

SOUTH AFRICA / JUDGMENT

Van Schalkwyk and Others v S (51/1998) [2017] ZAFSHC 169 (28 September 2017)

[2017] ZAFSHC 169**COURT**

Free State High Court, Bloemfontein

BEFORE

Rampai

CASE / FILE NUMBER

51/1998

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 51/1998****In****the matter between:**

JOHANNES
PETRUS VAN SCHALKWYK
1st
Applicant
PETRUS
XOLI
QUINCH
2nd
Applicant
JERRY
QUINCH
3rd
Applicant
and
THE
STATE
Respondent
HEARD

ON:

19
SEPTEMBER 2017

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 28 SEPTEMBER 2017

[1] This was an application for leave to appeal against the conviction and sentence. Besides the main relief sought, the applicants

also applied for a subsidiary relief to have the lateness of their appeal condoned. I shall revert to the respondent's

attitude towards the matters in due course.

[2] On 24 June 1999 Malherbe J, as he then was, convicted each of the 3 applicants in connection with the following charges:

2.1 The first conviction pertained to robbery with aggravating circumstances. The incident concerned the hijacking of a commercial a Mercedes Benz, cargo truck, with registration AK 644 owned by Mr Bilal Osman. The incident took place in Bloemfontein on 20 January 1998.

2.2 The second conviction pertained to kidnapping. The incident concerned the two occupants of the aforesaid truck, namely: Mr S.B. Letsie and Mr F Pitso – vide “exi b” and “exi f”.

2.3 The third conviction pertained to the murder of the truck driver Mr Setshotsha Letsi.

2.4 The fourth conviction pertained to the murder of the assistant truck driver, Mr Fusi Pitso. The 2 counts of murder and the kidnapping stemmed from the same hijacking incident.

[3] On 25 June 1998 the trial judge sentenced each of the applicants as follows:

3.1 Hijacking, 15 years imprisonment;

3.2 Kidnapping, 5 years imprisonment;

3.3 Murder, life imprisonment and

3.4 Murder life imprisonment.

[4] As regards condonation, the respondent did not oppose the application. The supporting affidavit was deposed to by the

first applicant. The salient features of his explanation were that shortly after they severe sentenced he alone brought his

application for leave to appeal; that he did so in good time; that he alone appeared before the court on the date that had been allocated for the hearing of his application; that the trial judge was not inclined to entertain his separate application; that his application was then postponed sine die.

[5] He went further to explain that his 2 co-accused, also subsequently decided to apply for leave to appeal. In due course a date was allocated for the hearing of their joint application. On the day in question the 2 of them were taken to court but he was not. On account of his absence, the trial judge declined to entertain their separate application, on the grounds that it was practically expedient to simultaneously hear their three applications. Consequently their two applications were also postponed sine die. I pause to point out that in those days, unlike nowadays, the accused had to be personally present in court during the hearing of his application for leave to appeal.

[6] Since then their applications for leave to appeal were never placed on the roll again. Although they made several request for further assistance in order to pursue their applications, they received no further assistance. The second and the third

applicants confirmed the averments made by the first applicants. I pause again to clarify one more point. It has to be mentioned that, according to their current attorney, their previous applications were in fact withdrawn.

[7] I am persuade that the applicants were not to blame for the delay. The delay was apparently occasioned by the stance of the trial judge and exacerbated by the failure of their previous attorneys to consolidate the separate applications in accordance with the directives of the trial judge. In my view they have given a satisfactory explanation. I find it reasonably acceptable. In coming to this conclusion, I am fortified by the attitude of Mr Strauss, counsel for the respondent.

[8] It would appear that the applicants were sentenced in accordance with the provisions of section 51 Criminal Law Amendment Act 105/1997 which prescribes certain minimum sentences. In the case of a conviction for robbery with aggravating circumstances the prescribed minimum sentence is 15 years imprisonment and in the case of premeditated murder the prescribed minimum sentence is life imprisonment. It is now their case that they were not warned by the trial court about the section; that they were unaware of the provisions of the section; that they were unaware of the provisions of schedule 2 and that they recently became aware that the law previously required that they should have been warned about those provisions before they were convicted.

[9] It was an undisputed fact that the applicants were indeed not warned at any stage of the trial. In view of this, I am persuaded that the applicants have a reasonable prospect of success on appeal as regards sentence.

[10] For the reasons given above, I was inclined to condone their failure to comply with section 319(1)(b) Criminal Procedure Act 51/1977. Therefore, I would extend the 14 day period referred to in the section to the date on which their appeal will be heard by the full compliment of the bench. Now I turn to the main application.

[11] As regards the substantive merits, the key prosecution witnesses were Mr Ruiters and Mr George. Indeed they were single witnesses as far as some aspects of their testimonies were concerned. However, they corroborated each other as far as other aspects of their testimonies were concerned.

[12] In order to secure conviction, the evidence of a single witness must be materially satisfactory not absolutely perfect.

S v Abdoormann 1954 (3) SA 163 (N)

S v Sauls and Others 1981

(3) SA 172 (A)

The trial court was mindful and alive to the factual matrix and the applicable legal principles.

[13] The prosecution witness, Mr Ruiters, was an accomplice. So was the prosecution witness, Mr George. The trial judge was mindful of the legal principles, applicable to an accomplice. Malherbe J quote the following passage from S v Francis 1991

(1) SACR 198 (A) at 205f-g:

“It is not necessarily expected of an accomplice, before his evidence can be accepted, that he should be wholly consistent and wholly reliable, or even wholly truthful, in all that he says. The ultimate test is whether, after due consideration of the accomplice's evidence with the caution which the law enjoins, the Court is satisfied beyond all reasonable doubt that in its essential features the story that he tells is a true one.”

[14] In the final analysis the trial judge found, beyond reasonable doubt, that the essential features of the testimony given by each of the two accomplices were true, notwithstanding its shortcomings.

[15] There were certain discrepancies between the court testimony and the police statement of Mr George. The trial judge recognised and considered those discrepancies. Having acknowledged their existence, the trial judge ultimately ruled that the essence of the two was substantially the same.

[16] The trial court considered the probabilities and improbabilities of each version as presented by the prosecution and the defence before he announced the verdict. S v Tellingien 1992 (2) SACR 104 (C) S v Teixeira 1980 (3) SA 755 (A).

[17] One of the specific grounds of appeal was that the trial judge erred in accepting “exi m” as a reliable piece of

circumstantial evidence and that the prosecution witness, Mr A.S. Mia was not an expert. The exhibit contained cellular data,

electronically generated by Vodacom (Pty) Limited. At the trial none of the applicants as accused persons challenged the

admissibility of “exi m” at all. It follows, that they are precluded from raising the point now. It is too late now. The horse has long bolted. At any rate, Malherbe J thoroughly and properly dealt with the argument that the witness was not a qualified expert.

[18] I hold the view, and it is a very firm view, that no court with appellate jurisdiction will come to a different conclusion. As I see it no other court will, on appeal, disturb any of the findings made and the ultimate conclusions reached by Malherbe J on the merits. Consequently, I conclude that none of the applicants has reasonable prospects of success on appeal as regards the merits. I would, therefore, deny each of the applicants leave to appeal against his 4 convictions.

[19] As regards sentence, it is trite that a court with appellate jurisdiction can interfere with the sentence imposed by the trial

court. Appellate interference is justified where, among others, it clear that the trial court did not exercise its discretion

properly and judicially. The court with appellate jurisdiction can also interfere in a case where the trial court has committed a material misdirection or irregularity which shows that it did not exercise its discretion at all or that it exercised such discretion

improperly or unreasonably.

[20] It was common cause that there was no reference to section 51 Criminal Law Amendment Act 105/1997 in the written indictment, and in the merits component of the judgment. Even in the sentence component of the judgment there was no explicit reference to the section. The concept of substantial and compelling circumstances was never mentioned. The omission presupposes

that no enquiry in terms of section 51(3A) was held to determine whether deviation from the prescribed minimum sentences was warranted

or not.

[21] In *Mabitle v State* 2017

(1) SACR 325 (NW) the court held:

“It is common cause that the indictment did not refer to the Criminal Law Amendment Act 105 of 1997. However, at the sentencing stage, the court a quo required the appellant to show that there were substantial and compelling circumstances present which would obviate the imposition of life imprisonment. The absence of any forewarning, at the commencement of the trial, that the minimum-sentence dispensation was applicable means that the court a quo was not entitled to impose sentence in terms of that law. See S v Ndlovu 2003

- (1) SACR 331 (SCA) ([2003] 1 All SA 66; [2002] ZASCA 144). It follows that the sentence imposed by the court a quo should be set aside and this court is at liberty to impose sentence afresh.”

I am in respectful agreement.

- [22] In this instance the trial court materially erred not only because the applicants were not forwarned at the commencement of the trial but also because they were not afforded the opportunity, or so it would appear, of showing why it would be unjust or disproportionate to impose the prescribed minimum sentences on them. If they were afforded such an opportunity, it does not appear from the sentence component of the judgment that an enquiry in terms of section 51(3A) was held in respect of any of them. Consequently I am inclined to grant leave to appeal. The conclusion has the support of counsel for the respondent.

- [23] Accordingly I make the following order

23.1 The non-compliance of the applicants with section 316(1)(b) Criminal Procedure Act 51/1977 is condoned. The 14 day period as envisaged in the section is hereby extended to the date on which their appeal will be heard;

23.2 The application of each of the applicants for leave to appeal against any of the 4 convictions is refused;

23.3 The convictions in respect of each applicants are confirmed;

23.4 The applicants are all granted leave to appeal against all the sentences imposed on them.

MH RAMPAL, J

On behalf of applicants: Attorney P Peyper

Instructed by:

Peyper Buitendag Incorporated

Bloemfontein

On behalf of respondent: Adv M Strauss

Director Public Prosecutions

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