IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: CA&R 296/2011
Date Heard: 25 April 2012
Date Delivered: 10 May 2012

In the matter between:

ANDILE MAHALA First Appellant

SIYABULELA KOHLELA Second Appellant

and

THE STATE Respondent

JUDGMENT

GOOSEN, J:

1] The appellants were convicted in the Regional Court on a charge of robbery with aggravating circumstances and on a charge of assault with intent to do grievous bodily harm. Following conviction and prior to the sentence proceedings that matter was referred on special review by reason of the fact that the accused had not, at the plea stage, pleaded to the second count namely that of assault with intent to do grievous bodily harm. Although the record does not disclose the outcome of those review proceedings, we were informed from the bar that the convictions in respect of the assault charge had been set aside on review and that the appeal was solely in respect of the conviction on the charge of robbery. The first appellant was granted leave to appeal by the trial court after the second appellant had been granted leave to appeal on petition to this court.[1]

1 Three persons were charged with the offence. The first appellant appeared as accused 1 and the second appellant as accused 3. The second accused is not before us on appeal.

2] The circumstances in which the offence was committed are the following. On the night of 22 July 2008 two friends, Madoda Tshatsu and Mbulelo Spondo were returning home from a tavern in New Brighton, Port Elizabeth where they had spent some time together drinking. Because of the late hour they hailed a taxi in the form of a private sedan, commonly known as a “jikeleza”. They told the driver where they wanted to go and got in. There were already five people, including the driver, in the vehicle. Both complainants were seated at the back with Tshatsu seated at the left rear passenger side door. After travelling for a short distance the vehicle turned into a side road and came to a halt. The men in the vehicle proceeded to assault the complainants. Tshatsu was forced out of the vehicle, was struck on the head with a firearm and was then robbed of his personal belongings, including his cell phone, wallet, his trousers and his shoes. Spondo was also dragged out of the vehicle. He was stabbed in the abdomen. The complainants were left on the road side and the vehicle drove off. The complainants ran to summon help and the police were called.

3] Approximately an hour after the incident was reported to the police, a police patrol in Zwide came across a red Nissan Sentra which fitted the description given by the complainants. What transpired thereafter was disputed in the evidence. The prosecution’s version was that when the patrol vehicle switched on its police light and siren the vehicle sped off. The police officers radioed for assistance and after a pursuit the vehicle drew to a halt when another police vehicle blocked its path of travel. Two men immediately leapt out of the vehicle and ran away. The driver

remained in the vehicle where he was apprehended. The two other men were pursued on foot and they too were apprehended. A search of the vehicle resulted in the police finding two wallets, two cell phones, a pair of trousers, two pairs of shoes, three “bompies” (plastic bank bags containing dagga) and a bloody knife.

4] The three men were placed under arrest and taken to the police station. There the complainant Tshatsu identified the three men, who were held together in a cell, as being three of the occupants of the vehicle who had participated in the robbery. Tshatsu also identified his trousers and shoes which he was told had been recovered from the red Nissan Sentra. Spondo was not present since he had been transported to hospital to receive treatment for the stab wound to his abdomen. He remained in hospital for some time, apparently as a result of complications that had set in as a result of the wound to his abdomen. I shall return hereunder to the evidence presented by the appellants and the findings made by the magistrate.

5] At the trial the prosecution presented the evidence of the two complainants and a constable Diki, a police officer who was driving the patrol vehicle and who participated in the arrest of the appellants. The prosecution did not produce into evidence any of the items allegedly found in the possession of the appellants. At the conclusion of the state’s case an application for discharge, in terms of section 174 of the Criminal Procedure Act, was brought by the second appellant. This application was refused. Somewhat startling was the fact that it appears from the record that the application for a discharge was refused during the course of the argument presented by the prosecutor and without affording the second

appellant's counsel an opportunity to reply. Each of the accused, including the appellants, testified in their defence.

6] The first appellant testified that he was the driver of a red Nissan Sentra on the evening in question and that he used it as a "jikeleza" taxi. He stated that he did not operate it in New Brighton on that night and that he had not been in New Brighton. He had given a number of passengers a lift during the course of the night. He had travelled a route from Motherwell to Zwide and between Zwide and Veeplaas. He had picked up two passengers in the vicinity of Njoli Square when he was already en route to Veeplaas. After dropping off other passengers in Veeplaas he returned towards Zwide. En route he stopped near a tavern and picked up his co-accused. At that stage there were five persons in the vehicle. When the police vehicle approached him with its blue light flashing and siren sounding he brought the vehicle to a halt. He did not speed away. Immediately he stopped the vehicle two people got out of the car and ran away. He and his co-accused remained in the vehicle. The police removed him from the vehicle and made him lay face down on the ground. He did not see the police search the vehicle. He and his co-accused were taken to the police station. A police officer there showed him a white plastic bag and he was asked to whom it belonged. None of the items allegedly recovered from the vehicle were shown to him.

7] Accused 2 (who is not before us on appeal) proffered a plea explanation at the commencement of the proceedings. In this he stated that he and accused 3 (the second appellant) were in each other's company on that evening and had spent

some time at a tavern in Veeplaas. When they left the tavern they got a lift in a 'jikeleza" taxi driven by the first appellant. They were on their way to Motherwell. When the police vehicle pulled over the taxi there were only three persons in the taxi; he and the two appellants. The second appellant's plea explanation was to the same effect. Both denied that they had fled when the police vehicle had stopped the taxi.

8] The magistrate found that the complainants were honest witnesses whose testimony was reliable notwithstanding that there were certain conflicts in their evidence. These, the magistrate found, were not of a material nature. In my view the magistrate's finding in this regard cannot be faulted. The discrepancies related to the manner in which the attack on the two complainants occurred. According to the complainant Tshatsu when the taxi came to a halt in a side street one of the occupants struck him on the head with a firearm. He was then pushed out of the vehicle and once out was stripped of his belongings. The complainant Spondo's evidence was that when the vehicle came to a halt the persons in the front of the vehicle got out and they pulled Tshatsu out of the vehicle and assaulted him. Whilst this was happening he was being assaulted by the persons at the back of the vehicle. When he resisted being pushed out of the vehicle he was sprayed with "a spray gun" (presumably some sort of disabling spray) after which he could not see anything and he was stabbed in the abdomen and then robbed of his possessions. The discrepancy, such as it is, is not so fundamental as to cast a pall over the evidence of both complainants. Whilst they may also both have been under the influence of alcohol, having spent some time drinking together at a tavern, and may therefore have been mistaken regarding specific details of the

assault, their evidence as a whole was, correctly, found to be honestly given and reliable.

9] The complainant Tshatsu stated that he had identified the first appellant as the driver of the vehicle when told by the police that the suspects had been apprehended. At that stage the three accused were held together in the police cell and the complainant, upon being shown these men, confirmed that these were the assailants. This evidence of an identification featured prominently in the trial. The magistrate did not however base any findings upon such identification. The identification of the first appellant by Tshatsu is in any event entirely unreliable in the light of the fact that the three suspects were placed together in a cell and that the complainant was told that these are the three persons apprehended by the police in relation to the complaint. Similarly unreliable is the evidence given by Spondo amounting to so-called dock identification.

10] It appears from the judgment of the court *a quo* that the court based its findings upon the circumstantial evidence implicating the appellants and the fact that direct physical evidence, in the form of some of the stolen items, were recovered from the vehicle in which the appellants were found at the time of their arrest. It is to this evidence that I now turn.

11] Constable Diki testified that he had received a radio report of a robbery that had taken place in New Brighton. He went to the police station where he spoke to the

complainant Tshatsu and obtained a description of the vehicle. He was told that it was a red Nissan Sentra. He and his partner Constable Tolong went out on patrol in their police van in order to search for the red Nissan Sentra. After a period of searching they came across a red Nissan Sentra in the vicinity of Yeko Street in Zwide. They followed the vehicle, switched on the blue light and sounded the siren on their vehicle. The red Nissan did not stop. It sped off and they followed it. They called for assistance from other patrols. He said that three police vans responded and after a short while the red vehicle came to a halt when another police van approached from the front. When it stopped two persons jumped out of the vehicle and ran. The driver, he said, remained in the vehicle. He arrested the driver. The other two were arrested by the police from Kwa-Zakhele who had responded to the call for assistance. He testified as to the goods found in the back of the red Nissan.

12] Constable Diki was not a particularly impressive witness. His independent recall of events and of the exact sequence of events was poor. He couldn't recall who had arrested the other two suspects. His description of the chase of the red Nissan, and in particular, how long it had lasted and how far they had travelled, leaves one in doubt as to the nature of the chase. When asked to explain how far they had travelled from Yekiso Street to where the vehicle stopped he estimated that it could be thirty metres and it appears from the record that the two streets are separated by a block. His evidence regarding whether there was another police van on the scene when the red vehicle came to a halt also vacillated. It appears, on the record, that the prosecutor and defence counsel intended at some point to undertake an inspection in loco in order to clarify aspects of the evidence. This was however not pursued and the prosecutor appears to have abandoned reliance

upon the evidence of a car chase.

13] The magistrate did not critically and carefully evaluate Diki's evidence and appears to have merely accepted it without anymore consideration. In my view the magistrate erred in this regard, however, for the reasons that follow such error does not have a material bearing upon the outcome of the matter.

14] Although Diki was cross examined at length on a number of aspects related to his evidence, the essential features of his evidence were not challenged. His evidence that two people jumped out of the vehicle and ran away when it stopped was confirmed by the first appellant, who stated that there were five people in the vehicle when it was stopped. Although both accused 2 and the second appellant had stated in plea explanations that there were only three people in the vehicle when it was stopped, accused 2's legal representative (presumably forgetting the content of her client's plea explanation) proceeded to put a version to Diki in cross examination that there were five people in the vehicle and that two people jumped out and ran away. Nothing turns on this. The second appellant confirmed Diki's evidence that he was seated in the front passenger seat, although he disputed that he had run away.

15] Even if it is accepted that there was no "car chase" before the red Nissan came to a halt all three accused persons stated that the police vehicle sounded its siren and had its blue light flashing and that thereafter the jikeleza was brought to a halt.

The fact that the first appellant testified that two persons ran away when the vehicle came to a halt is significant in a number of respects. Not only does this evidence confirm the evidence of the police officer, it is also destructive of the version presented by the second appellant.

16] First appellants defence was in essence that he was the innocent driver of a jikeleza who had transported passengers during the course of that evening. He was not involved in any robbery and such goods as were found in the vehicle could have been left there by one or more passengers he had transported. His version of the arrest suggested that the real culprits had escaped, since he said that there were five persons in the vehicle and only three were arrested, the other two having fled. If indeed there were five persons in the vehicle and the two real culprits had fled then one would have expected all three of the accused persons to have stated this. Instead, they fundamentally contradicted one another in their efforts at exculpation.

17] In my view the magistrate correctly found, on the reliable evidence, that when the red vehicle stopped there were only three people in the vehicle and that two of those attempted to escape the police by fleeing on foot. Those two persons were the accused, including the second appellant. The magistrate also correctly found that a search of the vehicle revealed items which had been stolen from the complainant and that these items were identified by the complainant shortly after the arrest of the suspects.

18] In argument before this court much was made of the unreliable evidence regarding identification. This matter does not however turn on identification but rather on the assessment of probabilities and the inferences which can properly be drawn from the circumstantial evidence which links the appellants to the commission of the offence.

19] The first appellant drove a red Nissan Sentra as a “jikeleza” on the night of the robbery. It was common cause that approximately an hour after the robbery was reported the first appellant was apprehended driving a red Nissan Sentra in Zwide, a few kilometres from where the robbery had taken place. Two people attempted to escape the police by running away and a search of the vehicle revealed items which had been stolen in the robbery an hour earlier. It is simply put, extremely unlikely that there was at the time another red Nissan Sentra being driven as a “jikeleza” which its occupants used to perpetrate the robbery in question and that the perpetrators of the robbery then transferred to another red Nissan ‘jikeleza” where they proceeded to leave the loot from the robbery before disembarking, prior to the police apprehending the appellants. The mere articulation of such a proposition demonstrates how farfetched it is, and that it is consequently not reasonably possibly true. So much for the version of the first appellant.

20] The acceptable and reliable evidence established that the red Nissan Sentra which was driven by the first appellant was indeed the vehicle in which the complainants

were robbed and that at the time of the robbery the vehicle was driven by the first appellant. The only reasonable inference to be drawn from all of the facts established by the evidence is that the first appellant was knowingly a party to a common criminal enterprise executed with the other occupants of the vehicle at the time of the robbery to rob the complainants.

21] It follows therefore that the magistrate's findings in regard to the first appellant cannot be faulted and that his appeal cannot succeed.

22] Insofar as the second appellant is concerned the magistrate found that second appellant was one of the two persons who had attempted to flee when the police stopped the red Nissan Sentra. This finding accords with the reliable and corroborated evidence of Diki. In coming to this finding the magistrate did not misdirect himself nor commit any error. The effect of the finding is destructive of the second appellant's credibility and of his exculpatory version. The probabilities again play a role in the proper assessment of his version. The effect of his version is that within a very short period after the commission of the robbery of the complainants, four of the perpetrators must have disembarked (leaving behind some of the loot) before the second appellant and his friend became passengers of the "jikeleza", which was now operating as a "jikeleza" rather than as an instrument for the commission of robbery. Again this is not reasonably possibly true.

23] The evidence established that the second appellant was in a red Nissan Sentra driven by one of the participants in a robbery executed in the vehicle an hour prior to the second appellant's arrest. The evidence also established that items belonging to the complainant and which had been stolen from him were in the vehicle. The magistrate found, correctly, that the second appellant attempted to flee when the vehicle was stopped. On these facts the magistrate drew the inference that the second appellant was a party to the common criminal enterprise of robbing the complainants. In doing so the magistrate neither erred nor committed misdirection.

24] It follows therefore that the appeal of second appellant too cannot succeed.

25] In the circumstances I make the following order.

The appeal is dismissed.

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G GOOSEN
JUDGE OF THE HIGH COURT

KEMP AJ.:

I concur.

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L KEMP
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:	For Appellants	Ms H. McCallum, Justice Centre
	For Respondent	Ms Packerey, DPP