

SOUTH AFRICA / JUDGMENT

Tatz v S (A272/2017) [2018] ZAFSHC 113 (5 July 2018)

[2018] ZAFSHC 113

COURT

Free State High Court, Bloemfontein

BEFORE

Q Nulliah, M.H. Rampai, P.E. Molitsoane

CASE / FILE NUMBER

A272/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

Case No: A272/2017

In

the appeal between:

TSHWANELO

TATZ

and

THE STATE

Appellant

Respondent

CORAM:

RAMPAI J, MOLITSOANE J, et NULLIAH, AJ

JUDGMENT

BY: NULLIAH AJ

HEARD ON: 26 FEBRUARY 2018

DELIVERED ON: 5 JULY 2018

- [1] These are appeal proceedings. The appellant, in the court a quo, was convicted and sentenced on a charge of robbery with aggravating

circumstances and murder. He was tried with Mr. Lebohang Mosia. The latter is not before us on appeal. He was aggrieved by his

convictions and sentences – hence the appeal. He comes on appeal with leave of the trial court.

[2] The appeal against both of the convictions is premised on the grounds that the trial court erred in the following respects:

Firstly, by failing to approach the evidence of Mr Lipholo, the accomplice, with the necessary caution; secondly, by failing to treat the evidence of the same witness with caution seeing that he was a single witness; thirdly, by rejecting the version of the appellant, which version was reasonably true and fourthly and lastly, by finding that the respondent had proved its case against the appellant beyond a reasonable doubt.

[3] The late Taole Hosea Masienyane, hereinafter, referred to as the deceased, was employed by his brother in Bloemfontein as a taxi driver. He was on duty in the city during the night of 27th November 2015. The next morning he was reported missing. The taxi was traced by the crew of Netstar at Meloding, Virginia

later the same morning. The trackers and the police spotted the taxi in the vicinity of a certain service station where the seller, in other words the accomplice, and the prospective buyer of the taxi, one Mr Naidoo, had arranged to meet. When the occupants of the taxi saw the police, the taxi sped away. The police and the trackers pursued the fugitive taxi and forced it to stop.

[4] There were four occupants found in the taxi. Among them were the appellant and Mr Lipholo. The victim was not one of the

occupants. The four suspects were apprehended by the police with the aid of the trackers. The police searched the suspects. One cellular phone was found in the possession of the appellant another in the possession of Mr Mosia. The two phones were later positively identified as that of the victim and his employer. At the time the suspects were arrested, the taxi was driven by the accomplice, Mr Lipholo.

[5] The suspects were questioned about the whereabouts of the victim. Acting on the strength of the information they obtained from the accomplice, the police proceeded to Farm Pitsalong district Koffiefontein. There the victim was found floating in the river, his upper limbs were handcuffed. He was already dead when found.

[6] Initially the three gentlemen, Mr Lipholo, Mr Mosia and Mr Tatz, were jointly charged. However, they were not jointly prosecuted seeing that Mr Lipholo pleaded guilty whereas his two co-accused pleaded not guilty. In view of the pleading patterns, the trials were separated in terms of section 157 of the Criminal Procedure Act, Act No 51 of

1977. Mr Lipholo was subsequently convicted on his plea and sentenced.

[7] In a separate trial of the appellant and Mr Mosia, Mr Lipholo testified against them. In brief his testimony was as follows:

One Mr Naidoo propositioned him to procure a motor vehicle for someone. The prospective purchaser was prepared to pay R30 000. The understanding was that he would have to steal a car. Following that agreement to steal, he proceeded from Virginia to Bloemfontein on 27 November 2015. He whiled away time at Pitseng Tavern. He told the appellant and his co-accused about his mission. He did not thereby recruit them. He decided to go to the Tourism Centre for the purpose of executing the stealing plan.

[8] On their own accord, the appellant and his companion volunteered to go with him. On their arrival the appellant identified a taxi. They approached the taxi driver under the pretext that they wanted to be taxied to Kellysview on the western outskirts of the city. On the way they turned against the victim, overpowered him, handcuffed him, dispossessed him of the taxi, placed him in the boot of the taxi, took control of the taxi and drove away. On the way the appellant mooted out the idea that the victim be killed in order to permanently silence him. He was against the idea. They ultimately stopped at a secluded spot on the farm Pitsalong district Koffiefontein. There the appellant and Mr Mosia took the victim out of the car. Instead of releasing him they marched him on a lonely footpath down to the river. He was still handcuffed.

He remained behind in the car.

[9] Upon their return from the river to the car, he established from them that they had thrown the victim into the river at the weir. He confirmed that he realized that his companions had intended throwing the victim into the river and that he appreciated that the victim would inevitably drown.

[10] He testified further that they then drove from Koffiefontein to Virginia in order to meet one Naidoo and to deliver the car to him. At Virginia he drove around in search of Mr Naidoo. All along the accused were with him. They were arrested at Virginia before they met the Mr Naidoo. He voluntarily accounted to the police how the incident unfolded. He was aware that cellular phones were handed in at the police station but he was uncertain as to whom they belonged.

[11] The appellant denied the above account given by the accomplice. He specifically denied the allegations that the witness knew him; that he accompanied the witness to the Tourism Centre; that he participated in the "hijacking" of the victim there; that he travelled in the same car with the victim to Koffiefontein; that he came up with the idea that the victim be killed; that he participated in the actual throwing of the victim into the river; that he travelled from Koffiefontein to Virginia with the accused. In short he strongly denied any involvement in the entire episode.

[12] He asserted that he met the witness, Mr Lipholo, at Pitseng Tavern on the night in question; that they were strangers to each other; that he was employed at the particular tavern; that he asked the witness to give him a lift because he was going to Welkom; that they left Bloemfontein at or about 03h00 on 28 November 2015; that they arrived at Virginia at or about 07h00; that they spent some time at Virginia with the witness because the witness was

looking for someone before he could take them to Welkom; that they were arrested at Virginia and that a Nokia Hasha cellular phone was found in his possession by the police; that he picked such phone up in the witness's car, a white Renault Sandero.

[13] The following facts appear to me to be common cause:

13.1 That the victim was robbed of the motor vehicle;

13.2 That he was found floating in the Riet River on the farm Pitsalong district Koffiefontein the next day;

13.3 That fairly shortly after the victim had been robbed and thrown into the river, the appellant, the witness, Mr Lipholo, were apprehended together with two other suspects at Meloding Virginia; That they were all occupants of the taxi, the victim was using before he went missing and

13.4 That the appellant was found in possession of a cellular phone (exhibit 2) belonging to the victim.

[14] The dominant and central core of the grounds of appeal indicates that the issue on appeal was whether the version of the appellant was reasonably true or not. On the one hand Mr Nel, counsel for the appellant, urged us to determine the issue in favour of the

appellant. On the other hand Ms Moroka, counsel for the respondent, implored us to determine the issue in favour of the respondent.

[15] It is a well-established principle that the onus is on the state to prove the guilt of an accused beyond a reasonable doubt. It is also accepted that there exists no burden on the accused to prove his innocence. The version of the accused only has to be reasonably true or possibly true - as some would prefer to say. [S v V 2000(1) SACR 453 (SCA); see also S v Van den Meyden 1999 (10) SACR 447 (W)]

[16] In arriving at its conclusion, it is accepted that "[t]he correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities on both sides, and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt" (S v Chabalala 2003(1) SACR(134(SCA) at 139 i- j

[17] In attacking the finding of the court a quo it was contended on behalf of the appellant that the trial court failed to approach the evidence of Lipholo, who was both a single witness and an accomplice with the necessary caution regarding the robbery and murder.

[18] A conviction may follow on the evidence of a single competent witness. Such evidence should, however, be approached with caution.[

See Stevens v S 2005[1] All SA 1 (SCA); S v Sauls and others 1981(3) SA 172(A) at 180E-G].

[19] As alluded to above, the evidence of Lipholo had to be approached with caution not only because he was a single witness but also because he was an accomplice inextricably involved in the commission of these offences.

[20] The trial judge's evaluation of the evidence indicates that she was alive to the fact that the witness, Mr Lipholo, was a single witness to the commission of the crimes and that she was further alive to the applicable cautionary rule. The record also clearly shows that the trial court scrutinised Lipholo's evidence with utmost caution seeing that he was also an accomplice in the execution of the offences. It is also patent that the trial court was indeed sentient to the fact that an accomplice may be predisposed to fashioning his evidence to suit his purpose.

[21] In considering the reliability of the evidence given by an accomplice, the ultimate test, after cautious consideration of such

evidence, is whether the trial court is beyond reasonable doubt satisfied that the story told by an accomplice, in its essential

features, is true notwithstanding its apparent shortcomings. *S v Francis* 1990(1) SACR 998 (A) at 205f.

[22] The trial judge was impressed by the accomplice as a witness. She evaluated him as follows, albeit from a negative angle:

"..... Mr Lipholo did not make an unfavourable impression on me in the witness stand. He spoke confidently, did not evade questions and gave a clear exposition of the events that unfolded before and on the 27 and 28 November 2015 in the planning and execution of the alleged crimes."

It is clear, therefore, that the trial court made positive credibility findings in respect of Lipholo. We are bound by the credibility

findings made by the trial court unless such findings are clearly wrong. [See *J v S* All SA 267(A) at 271(C)] I can find no reason whatsoever to depart from the credibility findings made by the court a quo. I am not persuaded that the trial court committed any material misdirection in considering the evidence of Mr Lipholo as an accomplice or as a single witness. Consequently the first and the second grounds of the appeal were devoid of any substance.

[23] The trial court correctly found Lipholo's evidence to be satisfactory in material respect to the extent that his evidence

disclosed that he acted in concert with the appellant in furtherance of a common criminal enterprise. The salient aspects of the witness' evidence demonstrated that he readily admitted he masterminded the plan and that he spontaneously admitted his involvement in the entire criminal venture to the police. It was indeed so that, at one stage he tried to diminish the extent of his participation. However, that untruthful aspect of his evidence and others did not render his entire evidence about the involvement of the appellant untrue.

- [24] Contrary to the contention that his evidence was improbable and that it stood to be rejected on that basis alone, there was no substance in the submission. It was indeed so that the accomplice first drove to Koffiefontein in the opposite direction to Virginia where the car had to be ultimately delivered. In my view there was nothing improbable about that. On the face of it that might well have seemed strange but he explained why he drove the other way. He was looking for a safe place where he could get rid of the highly incriminating cargo in the boot. He knew the Koffiefontein route better than the Virginia route. Moreover, that particular route was quieter than the route to Virginia. His plan was to drop the victim as far as possible from Virginia where he was going to deliver the car. The farmers who were patrolling the rural roads at Petrusburg made it unsafe and unwise to drop the victim there. Those then were the reasons why he dropped the victim on a remote farm on the other side of Koffiefontein on the road to De Aar.
- [25] As the victim was marched down the footpath towards the river, the witness knew that his life was delicately hanging in the balance. The victim was in great danger of being killed. Notwithstanding his knowledge and appreciation of the possible deadly consequences, he did nothing of any practical significance to avert such danger. By doing nothing to save the victim's life, he tacitly associated himself with the appellant's plan to kill. Although he did not actually push the victim into the river to drown him to death, he participated in his killing. The principle of *commisio per omissionem* applies. His conviction on a charge of murder was grounded on this legal foundation.
- [26] The conviction and sentence generally reduce the possible risk of the temptation on the part of an accomplice to underplay the extent of his criminal role at the expense of another in the hope that he would be benevolently rewarded.
- [27] On the other hand the version of the appellant was saturated with contradictions and improbabilities. His evidence that he was working on the night in question is contradicted by the owner of the tavern where he alleged that he was working at the time of incident. According to the tavern owner he was no longer in his employment at the time of this incident. It is noteworthy that the tavern owner corroborated the accomplice, Mr Lipholo in that regard. The appellant wanted the trial court to believe that the witness stole the car in Bloemfontein; that he travelled a considerable distance to Koffiefontein and that he then drove back to Bloemfontein only to have some alcoholic beverages at a tavern. The allegation was very improbable.
- [28] According to the appellant, they departed from Bloemfontein at 03h00 and travelled straight to Virginia where they arrived at 07h00. The evidence also stands to be rejected. It was highly improbable they would have travelled for 4 hours to cover the distance. A thief or a robber driving a stolen car would most certainly not have driven at a snail's pace on the road.

- [29] The version of the appellant was that he picked up the cell phone in the vehicle driven by Lipholo. It is not in keeping with ordinary human experience for people to give valuable gifts to strangers. Since the driver did not give the phone to him, after all they were strangers to each other; the appellant thereby implicitly acknowledged that he stole from the driver, Mr Lipholo. Now stealing was what this case was all about. Obviously if he could steal from the kind driver who had agreed to give him a lift free of charge, he would not hesitate to steal from any other stranger such as the victim. That was precisely what Mr Lipholo said they collaboratively did. The appellant's self-incriminating evidence, therefore, tended to corroborate the evidence of the witness that he was involved when the victim was robbed.
- [30] It must be borne in mind that the occupants of the victim's car were arrested at or about 14h35. In other words, the appellant spent about hours at Virginia with Mr Lipholo, a highly implicated man, a self-confessed robber who was a total stranger to him. The length of time he spent with the driver strongly militates against his claim that he did not have any previous knowledge of the driver who gave him a lift. On the contrary the time he alleged they arrived at Virginia was consistent with the evidence of the driver save that according to the driver they were from Koffiefontein and not Bloemfontein. From all these considerations, it can be fairly deduced that the appellant falsely tried to distance himself from the witness. The finding of the trial court that the appellant's version was not possibly true is one which cannot be objectively disturbed on appeal.
- [31] When the police emerged on scene the driver sped away. There was no evidence that the appellant ever confronted the fugitive driver as to why he was speeding away from the police. It does not seem to be unfair to impute guilty knowledge from his conduct. Therefore, it can be adversely deduced that he condoned the abortive attempt to flee because he knew his hands, just like those of the driver, were not clean. He knew they had something to hide. We know the driver wasted no time to throw in the towel. He spontaneously acknowledged the crimes to the police. On the contrary, the appellant did not spontaneously give his exculpatory explanation to the police - not that he was obliged to do so. However, it generally recognised that spontaneous explanations often have the hallmarks of been potentially true or reliable.
- [32] On behalf of the appellant, Mr Nel submitted that the version of the appellant was reasonably true and that the court a quo erred in rejecting it. The submission was in line with the third ground of appeal. I am satisfied that the version of the appellant was correctly rejected by the court a quo. Hardly a day after the victim had been robbed, the appellant was found in his stolen car. He was a passenger. Above that, he was also found in possession of the victim's cellular phone. As if that was not enough, another cellular phone belonging to the victim's employer was found in the possession of another passenger. Unlike the driver whose relationship was disputed by the appellant, the latter passenger was admittedly the appellant's friend. All these considerations were telling against the appellant.

[33] When a person is found in possession of recently stolen goods, (s)he is presumed to have acquired such possession through direct

participation in the actual stealing of such goods unless (s)he can give a reasonably innocent explanation for the possession of such incriminating goods. *S v Rama* 1966(2) SA 395 (AD) at 400C-D per Rumpff CJ. Applying the doctrine of recent possession to the facts in this instance, it cannot be convincingly argued that the appellant has rebutted the legal presumption. If that is the case, then the inevitable conclusion must be that his exculpatory version was not reasonably true. Therefore, the appeal cannot be upheld based on the third ground of the appeal.

[34] The evidence justified the following findings:

That the appellant and the accomplice knew each other before the incident; that the appellant accompanied the accomplice to the Tourism Centre ; that he initiated the attack by throttling the victim on the way to Kellys view; that he participated in the “hijacking” of the victim; that he, together with the accomplice, took the victim to Koffiefontein; that the accomplice did not initially contemplate the killing of the victim; that the idea of killing the victim came from him; that he robbed the victim of his cellular phone; that he actively participated in the actual throwing of the victim into the river and that the accomplice was not involved the execution of that final actus reus.

[35] Consequently the conclusion of the court a quo that the evidence as a whole established the guilt of the appellant beyond a reasonable doubt appears to be correct. I am not persuaded that a case has been made out to justify any interference with that conclusion. In the absence of any material misdirection, the appellant’s conviction in respect of each charge has to stand.

[36] The grounds of appeal with regard to sentence can be summarised as follows:

36.1 The trial court erred by failing to find the existence of substantial and compelling circumstances;

36.2 It erred by not aligning the sentence of the appellant with the sentence imposed on Lipholo;

[37] It is trite that a court of appeal will only in limited circumstances interfere with a sentence .It is also fundamental law that sentencing is pre-eminently the terrain of the trial court. The appellate court should be extremely reticent to usurp and interfere with such discretion unless it is convinced that it was not exercised judicially and properly or there exists a marked disparity between the sentence imposed by the trial court and the sentence that the court with appellate jurisdiction would have imposed had it been the trial court.

[38] The court in *S v Malgas* 2001(1) SACR 469(SCA) at 478 d-h said the following:

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates the exercise of that discretion, an

appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses the sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can be that it properly be described as 'shocking', 'startling', or 'disturbingly inappropriate'.

It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation, it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may only do so where the difference is so substantial that it attracts epithets of the kind I mentioned.”

[39] The offences that the appellant has been convicted fall within the ambit of s51 of the Criminal Law Amendment Act 105 of 1997. The court is obliged to impose the prescribed minimum sentences unless the court finds that there are substantial and compelling circumstances

warranting it to deviate the said prescribed sentences. [see s51(3) of Act 105 of 1997].

[40] It is putative that the ultimate impact of all the circumstances relevant to sentencing must be such as to cumulatively justify a departure from the prescribed minimum sentence. A careful reading of the sentence reveals that the trial court could not find the existence of substantial and compelling circumstances.

[41] With regard to the personal circumstances the court into account that the appellant was 30 years old at the time of his sentencing. That he was unmarried with no children to support. He did grade 10 at school and was unemployed. That he had been in custody for a period of 18 months at the time of sentencing.

[42] With regard to the period spent in prison prior to sentencing the trial court correctly pointed out that this factor was but one of the factors to be taken into account in balancing 'all the mitigating and aggravating factors in order to come to a just sentence.' The period spent in detention is but one of the factors that the sentencing court should take into consideration "in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed"- See *S v Radebe and Another* 2013(2) SACR 165(SCA).

The SCA proceeded further at [14] as follows:

Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention....(T)he test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentence, is a just one”.

[43] The period spent in detention is, therefore, but one of the factors to be taken into account in assessing if substantial and compelling circumstances exist to deviate from the prescribed sentences. The trial court took into account that the appellant acted in concert with Lipholo and the former co-accused in furtherance of a common purpose. It took into account the fact that the suggestion to kill emanated from the appellant. It further took into account that the appellant was one of the people who placed the deceased in the boot of a vehicle and ultimately threw him into a river, while still handcuffed, in order to kill him. The appellant did not show any inkling of remorse even in the face of overwhelming evidence against him.

[44] One of the gripes of the appellant arises out of the alleged disparity in his sentence and that of Lipholo. Lipholo was sentenced

to 12 years imprisonment for robbery with aggravating circumstances while on a charge of murder he was sentenced to 18 years imprisonment. On the other hand the appellant was sentenced to 15 years imprisonment on a charge of robbery with aggravating circumstances and on a charge of murder he was sentenced to life imprisonment.

[45] It is accepted that punishment must be meted in such a way that it is individualised, for punishment must always fit the crime, the criminal and the circumstances of the particular case. To do otherwise would constitute misdirection. The sentence discretion is an important aspect of our law of sentencing. Previous sentences like the court gave two reasons for the existence of the sentence

discretion in *S v Toms*; *S v Bruce* 1990(2) SA 802(A) 806;

“Such a discretion permits of balance and fair sentencing which is a hallmark of enlightened criminal justice. The second and somewhat related principle is that of individualisation of punishment.”

[46] At the onset it must be borne in mind that the circumstances relating to the sentencing of Lipholo were unknown to the trial court. Even if those circumstances of Lipholo were known to the trial court, the court a quo exercised its discretion independently in sentencing the appellant. Of importance, it is not the case of the appellant that the trial court exercised its discretion wrongly. Trying to match the facts of one case to another in order to find an appropriate sentence will be an ‘idle exercise’- See *S v Francis* 1987(2) 859(A) 863C-D.

[47] Contrary to the appellant, Lipholo was instrumental in assisting the police to recover the body of the deceased. It is clear that he cooperated with the police from the very day of arrest. He had been against the killing of the deceased as proposed by the appellant. He

pleaded guilty to the charges against him. He also testified against the appellant and his former accused and as a result in the most painful way the family found closure in this sad incident. I found no merit in the argument that the court erred in failing to align the sentence of Lipholo with that of the appellant.

[48] It is my considered view that the mitigating factors in this case are far outweighed by the aggravating factors. I am of the view that the trial court did not commit any misdirection when it found that there were no substantial and compelling circumstances warranting it to deviate from imposing prescribed minimum sentences.

[49] I accordingly propose the following order:

49.1 The appeal fails in toto.

49.2 The conviction and the sentence in respect of each charge are confirmed.

Q NULLIAH, AJ

I concur:

M.H. RAMPAI, J

P.E. MOLITSOANE, J

For Appellant: Adv. P.W. Nel

Instructed by: Legal Aid South Africa

Bloemfontein

For Respondent: Adv. MMM Moroka

Instructed by: Director of Public Prosecutions

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