

SOUTH AFRICA / JUDGMENT

Suka v S (CA&R 395/03) [2011]

ZAECGHC 17 (12 May 2011)

[2011] ZAECGHC 17

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Y Ebrahim, R Griffiths

CASE / FILE NUMBER

CA&R 395/03

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IN THE

EASTERN CAPE HIGH COURT, GRAHAMSTOWN

CASE NO: CA&R 395/03

In the

matter between:

LUVUYO

SUKA

.....Appellant

and

THE

STATE

.....Respondent

JUDGMENT

Y EBRAHIM J:

The appellant and a co accused were arraigned in the Regional Court for the Regional Division of the Eastern Cape, held at Elliot, on two counts, namely murder and robbery. The appellant's co accused was acquitted on both charges while the appellant was convicted of culpable homicide and robbery simpliciter and sentenced on 21 February 2002 to terms of imprisonment for thirteen years and seven years respectively, which were to run consecutively.

It has taken virtually ten years for the appeal to be heard on 26 January 2011. The reasons for this extraordinary delay appear from the affidavit of the appellant in support of the application for reinstatement of the appeal. Although the appellant had legal representation at the trial in the

court a quo he did not note an appeal timeously against his conviction and sentence. He has ascribed this to a lack of funds to pursue an appeal. Sometime later relatives assisted the appellant and instructed an attorney, Mr M Pangwa, who lodged a notice of appeal and an application for condonation on 19 September 2002. For reasons which have not been disclosed the appeal was set down for hearing only on 24 March

2004. On 17 March 2004 Mr Pangwa filed a notice withdrawing the appeal 'because of an insufficiency of instructions.' The appellant asserts that Mr Pangwa withdrew as his attorney and did not file Heads of Argument as his relatives were unable to pay the requisite fees to prosecute the appeal to its conclusion. On 24 March 2004 the appeal was struck from the roll. The appellant's relatives assisted him once more and instructed attorneys, L Qinga and Partners. The appeal was then re enrolled for hearing on 26 September 2007 but again a lack of funds resulted in the appeal being removed from the roll on 23 August 2007.

The appellant has indicated that Mr Pangwa informed him in 2002 that he could approach the Legal Aid Board to assist with his appeal. He decided against this as he considered a private law firm would render better legal services than the Legal Aid Board which rendered services free of charge. He eventually realised this not to be the case and sought the assistance of the Legal Aid Board. The appeal was then enrolled for hearing on 26 January 2011. It is apparent, but for the appellant's misguided opinion that legal services provided by the Legal Aid Board were not of a similar professional standard as that rendered by a private law firm, that the appeal could have been heard on 24 March 2004, if not sooner. Even if the appellant may have been disadvantaged by a lack of funds the alternative of engaging the services of the Legal Aid Board at no cost to himself was available. I recognise that the appellant was very young at the time and dependant on his father, both for financial assistance and advice, but he cannot blame anyone else for the decision not to approach the Legal Aid Board for assistance. As regrettable as it is, he cannot evade responsibility for the appeal not having been finalised at a much earlier date including the resultant adverse consequences the delay has had for the appellant. Needless to say, the respondent carries no blame for this unfortunate state of affairs.

Mr De Jager, who appeared for the appellant, applied for the appeal to be re instated on the roll and for condonation for the failure to file a Notice of appeal timeously. He further applied for condonation for the late filing of the Amended Notice of Appeal and for condonation for failing to file Heads of Argument within the time limits prescribed by the Rules of the Court. Ms Hendricks, who appeared for the respondent, did not oppose the applications and the orders sought by the appellant were granted.

I turn now to the merits of the appeal. After hearing argument we reserved judgment. We duly deliberated on the merits of the appeal and reached the conclusion that the appeal against the appellant's conviction for culpable homicide had to be upheld and that the conviction for robbery simpliciter had to be set aside and substituted with a conviction for theft of the motor car. Further, since the appellant had served a period of imprisonment in excess of what was appropriate for theft of the nature he had perpetrated we deemed it appropriate that the

appellant not remain incarcerated any further and on 1 march 2011 ordered that he be released immediately. The following are the reasons for upholding the appeal on the aforesaid basis.

In the trial in the court a quo three witnesses testified regarding the incident when the deceased was dispossessed of her BMW motor vehicle. Of the three, only the witness, Magdalena Gertruida Christina Schutte, witnessed the incident or, more correctly, saw some part of it. She testified that it was sunset when she was on the stoep of a school and was unlocking a door when she heard a terrible scream. She turned around and saw a car driving off. It appeared it had driven over a stone or something else. She ran to the street and saw a person lying on the ground – it was Mrs Botha (the deceased) – who was screaming repeatedly that they had driven over her legs. She waited until a doctor arrived and examined the deceased. She confirmed she had seen a person outside the car, at its window, but had not seen the deceased being knocked down.

The two other witnesses related to the court what the deceased had told them about the incident. Inspector Gustav Spann, the investigating

officer, testified that he interviewed the deceased at her home. She told him that she had parked her car next to a pavement and alighted, leaving the keys in the ignition and the boot open. She was picking berries growing on the pavement when two men passed by. She did not pay attention to them but then heard the car's engine starting up and went to the car. One of the men was in the driver's seat. She implored him not to steal the car but he ignored her and the other individual ran away. Suddenly the man drove off and knocked her down and drove over both her legs.

It is unclear when Inspector Spann spoke to the deceased but it was probably a day or two after the car was stolen as she died three days after the incident. There is no indication if Inspector Spann procured a written statement from her or wrote down what she was telling him. I assume Inspector Spann must have been aware of the need to record in writing the deceased's account of what had happened to her. A written statement from the deceased may have provided a clearer picture of events instead of Inspector Spann simply relying on his memory of what was said to him. Whether one existed or not was never explored by the State or the defence, thereby depriving the court of the benefit of what may have been a more reliable account.

The deceased's husband, Philip Johan Botha, when asked by the prosecutor if his wife had told him in detail how she was robbed of the car, replied, 'Well somebody grabbed the keys out of the boot of the car and jumped in the car and rode away.' Replying to further questions he said the person had driven over her legs and she sustained a number of bruises on her legs and could not walk. This, it appears, was the sum total of what the deceased said about the incident and what he observed of her injuries.

Inspector Spann's account, and that of the deceased's husband, of what the deceased had told them was hearsay evidence and the learned Regional Magistrate determined it was in the interests of justice to admit this evidence. What the deceased had related to them was consequently admitted in evidence.

There are differences in the respective accounts of the deceased's husband and Inspector Spann of what the deceased disclosed to them. According to her husband she told him the keys were in the boot [lock] whereas Inspector Spann stated she said it was in the ignition. Then, while she told Inspector Spann the boot was open it appears she did not tell her husband this. It is clear that she did not tell either of them where she was standing when the individual (who I am satisfied the evidence established was the appellant) drove off with the car. She also did not tell them how it came about that she was knocked down. The only indication of her position, in relation to the car, emerges from the evidence of Ms Schutte who said that she had seen someone outside the window of the car. It is apparent this person was the deceased since she told Inspector Spann that she went to the car when she heard the engine starting up and had implored the person behind the steering wheel not to steal her car. Ms Schutte then observed the car driving off and saw the deceased lying on the ground when she went nearer. There is thus no evidence that the deceased was in front of the car or in its immediate vicinity when the thief drove off.

In regard to what transpired thereafter, all we know is that when the car moved off the deceased fell down and the car's wheels went over both her legs. The post mortem report and the testimony of Dr G R Christiane, who treated her after the incident, do not reveal that the deceased sustained any injuries consistent with having been knocked down by a motor vehicle. The prosecutor, it appears, did not deem it necessary to obtain clarification regarding this and it appears that the appellant's legal representative was content to leave this aspect uncertain. Regrettably, the court did not seek clarification either. The effect of this is that the medical evidence does not assist in resolving whether the deceased was knocked down or had fallen down for some other reason.

The Regional Magistrate held that the deceased 'tried to prevent him [the appellant] moving off with the vehicle and he had overcome this by simply driving her out of the way [sic], so force was used to obtain final control of this vehicle and I am therefore satisfied that he makes himself guilty of robbery'. The evidence, in my view, does not support the conclusion that the deceased physically tried to restrain the appellant or held onto the car in an attempt to prevent him from driving off and was then deliberately knocked down. The fact that she told Inspector Spann that the person knocked her down does not on its own, in the absence of any corroborative evidence, warrant

the conclusion that it was a deliberate act on the part of the appellant. It should be remembered that Ms Schutte, who related

what she had observed, clearly said that she did not see the deceased being knocked down. In the final analysis, one can only

speculate on what may have happened but the evidence does not support the trial magistrate's conclusion that 'force was used to obtain final control of this vehicle'.

I am of the view that the evidence manifestly does not establish that the appellant had the intention to kill the deceased. The Regional Magistrate, correctly, reached the same conclusion. But, in holding that the appellant 'should have then foreseen that he could have injured her or

run her over to the extent that she could have died as a result of that,' the Regional Magistrate misdirected himself. This line of reasoning was not supported by the proven facts. In the absence of evidence that cast a light on what happened at the time that the deceased was next to the vehicle there was no factual or legal basis for holding that the appellant had acted negligently and that a reasonable man would not have driven off in those circumstances. The Regional Magistrate, therefore, erred in finding that the evidence established that the appellant was guilty of the offence of culpable homicide.

I need to mention, in passing, that the deceased's refusal to be hospitalised and her decision to be treated at home, as

Dr Christiane testified, despite the serious nature of her injuries was ill advised. Given the risk of blood clots forming I would have thought it far better that she be treated in a hospital and not at home. Unfortunately, we shall never know. In view of the decision I have reached on the facts I do not pursue this any further.

The appellant's assertion that he was innocent of the theft of the car was rightly rejected by the trial magistrate as false. He told an implausible and convoluted tale, riddled with improbabilities, of how he came to be involved with the vehicle. All this, it would appear, happened a few hours after the vehicle was stolen. The gist of it was that he was hitch hiking from Elliot to Umtata and obtained a lift from Sandiso Nxadala and Xola Ntoyaphi in a BMW motor car. On leaving Engcobo the car broke down and Sandiso told him and accused no. 2 to look after the vehicle while he went to fetch a mechanic. They waited awhile but Sandiso did not return. He managed to get a vehicle to stop and asked the men to tow the car to Engcobo. They wanted R200,00 and at Engcobo he gave them R50,00, provided by accused no. 2, and asked them to wait for the owner who would pay the rest. The men became angry and he went to telephone Sandiso who told him to get them to tow the car to Gauteng taxi rank. They did so but when Sandiso did not arrive the men threatened to shoot them. He was afraid and offered two wheels of the car as security, which they accepted. He and accused no. 2 tried to telephone Sandiso again but could not do so as the public telephones operated with a card and not coins. While waiting for Sandiso a man tried to dispossess accused no. 2 of his cellphone and they sought help from security officers. The man said he had not been paid for towing the car and the security officer suggested they go to the police station and then took them there. After explaining what had happened a policeman said they had to go to the car. On arrival the policeman asked why two of the wheels were missing but rejected his explanation. They returned to the police station where they were questioned, assaulted and locked in a cell. The following morning three policeman arrived and they were taken to the Elliot police station.

Ms Hendricks submitted that the Court should not uphold the appellant's appeal against the conviction for robbery. She contended that the appellant's intention to steal the car changed to an intention to rob when he sought to thwart her resistance to his taking the vehicle. Her submissions were predicated on the factual position being that the deceased had tried to restrain the appellant. However, this was not the evidence. Apart from the deceased having told Inspector Spann that she asked the thief not to take her car, there is nothing else that supports a factual

position as contended by Ms Hendricks. The second leg of her argument was that the appellant drove over the deceased's legs in order to end her resistance to his taking the vehicle. The proved facts certainly do not establish this nor do they permit the deduction Ms Hendricks has made. As I have stated previously, what the evidence shows is that at one stage the deceased was standing next to the car and that the car then went over her legs. We can only speculate on how this may have occurred but there are insufficient facts to justify the

conclusion

that this was a deliberate act on the part of the appellant to counter resistance by the deceased. More importantly, at the time the vehicle went over the legs of the deceased, the appellant had already acquired control of the vehicle. I do not find merit in the submission by Ms Hendricks that the scenario postulated by the then Appellate Division in the case of *S v Yolelo*¹ is applicable to the proved facts in the instant matter.

I am of the view that the evidence adduced by the State failed to establish all the necessary elements of robbery. In finding the appellant guilty of robbery the Regional Magistrate erred. The evidence does, however, establish beyond a reasonable doubt that the appellant committed the crime of theft.

In the circumstances, the appellant's appeal against his conviction for culpable homicide and sentence should succeed. Further, the appellant's appeal against his conviction for robbery should also succeed but only to the extent that the conviction be substituted with a conviction for theft. It follows, too, that the appeal against sentence imposed for robbery should be set aside and substituted with an appropriate sentence for theft of the motor car.

On the sparse information placed before the trial court it is difficult to establish the correct age of the appellant. In the charge sheet his age is recorded as eighteen years but when he testified he said he was seventeen years old. When cross examined by his co accused's legal representative he stated he was born on 22 August 1983 and would be eighteen years old in August 2002. It was pointed out to him that he would in fact be nineteen years old, to which he replied that it was possible. If the appellant indeed provided his correct date of birth, it appears he was only sixteen years and six months old when he committed the theft. On the available evidence the appellant was most certainly under eighteen years of age and, therefore, a juvenile when he committed the theft. Given this, the appellant should not have been sentenced without a pre sentencing

report having been obtained from a probation officer. Inexplicably, neither the court nor the appellant's legal representative or the prosecutor requested one. The Regional Magistrate noted that the appellant was approximately sixteen years old when he committed the crime(s) but nevertheless proceeded to impose sentence without the necessary report and any recommendations that the probation officer may have made. The difficulty now confronting this Court regarding sentence for the theft is that no purpose would be served in remitting the matter back to the trial court so that a pre sentence report may be obtained and sentence considered afresh. Whatever such a report may have produced, whether to the benefit or detriment of the

appellant, is of no import now as he has been imprisoned for nine years, prior to his release in terms of our decision of 1 March 2011. This apart, it appears to me the appellant conducted himself not as an immature young person but as would an adult when he embarked on his criminal escapade. He seized the opportunity of stealing the vehicle when it presented itself without giving it a second thought. He thereafter embarked on a joyride that ended in the vehicle being damaged beyond repair. According to Mr Botha the costs of repairs exceeded the value of the vehicle. Further, even though the appellant has avoided being held criminally responsible for the death of the deceased he cannot escape moral blameworthiness for her demise. His conduct is deserving of severe punishment.

On considering all the circumstances and, had I sat as a Court of first instance, I would have imposed a sentence of six years imprisonment which, in my view, meets the demands of the case. The fact that the appellant will not gain any benefit from the reduced sentence is, as I have stated previously, entirely of his own making.

In the result there is an order in the following terms:

The appellant's conviction for culpable homicide and the sentence imposed are set aside; The appellant's conviction for robbery and the sentence imposed are set aside and substituted with a conviction for theft; and

The appellant is sentenced to a term of imprisonment for six (6) years, which is antedated to 21 February 2002.

Y EBRAHIM

JUDGE OF THE HIGH COURT

I agree

R GRIFFITHS

Heard on: 26 January 2011

Judgment

delivered on: 12 May 2011

For the appellant: A De Jager

For the respondent: S Hendricks

SUKA v THE STATE.APJ

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(1) SA 1002 (A) at 1015CH

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