

SOUTH AFRICA / JUDGMENT

Williams v S (CA&R119/2016) [2016] ZAECHGHC 138 (22 November 2016)

[2016] ZAECHGHC 138

COURT

Eastern Cape High Court, Grahamstown

BEFORE

S M Mbenenge, G H Bloem

CASE / FILE NUMBER

CA&R119/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CA&R

119/2016

In

the matter between:

SHAUN
BRENDAN
WILLIAMS
Appellant
and
THE
STATE
Respondent

JUDGMENT

MBENENGE J:

- [1] The late Pumlanzi Monakali (the deceased) died of a stab wound to the chest inflicted by a person who was part of a group in whose company the appellant had been on the night of 9 March

2013. Subsequent thereto, the appellant and his erstwhile co-accused[1] stood charged before the Regional Court, Port Elizabeth with murder (count 1) and robbery with aggravating circumstances (count 2). The robbery charge, which is the subject of this appeal, had been founded on the allegation that on or about 9 March 2013 at or near Timothy Valley the appellant (and his co-accused) had unlawfully and intentionally assaulted the deceased and forcefully took from the deceased his property (grasshopper shoes).
- [2] Erstwhile accused 1, 2 and 3 were discharged at the end of the State's case, whilst erstwhile accused 5 was acquitted at the conclusion of the trial. The appellant was found not guilty on the murder count, but guilty on the robbery count.[2]
- [3] Not a single one of the State witnesses had eye-witnessed the robbery (and the related murder). The upshot of the testimony of the witnesses on the strength of which the court a quo was called upon to infer that the appellant had been one of the culprits was the following:
- (a) the presence of the appellant at the scene during the attack that resulted in the deceased's death;
 - (b) the possession by the appellant of the deceased's grasshopper shoes approximately 3 to 4 hours after the incident;
 - (c) the existence of blood stains on the clothes the appellant wore during and after the attack; and
 - (d) the fact that the appellant went to the house of Magdaleen Moody in the early hours of the morning following the attack to soak his blood stained top in water.
- [4] The appellant did not dispute having been at the scene when the deceased met his demise. He also did not dispute that he picked up blood stains during his involvement in the fracas in question. His explanation boiled down to one thing; he had been intervening on behalf of the deceased when the latter was being attacked.
- [5] Before giving further consideration to the issues emerging in this appeal, a scrutiny of the evidence and the circumstances revolving around the attack on the deceased becomes necessary.
- [6] Mr Jean Claud Bouwer (Bouwer) testified that erstwhile accused 5 (Malcolm) informed him that he (Malcolm) and the appellant bore blood stains on their clothing after "fighting with a guy in Timothy ... Valley." Under cross-examination it emerged that Bouwer was completely oblivious to the circumstances surrounding the fight and the appellant's involvement therein, and that his testimony was based solely on what he might have been told by others about the alleged fight. He also had not mentioned in the statement he made to the police that the appellant and Malcolm bore blood stains after having fought with "another guy."

- [7] The other witness who testified about blood stains was Ms Jade Israel (Israel). She said she was approached by Malcolm to wash the blood stained clothing items and that the appellant and Malcolm had told her that “they fought with a guy earlier on.” When, under cross-examination, it was put to her that the appellant had merely intervened on behalf of the deceased during the fracas, Israel did not dispute the appellant’s version. The relevant portion of the transcript reads:

“And [the appellant] will say, ma’am, that there was a fight. [Malcolm], he says there was a fight. And he did get blood on his clothes. But his version is there were people fighting with this gentlemen. He got in the middle of this fight, in other words tried and intervened. What is your comment on that?...I don’t know about that . [3]” Sic.

The transcript further reads:

“And you can’t say because you weren’t there, under the circumstances on which that blood got onto the jackets?... No I can’t say. I don’t know.[4]”

- [8] The version that the appellant had been intervening was also put to Captain Jacobs who attended upon the scene soon after the incident. Captain Jacobs did not dispute the version and added that this was the version the appellant had proffered at the outset.
- [9] The appellant made common cause of the fact that he approached Veronique (a State witness) and handed over to her a plastic bag containing the grasshopper shoes. Under cross-examination Veronique did not dispute that the appellant had received the

grasshopper shoes from a friend. She also confirmed that she was not aware of how the shoes got to be in the appellant’s

possession. Otherwise, none of the State witnesses gave testimony regarding the circumstances in which the grasshopper shoes

got to be removed from the deceased when he was being attacked or from the scene of the offence.

- [10] The appellant testified as follows regarding how he got to be in possession of the grasshopper shoes:

“Ms Wolmarans ...Now with regard to these takkies there were certain takkies that the complainant’s wife identified as the complaint, that was recovered from Veronique Currie’s place. Veronique Currie gave evidence that you brought the takkies to her. How did you get these takkies?...The morning I then returned home to go and have a meal and I then came across Malcolm, Bessie and Mila...

Ms Wolmarans And you met up with them and?...Mila then asked Bessie where are the grasshoppers that he had taken. Bessie said he had left them at home. Mila then said to Bessie that Bessie could give the grasshopper to Mila seeing that Bessie does have a new pair of takkies. Bessie then went to the grasshoppers. He gave them to Mila in packet. Mila then wanted, asked whether I could not keep the takkies for him seeing that his home was a distance away from mine.

Court To keep the takkies. ...The grasshoppers. I then said to him Mila you know I still have to go to work and my mom is going to ask why I am not at work. And then we went through an alley and it is then that Veronique came from the front in the alley.

Ms Wolmarans Veronique is the 3rd State witness in this matter? She gave evidence that you then asked her to keep the takkies for you until a later stage. Is that correct?...Yes, she is correct.

Court Sorry, did he eventually take these shoes from Mila?...I only took the grasshoppers when we met Veronique and this after meeting with Veronique I asked whether Veronique did not want to keep the takkies and then I took the grasshoppers from Mila.

Ms Wolmerans Veronique took them then...Then Veronique took them...

If it is alleged by the State that the reason why the takkies were in your possession is because you were part of the group that robbed this gentlemen. What is your comment on that? ... I left them there and proceeded home and only got the takkies later after I was asked to keep them.

When I say takkies I actually mean grasshoppers...grasshoppers." Sic.

[11] The court a quo found that on the facts before it,[5] there was no basis for inferring that the appellant (and Malcolm) had caused the death of the deceased.

[12] Despite finding that there was no evidence that the appellant "actually perpetrated the robbery upon...the deceased", the court a quo became satisfied that the charge of robbery of a common nature against the appellant had been proven beyond reasonable doubt. In this regard, the court a quo reasoned:

"Now it is common cause that the deceased was robbed of his shoes in the process and it is common cause now or it is a fact found proved that the shoes in question were subsequently found in possession of [the appellant]. He made mention of a certain Salman which Salman is just a person who was not even been called by the accused person to come and testify and confirm he indeed was the person for whom this shoes were intended. Mention was made of this Salman having made a statement to the police. Neither does the court have the statement nor has that Salman come to testify regarding these shoes." Sic.

[13] The reasoning of the court a quo is clearly fallacious. In the first place, the State bore the onus to prove the guilt of the appellant on the robbery count

throughout the proceedings. Moreover and in any event, no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.[6]

[14] In my view, the appellant's version that he left the scene at a time when the deceased was still being molested and was given the shoes at a later stage by somebody else is reasonably and possibly true. The court a quo sought to cast a burden on the appellant to prove his innocence, without the invocation of the proper test. Even without the said Salman having been called to testify, there was a reasonable possibility of the appellant's explanation that he had been given the grasshopper shoes by somebody else having been true.

[15] Despite the court a quo's finding of the absence of evidence of the appellant having perpetrated the robbery, convicting the appellant of robbery suggested that the grasshopper shoes had been removed by force from the appellant. There is no evidence supportive of such a conclusion. No testimony of how, where and by whom the shoes were removed from the scene was tendered. The appellant should accordingly have been acquitted on the robbery charge as well. The court a quo erred in not doing so.

[16] In this court, it was argued on behalf of the State that there was evidence of the appellant being guilty of the competent verdict of theft, in the event that there was lack of evidence to find the appellant guilty of robbery, as the appellant was found in possession of the shoes that belonged to the deceased soon after the attack on the deceased. This argument was premised on the doctrine of recent possession which permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence.[7]

[17] On the court a quo's own showing, the appellant was neither a party to the murder nor the robbery. It has also been repeatedly emphasised that the doctrine of recent possession should not be invoked to undermine the onus of proof which always remains with the State. It is not for the accused to rebut an inference of guilty by providing an explanation.[8] All that the law requires is that having been found of possession of the property that has been recently stolen the accused gives the court a reasonable explanation for such possession.[9] In my view, the appellant did give a reasonable explanation for the possession of the grasshopper shoes.

[18] Moreover and in any event, the theft continues as long as the stolen property is in the possession of the thief or of some person who was a party to the theft or of some person acting on behalf of or even, possibly, in the interests of the original thief or party to the theft. [10] As already pointed out there is no evidence that the appellant was a party to the removal of the shoes from the deceased or from the scene. There is also no evidence that the appellant was acting on behalf of or in the interest of a party to the alleged theft. Absent

evidence of when, how and by whom the shoes were removed from the deceased or absent evidence controverting the appellant's version that he received the shoes from some other person after the incident, it would not be proper to convict the appellant of theft, either. Nor can the conviction on any other competent verdict be sustained.

[19] In all the circumstances, the appeal succeeds with the result that the appellant's conviction of robbery and the resulting

sentence are set aside and replaced by the following:

"Accused no 4 is found not guilty and discharged on count 2."

S M MBENENGE

JUDGE OF THE HIGH COURT

I agree

G H BLOEM

Counsel for the Appellant : Ms N M Mazibukwana

Instructed by

: Legal Aid South Africa

Justice Centre

GRAHAMSTOWN

Counsel for the Respondent : Ms S Hendricks

Instructed by

: DPP's Office

Date heard

: 9 November 2016

Date judgment delivered : 22 November 2016

[1] Namely, Rwayne Gasiba, Emile Draghoender, Roydon Plaatjies and Malcolm Van Sasies (accused numbers 1, 2, 3 and 5, respectively).

[2] Although the appellant was charged with robbery with aggravating circumstances, he was found guilty of common robbery.

[3] My emphasis.

- [4] Ibid.
- [5] The blood stains on the jacket of the appellant, the grasshopper shoes found in the possession of the appellant soon after the incident and the involvement of the appellant in a fight at the scene.
- [6] R v Difford 1937 AD 370 at 372; see also S v V 2000 (1) SACR 453 (SCA).
- [7] S v Skweyiya 1984 (4) SA 712.
- [8] Tsokwane Elias Mothwa v The State 2016(2) SACR489 (SCA) para [10].
- [9] Zwane and Another v S
- [2013] ZASCA 165 (27 November 2013) at para [12].
- [10] Per Tindall J in R v Attia 1937 TPD 102 at 106; see also S v Cassiem 2001 (1) SACR 489 (SCA) at 492-3.

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