

SOUTH AFRICA / JUDGMENT

Van Der Ross v S (A 41/12) [2012] ZAWCHC 155 (3 August 2012)

[2012] ZAWCHC 155

COURT

Western Cape High Court, Cape Town

BEFORE

Goliath, Cloete

CASE / FILE NUMBER

A 41/12

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Source record**Republic of South
Africa****IN****THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE HIGH COURT, CAPE TOWN)****CASE****NO. A 41/12****In**

the matter between:

NIKLAAS

VAN DER ROSS

.....Appellant

and

THE

STATE

.....Respondent

Coram:

GOLIATH,

J et CLOETE, AJ

Heard:

3

AUGUST 2012

Delivered:

3

AUGUST 2012

JUDGMENT**CLOETE, AJ:**

- [1] The appellant, who was legally represented throughout the trial, was convicted as charged on 23 September 2011 on one count of robbery with aggravating circumstances and sentenced on 28 September 2011 to 15 years imprisonment. He appeals against both his conviction and sentence with the leave of the trial court.
- [2] It was common cause that at approximately 11h00 on Friday 12 January 2007 the complainant, who was 77 years old at the time and who lived alone on his farm known as Voorbaat in the Ladismith district, was attacked and robbed as he returned to his home by two unidentified men wearing gloves and balaclavas. One threatened him with a firearm and the other with a knife. He was tied up and forced to open his safe from which the robbers removed cash of R51 900 including a few hundred rands that had been lying on a nearby table. No forensic evidence was found at the scene to link the appellant to the crime. It was also common cause that both the appellant and the vehicle in which he had been travelling shortly after the robbery had been searched twice by the police but that nothing had been found.
- [3] The only issue in dispute was whether the appellant was one of the two men who had robbed the complainant. The appellant pleaded not guilty to the charge against him and exercised his right to remain silent rather than to provide a plea explanation.
- [4] As the trial progressed it emerged that the appellant admitted being in the vicinity of the complainant's farm at the same time and on the same date that the robbery occurred. He also admitted that he had obtained a lift from the area back to Ladismith with Henry Aysley who was one of his co-accused in the trial, and that later that day he had arranged to leave Ladismith that night. He also admitted that later on that same night or in the early hours of the following morning he was found by the police to be in possession of R17 700 cash, most of which was stored in a bag at his uncle's house in Laingsburg and a small amount in his pocket. The appellant however vehemently denied any involvement in the robbery. His other co-accused, Lorenzo Rademeyer had, after a separation of trials at the outset of the proceedings, pleaded guilty and had been sentenced to correctional supervision, whereafter he evidently disappeared.
- [5] The state's case against the appellant rested largely on circumstantial evidence, together with admissions made by Henry Aysley in terms of s 220 of the Criminal Procedure Act 51 of 1977 ("the Act") as well as his testimony, and the evidence of two other witnesses who, together with Henry Aysley, had been fellow occupants of the vehicle in which the appellant had travelled from Ladismith to Laingsburg on the evening of the robbery and in the presence of whom he allegedly confessed to having been one of the perpetrators.

- [6] The state called seven witnesses and produced detailed cell phone records of calls which had taken place on that day and the night that followed. These records were handed in and relied upon without objection from the defence.
- [7] The appellant testified in his own defence and called one other witness, Piet Serfontein. The state had initially also intended to call a Henry Jaftha, a former fellow inmate of the appellant, but elected not to do so and made this witness available to the defence. The record of the proceedings reflects that despite a number of attempts the appellant was unable to secure Jaftha's attendance at the trial to testify on his behalf, evidently due to Jaftha's ill health. Henry Aysley testified in his own defence and called no other witnesses. He was subsequently acquitted and discharged.
- [8] The appellant's conviction was attacked essentially on three grounds. First, the state had failed to prove its case beyond a reasonable doubt and no consideration was given by the magistrate to the appellant's version. Second, and although this contradicts the first ground to a certain extent, the magistrate erred in finding that the appellant's version was not reasonably possibly true. Third, the magistrate misdirected himself by accepting aspects of the evidence of Henry Aysley, who testified as a single witness to those aspects.
- [9] I do not intend to summarise all of the evidence before the court a quo but rather to highlight the salient aspects thereof.
- [10] The complainant's unchallenged evidence was that although it was possible to obtain cell phone reception on certain areas of his farm there was no cell phone reception at the farmhouse itself. He identified his landline telephone number at the farmhouse.
- [11] The unchallenged cell phone records introduced by the investigating officer Captain Linde during his testimony showed that a telephone call lasting 15 seconds had been made from the complainant's landline to the cell phone of Henry Aysley at 11h10 on the day in question. It was not suggested by the appellant that the complainant had made that call. Henry Aysley testified that it was in fact the appellant who had called him.
- [12] The same records reflected 9 further calls made between the cell phones of the appellant and Henry Aysley on that day and on the evening that followed. The first was at 8h24 and supported Henry Aysley's testimony that the appellant had called him that morning, requesting a lift for himself and Lorenzo Rademeyer to Voorbaat. According to Henry Aysley the appellant wanted to go to Voorbaat to collect money owed to him by certain people who lived on the farm. It was also Henry Aysley's testimony that he took the pair to the crossing near the farm and the arrangement was that the appellant would call him when he was to collect them, which the appellant did just after 11 h00, albeit from a different telephone number.
- [13] When Henry Aysley arrived back at the crossing the appellant emerged from nearby bushes. He was alone. On their way back to Ladismith they were (as I have said) searched twice by the police but nothing was found. Henry Aysley dropped the appellant outside a restaurant

in the town and returned home. He was thereafter visited by Captain Linde and accompanied him to the police station for questioning. It was while he was there that the appellant made two further calls to him but he told him that he could not speak to him. The times of these calls, namely at 12h23 and 12h31, corresponded with Captain Linde's testimony to that effect although at that stage the latter was not aware of the identity of the caller.

- [14] As appears from the evidence led during the course of the trial it was accepted by both the state and the defence that the 6 calls that followed related to arrangements being made for the appellant to leave Ladismith that night, although there were contradictions in the testimony of the various witnesses as to who exactly had made those arrangements with the appellant (that is, whether it was Henry Aysley himself or his nephew Leandre Aysley - an alleged police informant - who had given Captain Linde the information that the appellant wanted to leave

Ladismith); and also the appellant's intended destination. It was also accepted by all concerned that the two Aysleys as well as their close relative Patrick Roodtman had drunk a considerable amount of alcohol from around midday that day.

- [15] It was also common cause that the two Aysleys together with Roodtman and the appellant left Ladismith later that night (although they disagreed on the exact time of their departure) and ultimately arrived in Laingsburg where the appellant was dropped off at his uncle's house and was arrested there a short while later by the police. The appellant did not dispute that he and his three fellow occupants of the vehicle were on familiar terms.

- [16] It was the evidence of both Aysleys and Roodtman that during the course of their journey to Laingsburg the appellant told Roodtman

within their earshot that he had been involved in the robbery and that weapons had been used. Roodtman went further. He testified that the appellant had told him that after the robbery he had sent his accomplice (that is Lorenzo Rademeyer) in another direction with the cash and that the weapons used had been given to the appellant's girlfriend. This was all vigorously denied by the appellant who claimed alternately that he would never have said anything of this nature in the presence of a known police informant (that is, Leandre Aysley); and that on the night in question Leandre Aysley had certainly not behaved in a manner befitting a police informant since he was clearly intoxicated. He could not provide an acceptable explanation as to why the three had ganged up against him. The best that he could proffer was that Captain Linde was waging a vendetta against him and had somehow managed to draw the three into his plot.

- [17] It was the unchallenged evidence of Henry Aysley (supported by the testimony of Captain Linde, Leandre Aysley and an Inspector Carelse who at the time was stationed at Laingsburg) that Henry Aysley had been found in possession of R5000 cash that same night. Both Aysleys claimed during the trial that this money had been handed over by the appellant. The appellant met these claims with a bare denial but changed his version more than once on the issue of whether he had paid for his trip to Laingsburg, and to whom and

how much.

- [18] I now turn to deal with the other material aspects of the evidence, since it is trite that the onus to prove guilt beyond a reasonable doubt (not any doubt) rests throughout on the state; and that this onus will be discharged only if at the same time there is no reasonable possibility that an accused's explanation - even though improbable - might be true (see *inter alia* *S v Van der Meyden* 1999(1) SACR 447 (W) at 448 f-g).
- [19] The appellant gave four different explanations for his presence at Voorbaat on the morning in question. According to Henry Aysley, he had said that he wanted to collect money from certain people who lived in that area. The testimony of Warrant Officer Willemse (who was one of the officers who had stopped and searched the vehicle in which the appellant and Henry Aysley were travelling shortly after the robbery) was that the appellant had said that he had gone to collect dagga money from Tom Kammies at Anysberg, which is about 20 km from Voorbaat. Captain Linde confirmed that this was also what the appellant had told him after his arrest. Although this was denied by the appellant the unchallenged evidence of Warrant Officer Willemse was that, acting on the strength of that information, he had travelled to Anysberg immediately thereafter to check with Tom Kammies who denied this to be the case. It was then put to Captain Linde during cross-examination that the appellant had gone to collect dagga money from Piet Serfontein at Voorbaat that day.
- [20] When Captain Linde responded by asking where the dagga money then was when the appellant was stopped and searched, the appellant came up with yet another version, claiming that he had not gone to collect dagga money from Serfontein but deliver dagga to him to sell on his behalf.
- [21] The appellant also claimed that he had not contacted Henry Aysley that morning, although he admitted that his cell phone had been in his possession that entire day and the night that followed. It was during his own cross-examination that for the first time he claimed that maybe his daughter had used his cell phone to call Henry Aysley's daughter that morning. This had never been put to any of the state witnesses. He did not even attempt to challenge the records of the other calls made between his cell phone and that of Henry Aysley that followed. He also claimed that he had in fact obtained a lift with Johan Graaff to Voorbaat that morning. Graaff had since passed away and was thus unable to confirm this. It was however common cause that Graaff had never made a statement to that effect.
- [22] The appellant denied that he had arranged that Henry Aysley would later fetch him from Voorbaat, claiming that he had intended catching a taxi from the Voorbaat crossing back to Ladismith. When asked how he intended to pay for the taxi without money he said that Piet Serfontein had offered to lend him the taxi fare. The pair had been waiting for a taxi at the crossing when Henry Aysley just happened to drive past and gave him a lift. Not only was this a clear afterthought on his part, it contradicted Henry Aysley's testimony that Piet Serfontein was nowhere to be seen when he arrived at the crossing and the appellant emerged from the bushes nearby.

- [23] Serfontein, who on his own version had been an inmate at the same prison during the appellant's incarceration while awaiting trial, claimed to be able to recall the appellant's version with startling clarity, although this was more than four years after the event, that according to him the arrangement whereby the appellant delivered dagga to him to sell each Friday was one of long standing, and that he had never made a previous statement to that effect. The police officers who testified confirmed that they had not approached Serfontein for a statement since the appellant had never mentioned his name to them. It was also Serfontein who said that the appellant had arrived with the dagga in a rucksack. Why the appellant, on his version, then left both the dagga as well as his rucksack with Serfontein was not explained.
- [24] It was initially the appellant's version that of the cash of R17 700 that was later found in his possession, he had borrowed R10 000 from his brother and the balance he had collected on account of loans made to people who lived in Ladismith and Zoar. However not only was he unable to name any of these people, none of them were called to testify on his behalf. He later claimed that the R10 000 which he had obtained from his brother was in fact his own money which he had left there for safekeeping. He did not however call his brother to testify to confirm any of this. Further, the complainant's evidence was that most of the cash stolen from him had been packed in bank bags, and the unchallenged testimony of the appellant's uncle in Laingsburg was that he saw the cash stored in what appeared to be bags in the appellant's luggage.
- [25] The appellant also gave differing versions as to his intended destination after leaving Ladismith that night. His uncle testified that he had told him that he was on his way to Johannesburg. The appellant claimed that he must have misheard him since he was on his way to Beaufort West to collect his vehicle which was there for repairs. The cash was to pay for the repairs. However the registration number of the vehicle which was then provided to Captain Linde during cross-examination turned out to be a different make, a different model and owned by someone else entirely. When the appellant himself testified he claimed that the reason for his trip to Beaufort West was to purchase dagga because it was cheaper and readily available there. Much later in his testimony he said that he intended to travel to Beaufort West for both of these purposes.
- [26] It is against this background that I do not believe that there is any substance in the appellant's grounds of appeal. It is clear that the magistrate in evaluating the evidence not only had due regard to the relevant cautionary rules, he indeed gave due and proper regard to the appellant's version. In my view the magistrate was correct in concluding that, in light of all of the evidence, the appellant's version was not only improbable, it was not reasonably possibly true. The state had indeed proved its case against the appellant beyond a reasonable doubt. The appellant was correctly convicted and it follows that the appeal against his conviction must fail.

[27] I turn to the sentence.

[28] It is trite that the circumstances in which a court of appeal may interfere in a sentence which another court has passed are limited. There must be either a material misdirection by the trial court, or 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 properly be described as 'shocking, startling or disturbingly inappropriate': see *S v Malgas* 2001

(1) SACR 469 (SCA) at 478 d-g.

[29] In delivering judgment on sentence the magistrate specifically referred to the minimum sentencing provisions contained in s 51 of the Criminal Law Amendment Act 105 of 1997. The difficulty here however is that neither the charge sheet nor the record reflect that the appellant's attention was ever drawn to those provisions, nor is there any indication that the appellant was aware of them. In this regard it is also noted that, of the appellant's long list of previous convictions, the last involving a crime which would have attracted a minimum sentence was for housebreaking in 1994, which pre-dated Act 105 of 1997.

[30] In *S v Legoa* 2003

(1) SACR 13 (SCA) at 22 g - 23 b the Supreme Court of Appeal found that the Constitution dictates that in order to meet the requirement of substantive fairness, it is desirable that if the state is to rely on the minimum sentencing legislation this should be set out clearly in the charge sheet, although the issue is really one of substance and not of form. As I understand what follows in that judgment, at the very least, an accused person must either be aware or be timeously notified that the state intends to rely on the minimum sentencing legislation on conviction; and it will be a misdirection on the part of the presiding officer to have regard to those provisions in imposing sentence if this is not the case. See also *S v Ndlovu* 2003

(1) SACR 331 (SCA) at 337 a-b.

[31] As a first offender for this type of offence the appellant was liable to serve a minimum sentence of 15 years imprisonment (subject of course to substantial and compelling circumstances being found which would justify the imposition of a lesser sentence). The magistrate's regard to the minimum sentencing provisions in the circumstances outlined above constituted a misdirection and this Court is thus at large to consider sentence afresh.

[32] The appellant had been arrested on 13 January 2007 but escaped from custody on 25 January 2007. He was subsequently re-arrested in June 2007, and was convicted and sentenced to 12 months imprisonment in terms of s 276 (1) (i) of the Act coupled with a suspended sentence of a further 24 months. When he was sentenced on 28 September 2011 he had thus spent about 3 years and 3 months as an awaiting trial prisoner.

- [33] He clearly has little, if any, respect for the law and the rights of persons and their property. He has 42 proven previous convictions spanning the period 1979 to 2007. The first offence was committed when he was just 12 years old and he was 44 years old when he was sentenced for the present offence. The offences range from housebreaking, theft and assault to escaping from custody, road traffic violations and drug related offences. His history shows that the prospect of him being rehabilitated is virtually nil.
- [34] Although he has dependants and claimed to have fixed employment when he was arrested, these personal circumstances must in my view be outweighed by the interests of the community and the sheer callousness of his attack on the 77 year old defenceless complainant who testified that he still suffered from the long term effects of the trauma inflicted upon him, and that the bulk of the cash stolen had never been recovered.
- [35] To my mind the only mitigating factor is the period spent by the appellant in prison awaiting trial. Although there is authority to the effect that time spent in prison awaiting trial is at least the equivalent of a sentence of twice that length (see *S v Stephen and Another* 1994 (2) SACR 163 (W) at 168 f, followed in *S v Brophy and Another* 2007 (2) SACR 56 (W) at 60 a), the court in *S v Vilikazi and Others* 2000 (1) SACR 140 (W) at 148 a-e expressed reservations that this should be of uniform application. In *Sv Kruger* 2012 (1) SACR 369 (SCA) at 375 c - d the Supreme Court of Appeal went no further than to declare that it is only fair to take into consideration the period spent by an accused person in prison awaiting trial, particularly where it is a lengthy period.
- [36] Having regard to the foregoing it is my view that a period of 12 years imprisonment is an appropriate sentence.
- [37] In the result I propose the following order:
1. The appeal in respect of the conviction is dismissed. The conviction is confirmed.
 2. The appeal in respect of the sentence is upheld. Such sentence is set aside and replaced with a sentence of twelve (12) years imprisonment with effect from the date of the sentence, being 28 September 2011.

CLOETE, A.J.

I agree and it is so ordered.

GOLIATH, J.

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