

SOUTH AFRICA / JUDGMENT

Twala and Another v S (A661/2013) [2017] ZAGPPHC 467 (5 June 2017)

[2017] ZAGPPHC 467**COURT**

North Gauteng High Court, Pretoria

BEFORE

Ranchod, Rabie, Mothle

CASE / FILE NUMBER

A661/2013

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO:A661/2013****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHERS JUDGES: YES/NO****(3)****REVISED ✓**

”

.....5/6/2017.....

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DATE**SIGNATURE****In**

the matter between: VUSIMUZI
 LANDFORD TWALA
 FIRST
 APPELLANT
 SIMPHIWE
 DENNIS
 ZWANE
 SECOND APPELLANT
 and
 THE
 STATE
 RESPONDENT

JUDGMENT

RANCHOD J:

[1] The appellants were convicted in the High Court, Pretoria, on five counts, to wit murder (count 1), robbery with aggravating

circumstances (count 2), kidnapping (count 3), theft (count 4) and fraud (count 5). The appellants were

sentenced to life imprisonment on count 1, 15 years imprisonment on count 2, 5 years imprisonment on count 3, 5 years imprisonment on count 4 and 10 years imprisonment on count 5. The court a

quo ordered that the sentences in respect of counts 2-5 run concurrently with the sentence imposed on count 1.

[2] The appellants were legally represented during the proceedings in the court a quo. They stood trial as accused 1 and 2. We were informed that accused 3, who stood trial along with the appellants, had passed away. The appellants were granted leave to appeal against the convictions and imposed sentences on 2 April 2012 by the court a quo per Mabuse J.

[3] The facts of the case may be summarised as follows. The deceased went to Nedbank, Benoni, on 22 July 2009 and withdrew an amount of R 7000 with his debit card. After this transaction the deceased was never seen or heard from again. Less than an hour after his transaction at Nedbank, the debit card belonging to the deceased was used to withdraw cash at the Nedbank

ATM at Naledi Mall. Thereafter the debit card was used to make purchases at three shops (Uzzi, Sports Scene and Total Sports) at

East Gate Mall.

- [4] After the wife of the deceased reported him as missing to the police, an investigation was launched into his disappearance. Security video footage was obtained from Nedbank, Benoni, as well as from Naledi Mall and East Gate Mall. The transaction records of the bank account of the deceased were obtained along with the purchase slips from the above mentioned three stores. Upon a perusal of the video footage, certain suspects were identified that appeared in the footage from Nedbank, Benoni, Naledi Mall and East Gate Mall given that their clothing was similar in the three Exhibits, to wit "C", "E" and "F". The suspects were also identified based on the suspicious nature of their actions in the video footage of, inter alia, Nedbank Benoni.
- [5] After the suspects were identified, photographs obtained from the video footage was published in the media and that led to the arrest of the appellants. The first appellant was arrested on 21 November 2009 in Ladysmith. He was found in possession of an Uzzi jacket and a cellular telephone. It was established that the cellular telephone found in his possession belonged to the deceased. This evidence was not disputed by the first appellant.
- [6] The second appellant was arrested on 18 February 2010 in Harrismith. He was traced by the police after it was established that he had deposited an amount of R700 into the account of a Ms Phumzile Nyende at Nedbank, Naledi Mall. She was traced and assisted the police in tracking the second appellant.
- [7] The State's case was that the appellants were part of a group that formed a common purpose to commit the offences and worked as a team, each with a pre-arranged purpose. The State led evidence to show that the appellants were linked to the offences, inter alia, on the following basis - much of it on the basis of CCTV video footage obtained from Nedbank in Benoni, the Naledi Mall and the East Gate Mall -

7.1 the first appellant used his SIM card in the cellular telephone of the deceased four days after his disappearance;

7.2 the first appellant wore a blue tracksuit- type jacket with a white stripe across the chest;

7.3 he was present inside Nedbank, Benoni, while the deceased

withdrew R7000 at teller 1;

7.4 he was right behind the deceased when he (the deceased) left the bank;

7.5 the first appellant then stood at the railing outside the bank, looked in the direction of the street/sidewalk and then walked in the same direction as the deceased;

- 7.6 on the footage of Naledi Mall, the first appellant can be seen near the ATM where the money from the deceased's account was withdrawn by accused 3;
- 7.7 at East Gate Mall, the first appellant was part of a group moving together with the first appellant and accused 3.
- 7.8 the first appellant can be seen carrying a shopping bag - Exhibit "C" photo 7;
- 7.9 the second appellant was wearing a blanket-type jacket on the 22nd of July 2009;
- 7.10 he was present outside Nedbank, Benoni, when the deceased withdrew money;
- 7.11 he was present at Naledi Mall where the bank card of the deceased was used to withdraw money;
- 7.12 he went inside the bank and conducted a transaction as referred to in para 6 supra;
- 7.13 he was also present with the rest of the group at East Gate Mall.

[8] It is apparent that the State relied on circumstantial evidence. The deceased was Mr Godfrey Nkonzeni Mbethe, who is also referred to as Kanjela Mbethe. As I said earlier, he was never seen again after he withdrew R7000 from Nedbank in Benoni. During the course of his judgment, Mabuse J, after carefully looking into the facts, declared Mr Mbethe to be presumed dead. It is apparent from the heads of argument and submissions made that the appellants do not challenge this finding or declaration of the court a quo. Hence, a finding of murder, could be made, depending on the evidence, as the court a quo did here. However, the appellants in essence argue that the trial court erred or misdirected itself in finding that the State proved its case beyond reasonable doubt and in rejecting the appellant's versions as not been reasonably possibly true.

[9] It is trite that a conviction can be based on circumstantial evidence. However, before a court can convict, it must apply the two rules of logic referred to in R v Blom 1939 AD 188 at 202 - 203:

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

Indeed the court a quo was aware of this principle and referred to R v Blom in its judgment.

[10] Counsel for the appellants submitted that the court a quo misdirected itself when it found that the only inference that can be drawn from the facts is that the deceased was robbed of R7000 and of his bank debit card. However, he does not say what other reasonable inferences could be drawn from the proved facts.

[11] In *S v Reddy and Others* 1996(2) SACR 1 A it was held, - I quote from the Headnote:

'The fact that a number of inferences can be drawn from a certain fact, taken in isolation, does not mean that in every case the State, in order to discharge the onus which rests upon it, must indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called upon to seek speculative explanations for conduct which on the face of it is incriminating. The Court held that the cumulative effect of all the facts formed a network so coherent in its texture that the appellants could not break through it.'

[12] In *S v Sauls and Others* 1981 (3) 172 (AD) at 182 it was said that:

'The state is however not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the court is called to seek speculative explanations for conduct which on the face of it is incriminating and when the accused misleads the court by lying, arguments on improbable inferences are not calculated to impress trial judge.'

[13] As far as the first appellant is concerned, the only argument advanced in the heads of argument is that he had a reasonable

explanation as to how he came to be in possession of the deceased's cell phone. His explanation was that someone called Sgidi had given it to him as security for a loan he advanced to the latter. However, this is not the only evidence that was before the court a quo. There is the video footage of him having been in the bank at the same time as the deceased was withdrawing cash and that he is seen

leaving the bank at almost the same time as the deceased. And it was he who signalled to the others in the group outside that the deceased was the target. In my view, the court a quo properly evaluated the evidence and its conclusion about the guilt of the first appellant cannot be faulted.

[14] Insofar as the second appellant is concerned, the only submission is that he is not linked by any evidence to the commission of the offences as he had testified that he was inside the Condor motor vehicle drinking alcohol and that he had sent one Nene to deposit money for him. Second appellant does not challenge the court a quo's acceptance, after a trial-within-a-trial, of the admission made by him before a magistrate. Second appellant did not testify in the

trial-within-a-trial relating to his admission before the Magistrate.

[15] The court a quo took cognisance of the admission in which the second appellant sets out in detail his involvement in the offences and also referred to the evidence of Mr Labuschagne, a forensic investigator employed by Nedbank. It was Mr Labuschagne who had identified the second appellant in the CCTV footage. The court a quo, in my view correctly so, rejected

second appellant's version that he was at all times in the motor vehicle consuming alcohol. The court a quo found, again, in my view correctly so, that he was positively identified at Naledi and East Gate Malls.

[16] The trial court is the primary trier of fact and this court can only interfere with a finding if we are satisfied that it is wrong. It is apparent that the trial judge in this matter before us considered the evidence very carefully and came to the conclusions that he did. His reasoning and conclusions cannot be faulted.

[17] I would accordingly dismiss the appeals on conviction.

Sentence

[18] The first issue here is that the appellants concede that the indictment does refer to the minimum sentence provision of the

Criminal Law Amendment Act 105 of 1991 but counsel then goes on to submit that nowhere in the record is there any indication

that the appellants were warned about the applicability of the minimum sentence required. This submission is clearly without merit.

At p35 lines 10-25 of the transcribed record the Learned Judge informs the accused as follows:

'COURT: Before I [inaudible], Mr. Twala and Mr Zwane and Mr. Mbatha, I notice that the charge, count 1 and count 2 were subject

to the provisions of Section 108 of Act 105 of 1997. It is my duty to warn you that at the end of the trial if you are convicted in respect of count 1, in other words if this court can find and if the state can prove that this charge in respect of count 1 was planned or premeditated, if the death of the deceased was caused by you in committing or attempting to commit or after having committed or attempted to commit robbery with aggravating circumstances or if it is found that this count 1 was committed by you as a group and while you were acting in common purpose the law prescribed that the court should sentence you to life imprisonment. It is only if the court is satisfied about the existence of compelling and substantial circumstances that it will deviate from imposing the prescribed sentence on you and impose a [inaudible]. The law ordains this court to impose a minimum sentence of 15 years in respect of robbery committed under the circumstances described in count 2. Do you understand?

ACCUSED: Yes M'Lord.'

[19] Counsel for the appellants also stated that leave to appeal was granted by the Supreme Court of Appeal when it was in fact the trial court that granted it. It is apparent that on the covers of the 9 volumes of the appeal record it is incorrectly stated that the trial court was presided over by Seriti J when it was in fact Mabuse J and that leave to appeal was granted by the Supreme Court of Appeal when, as I said, it was Mabuse J who granted leave. It is unacceptable that counsel does not pay attention to basic details and worse, make

submissions totally at variance with the record.

[20] Counsel for the appellants submits, firstly, that the trial court misdirected itself in imposing a sentence of life imprisonment for the murder count and secondly, that the time spent awaiting trial, 3 years and 2 years respectively were not taken into account by the trial court.

[21] The first appellant's personal circumstances were recorded as follows:

1. He was 37 years old;
2. He was not married;
3. He has nine children;
4. He went to school up to standard 10;
5. He was self-employed;
6. He was earning between R2000 and R3000 per month;
7. He was supporting his children; and;
8. He is skilled in repairing television and radios.

[22] The second appellant's personal circumstances were set out as follows:

1. He was 51 years
2. He is married; old;
3. He was supporting nine children;
4. He was self-employed as a hawker and his wife is also a hawker;
5. His income was between R2000 and R3000 per month;
6. He went to school up to standard 4;
7. He is suffering from [...] and high blood pressure, and;
8. He is sorry and apologised to the court.

[23] Against these facts are the aggravating features:

23.1 the offences were meticulously planned. The appellants went to the bank with the purpose of selecting a target;

23.2 the appellants together with accused 3 and the other members of the group each played a role in committing the offences;

23.3 the appellants were part of a group;

23.4 the body of the deceased has not been recovered, leaving the family

of the deceased with no closure;

23.5 the appellants are not first offenders;

[24] As I said, the appellants are not first offenders.

[25] The first appellant has two previous convictions for theft in 1993 and 1999 respectively. Although the convictions are more than 10 years old and before he was convicted for the present offences, they are relevant in that they indicate a propensity to commit crime.

[26] The second appellant has a string of previous convictions - in 1978 for rape; February 1979 for theft; May 1979 for receiving stolen property, in 1983 again for theft; in 1987 for theft and assault with intent to commit grievous bodily harm; in 1991 for housebreaking with intent to? (it is not clear what the intention was); in 1998 for robbery and in 1999 for assault. As in the case of the first appellant, indeed even more so, it indicates that the second appellant has a propensity to commit crime and was even warned in 1991 already that he may be declared a habitual criminal. The court a quo also found that they showed no remorse.

[27] In my view, the court a quo was correct in finding that there were no substantial and compelling circumstances in respect of counts 1 and 2. The sentences on the remaining counts are not vitiated by any misdirection or irregularity nor can they be said to be shockingly or disturbingly inappropriate.

[28] I propose that the appeal in respect of both conviction and sentence be dismissed.

RANCHOD

JUDGE OF THE HIGH COURT

I AGREE

RABIE J

MOTHLE J

Appearances:

Counsel on behalf of Appellant : Mr. M.B Kgagara

Instructed by

: Pretoria Justice Centre

Counsel on behalf of Respondent : Adv J Cronje

Instructed by

: Director of Public Prosecutions, Pretoria

Date heard

: 26 May 2017

Date delivered

: 6 June 2017

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