE Maoke

Instructed by: Director of Public Prosecutions

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