
SOUTH AFRICA / JUDGMENT

Skeyi and Another v S (A25/2021 SA 7/2021) [2021] ZAGPPHC 879 (22 December 2021) [2021] ZAGPPHC 879

COURT

North Gauteng High Court, Pretoria

BEFORE

Phahlane, Noncembu

CASE / FILE NUMBER

A25/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A25/2021

DPP

REF. NO: SA 7/2021

REPORTABLE: YES/NO

OF INTEREST TO OTHER

JUDGES: YES/NO

REVISED: YES/NO

DATE: 22 DECEMBER 2021

In

the matter between: ERNEST
SKEYI
1st APPELLANT
SIPHOSSENKOSI
MHLONGO
2nd APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

PHAHLANE, J

- [1] This is an appeal against both conviction and sentence imposed by the Oberholzer Regional Court on 27th November 2020. The appellants who were legally represented in the court a quo, were convicted for house breaking with the intent to steal and theft, and for possession of house breaking implements. They were sentenced to 15 years' imprisonment on the count of housebreaking and three months on the count of possession of house breaking implements. This appeal comes with leave granted by the court a quo on the same day of 27th November 2020.
- [2] It had appeared from the reading of the record that part of the evidence of the second State witness was not transcribed. Although this aspect was never raised during the appeal proceedings, both counsels have however raised the issue in their heads of argument. The question is whether the available record is sufficient for the court to adjudicate the appeal. In my view, the missing parts of the record are not of such a nature that the appeal could not be proceeded with. The common cause issues as well as the disputed issues which should be adjudicated on by this court are contained in the record before court. It was on this basis that this court was of the view that the appeal may be proceeded with, as the record at hand was sufficient to adjudicate the matter on.
- [3] This court will reiterate on what was said by Boshielo JA in *S v Engelbrecht*[1] when he pointed out that:

“Having read the transcript, I am unable to find any fault with the assessment of these witnesses by the trial court, which had the

advantage of seeing them testify and observing their reactions to questions during cross-examination. This gave the trial court an advantage which this court does not have as a court of appeal. In the absence of any misdirection by the trial court, I decline to interfere with such a finding”.

- [4] In *S v Chabedi* 2005 (1) SACR 417 the court held that:

“On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the hearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal, not that it must be perfect recordal of everything that was said at the trialThe question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.....” (emphasis added).

[5] Mr Moeng on behalf of the appellants argued that the appellants’ conviction was not in accordance with justice as their version was rejected as not being reasonably possibly true. The basis of this argument is premised on the explanation given by the appellants, which they tendered as an admission in terms of section 220 of the Criminal Procedure Act 51 of 1977 (“CPA”) that on the day of the incident, they were from Lover's Rock tavern in Welverdiend and were on their way to Phase 2 where they resided. They stated that they were walking on a foot path when they were confronted by security officers who took them to the Transnet Relay Room (ie. “the Relay Room”) and accused them of damaging that property. They further stated that the police were called and they were made to pick up transformers which were on the ground.

[6] Against this background, the State led evidence of, among others, Mr Kadi, who was employed as a security supervisor by Combined Private Investigations, and his colleague Mr Mofokeng, a security officer who was posted to guard the Relay Room. It is not in dispute that when Mr Kadi posted Mr Mofokeng and his colleague Mr Ditabe around 20:00 to keep observation at the Relay Room, he inspected the building and everything was in order. It is also not in dispute that the appellants were apprehended not far from

the Relay Room by both these witnesses.

[7] Mr Kadi testified that after receiving a call from Mr Mofokeng around 22:10 that two suspects have entered the Relay Room, he quickly rushed there for backup and upon arrival, he saw people getting out of the Relay Room and they gave chase. He managed to apprehend the second appellant and the first appellant was apprehended by Mr Mofokeng. They found two transformers and a black bag containing spanners and alarm detectors. This evidence was corroborated by Mr Mofokeng who testified that he called his supervisor after he spotted three men entering the Relay Room and thereafter the alarm went on and off, and ultimately went silent. He confirmed apprehending the first appellant and that both appellants were taken to the Relay Room where they found that the door was broken, and the police were called.

[8] In convicting the appellants, the trial court accepted that it was common cause that the appellants and the security officers were the only people in the area at the time the appellants were apprehended. The trial court also accepted the evidence of the appellants when they confirmed that they did not see anyone else around the area where the incident

took place or running away therefrom. Further that when the appellants were being chased, Mr Kadi and Mr Mofokeng had flashlights and never lost sight of the appellants. The court accepted that visibility was not in dispute based on the evidence that there was moonlight and lights illuminating in front of the Relay Room when the appellants entered. The appellants testified and denied any

involvement in the offences and stated that as they were walking towards the direction of the security guards, the security guards ran towards their direction and caught them. In rejecting this evidence, the trial court stated as follows: “Clearly, it was not necessary for security to run on the version of the accused, because the accused were already approaching the security”.

[9] It is trite law that a court appeal will not interfere with the trial court’s decision regarding a conviction, unless it finds that the trial court misdirected itself as regards its findings or the law[2]. As a court of appeal, this court must determine, as regards the conviction, what the evidence of the state witness was, as understood

within the totality of the evidence led, including evidence led on the part of the defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decision.

[10] Even so, there are well-established principles governing the hearing of appeals against findings of fact. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong[3].

[11] The appellants had in their notice of appeal stated that the trial court erred in holding that the State proved its case beyond a reasonable doubt against them, thereby rejecting their version as being reasonably possibly true. It is on this basis that Mr Moeng argued that the appellants’ conviction was not in accordance with justice as their version was rejected, and submitted that the trial court misdirected itself in convicting the appellants.

[12] To succeed on appeal, the appellants needed to convince this court on adequate grounds that the trial court was wrong in accepting the evidence of the State and rejecting their version as not being reasonably possibly true. The question whether trial court was

correct in finding that the State proved its case against the appellants requires the evidence of the State to be measured against

the evidence of the appellants. It is therefore imperative that in determining whether the accused’s version is reasonably

possibly true, and whether his guilt has been proven beyond a reasonable doubt, the court must consider the totality of the evidence before it, in order to come to a just decision[4].

- [13] It is the appellant's contention that a possibility existed that other people were in the Relay Room and fled when seeing the security officers, but unfortunately they were the ones found in the vicinity of the Relay Room. In this regard, Mr Moeng argued that it is possible but highly unlikely that the suspects would have just rushed to the Relay Room without observing the surroundings because the people who broke into the Relay Room were informed perpetrators who knew how to dismantle the alarm and remove the transformers. Mr Moeng further argued that there were material contradictions in the evidence of Mr Kadi in that he contradicted himself when he stated that he found two transformers on the scene and a black bag with spanners and detectors on the inside, and thereafter stating that he saw the second appellant throwing the bag whilst he was busy chasing him. He submitted that there was no corroboration in the evidence of the security officers, and as such, the State should have called Mr Ditabe who was in the company of Mr Mofokeng to testify as the available witnesses could not properly place the transformers on the scene.
- [14] In my view, this argument is misplaced. On the conspectus of the evidence as it appears on record, I am of the view that the trial court evaluated all the evidence before it and considered the probabilities and improbabilities inherent in the case. Having given proper and due consideration to all the circumstances, we agree with the finding of the trial court and we are of the view that the trial court did not misdirect itself in convicting the appellants. We also agree with the trial court's finding that the State proved its case against the appellants beyond any reasonable doubt.
- [15] In *De-Conceia, Castro Nora v The State*, case number A296/2016, paragraph 13, this court held that:
- "In this case the appellant's hurdle is a challenging one, because the magistrate analysed the evidence thoroughly and his analysis was based on the probabilities of the versions. It is true, as counsel for the appellant submitted, that the appellant is entitled to an acquittal if his version is reasonably possibly true. But it is often forgotten that the version of an accused is required to be reasonably possibly true, given the version put up by the state against the version of the accused, and particularly the strength of the state case. In other words, what is required is a consideration of all of the evidence put up – that by the state as well as that by the accused – and then the assessment must be whether the version of the accused is reasonably possibly true".*
- [16] With regards to sentence, it was submitted on behalf of the appellants that an effective term of fifteen (15) years imprisonment is strikingly inappropriate and induces a sense of shock as the sentencing court did not show any mercy to the appellants. It was further submitted that a lengthy term of imprisonment imposed is not in the best interest of the community and the appellants. On the other hand, advocate Pruis argued that the appellants were correctly sentenced and submitted that the sentence imposed was an appropriate sentence as the court took into consideration all the circumstances relating to sentence, as well as the personal circumstances of the appellants.

- [17] It is trite that sentencing remains pre-eminently within the discretion of the sentencing court. However, the appeal court must determine whether the sentence imposed on the appellants was justified. An appeal Court is therefore entitled to interfere with a sentence imposed where such a sentence is disturbingly inappropriate or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably[5].
- [18] The principle was well articulated by the Supreme Court of Appeal in the case of *S v Kgosimore*[6] when it held that:
- “It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and sentence the Court of appeal would impose. All these formulations, however, are aimed at determining the same thing, viz whether there was a proper reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis, this is the true inquiry. Either the discretion was properly and reasonably exercised or it was not. If it was, a Court of appeal has no power to interfere; if it was not, it is free to do so”.*
- [19] The personal circumstances of the appellants as placed on record reveals that they were both 27 years of age; both were employed,
- with the first appellant having worked for the same company for a period of seven years and supporting his family whom he was staying with, while the second appellant was employed for the same company for a period of nine years, and was supporting his minor children and his unemployed parents and siblings whom he was staying with. While the first offender had a previous conviction of dagga which his counsel argued that it was unrelated to the current offence and that he should be treated as a first offender, the second appellant had no previous convictions.
- [20] It is on record that the appellants were arraigned in terms of section 262(1) and 264 of the CPA which do not call for a prescribed minimum sentence to be applicable in case of a conviction. In her judgment, the Learned Magistrate stated that it has to be emphasised that the State preferred not to charge the appellants under the provisions of Act 105 of 1997 where the prescribed sentence would call for a minimum of 15 to 30 years’ imprisonment, depending on the previous convictions. Having pronounced that ‘the appellants are not to be visited with vindictiveness, but with humaneness, the Learned Magistrate also stated that the court will also take into account that the entire Welverdien area was without power for two to three days, and that one cannot be without electricity without serious implications.
- [21] It is on this basis that Mr Moeng argued, and correctly so, that the trial court erred in over-emphasizing the seriousness of the offences and the interest of society while the personal circumstances of the appellants were under-emphasized. He submitted that the sentence imposed left the appellants with no room of hope or being rehabilitated.

[22] A determination of an appropriate sentence which is just and fair must have due regard to the triad factors pertaining to sentence which includes a consideration of the personal circumstances of an accused person and a balancing effect as pronounced by the court in *S v Rabie*[7] that the sentence to be imposed should fit the crime; the criminal, and it must be fair to society.

[23] Having given proper and due consideration to all the circumstances, we are of the view that the sentence is startlingly inappropriate and unjust. The sentence imposed on the appellants is similar to the minimum sentence which would ordinarily be imposed under Act 105 of 1997. We are of the view that the Learned Magistrate misdirected herself in imposing an effective sentence of fifteen (15) years imprisonment on count 1, and that the interest of society would not be best served by sentencing the appellants to a term of fifteen (15) years imprisonment on count 1. Although Mr Moeng did not make out a case for a concurrence of sentences, we accept

that the offences are linked in terms of locality, time and the perpetrators. In the circumstances, the trial court should have made an appropriate order.

[24] In the circumstances, the following order is made:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.

The sentence handed down by the trial court on 27 November 2020 is set aside and substituted with the following sentence:

Count 1: Ten (10) years imprisonment

Count 2: Three (3) months

3. It is further ordered that the sentences are to run concurrently in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 (the CPA)
4. The sentence is antedated to 27 November 2020 in terms of section 282 of the CPA

PD. PHAHLANE

JUDGE OF THE HIGH COURT

I agree,

NONCEMBU, AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellants

: Mr. S. Moeng

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For the Respondent

: Advocate C Pruis

Instructed by

: Director of Public Prosecution, Pretoria

Date of hearing

: 10 August 2021

Date of delivery

: 22 December 2021

[1] 2011

(2) SACR 540 (SCA) at para 18

[2] R v Dlumayo and Another 1948 (2) SA 677 (AD) at 705-6.

[3] See: S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f; S v Monyane and Others 2008 (1) SACR 543 (SCA) at para 15; and S v Francis 1991

(1) SACR 198 (A) at 204e.

[4] See: S v Trainor 2003 (1) SACR 35 (SCA) at 9; S v Chabalala 2003 (1) SACR 134 (SCA); S v Van der Meyden 1999 (1) SACR 447 (W); also: S v Van Aswegen 2001 (2) SACR 97 (CSA) at para 8; S v Shilakwe [2011] ZASCA 104; 2012 (1) SACR 16 (SCA) para 11

[5] S v Salzwedel 1999 (2) SACR 586 (SCA) at 591F-G.

[6] 1999

(2) SACR 238 (SCA)

[7] 1975

(4) SA 855 (A).

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