

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: A243/2019

REPORTABLE: NO.
OF INTEREST TO OTHER JUDGES: NO
REVISED.
2022-05-13

In the matter between:

TONEY KAMHUKA
BRIAN MLAMBO

First Appellant
Second Appellant

and

THE STATE

Respondent

JUDGMENT

POTTERILL J

Background

[1] Both the appellants were found guilty of robbery with aggravating circumstances in terms of section 7 of Act 5 of 1977 read with sections 155 of Act 51 of 1977 (the Act) and section 51(2) of Act 105 of 1997 as amended by Act 38 of 2007. Both the appellants were sentenced to 15 years' imprisonment. The appellants are before us with the leave of the court *a quo*.

[2] It was undisputed that on 2 May 2016 the appellants were pulled off the road by the police while they were in an Iveco Truck Registration number [...] with a trailer. The first appellant was the driver of the truck and the second appellant was the passenger next to the driver.

[3] What the court *a quo* had to decide was whether the appellants had earlier stopped the truck by blocking its travel with a vehicle and then physically removing the driver of the truck, Mr Bongani Gola, or whether they had been handed the truck by a Mr Moyo to drive the truck and for the purpose of loading goods.

Plea explanations

[4] The appellants chose not to testify, but did provide plea explanations. The first appellant, Mr. Kamhuka, placed on record that a Mr. Moyo, a person for whom he on and off drove trucks, had phoned him to tell him that he had to drive a truck on 2 May 2014 following a car which Mr. Moyo drove. He was to meet Mr. Moyo at the garage next to the N3 at a four-way stop across from the BP garage.

[5] The second appellant, Mr. Mlambo, pleaded that a friend of his called him to help to load a truck. His friend showed him the truck close to Heidelberg and when he got into the truck Mr. Kamhuka was the driver of the truck. He had never met Mr. Kamhuka before. He later changed his plea explanation that in fact he and the first appellant and two other people drove to Heidelberg together in the truck.

Evidence for the State

[6] For the state, the driver of the truck, Mr. Gola testified. He was driving the truck from Durban to Johannesburg. After stopping at a stop sign at the BP garage in Heidelberg a vehicle approached him and people armed with fire-arms alighted from the vehicle. He was assaulted in the truck, he was pushed out of the truck through the passenger door and fell to the ground. His arm was broken in the process. He attempted to run away from the robbers, but was caught, his right arm and leg were tied with his shoe laces and he was guarded under a bridge and much later left alone under the bridge from where he ran for help. The police had gone back to the robbery scene to look for Mr Gola and found him there. They took him to the

hospital. Mr. Gola identified the first appellant at an identification parade. He did not identify appellant number two.

[7] Mr. Mtshali testified that he was at the BP garage to buy food. After buying the food he passed a Toyota Corolla and saw the person in the Toyota Corolla stopping the truck. He saw both the appellants on the scene, running towards the truck. The second appellant was standing at the passenger door of the truck. He identified appellant 1, because he noticed a tattoo on his neck. He saw the truck driver running away from the truck and the appellants driving off in the truck. He contacted the police and then went with the police to look for the truck. They caught up with the truck and he identified the truck. The police stopped the truck. He identified the first appellant at the identification parade.

[8] Both Constables Motaung and Singo testified that they were on duty on 2 May 2016 and attended to a hijacking complaint. They picked up Mr. Mtshali and he pointed out the hijacked truck. They saw a vehicle in front of the truck, but the vehicle just travelled on. The first appellant informed them that he acted on instructions and the second appellant explained that he was only a passenger in the truck.

[9] Constable Malahle testified that he was called to where the truck was stopped, but the appellants were already arrested. He then went looking for the driver of the truck and found Mr. Moyo and took him to the hospital.

Analysis of the evidence

[10] There were substantial contradictions where witnesses not only contradicted themselves, but also each other. The court *a quo* considered and addressed these contradictions in terms of the established rules and case law and found that not in isolation, or taken together, the contradictions render the witnesses unreliable. The contradictions were not material. Whether the Toyota was white or grey, or came from the front or the back of the truck did not detract from the fact that a Toyota had a role to play in the robbery of the truck. Whether there were two or seven people involved in the robbery, is not material. The question is whether the appellants were the participants in the robbery. Whether the truck took long to react to the police

indicating it must stop or not, is not material. It is common cause that the truck was stopped. Contradictions *per se* do not lead to the rejection of a witness' evidence, but under these circumstances can be indicative of errors due to lateness of the hour, the tenseness of the situation and errors. Not every error made by a witness affects credibility. In taking into consideration the nature of the contradictions, their importance and bearing on the evidence in totality I cannot find that the court *a quo* erred in finding the witnesses' evidence reliably and creditworthy.¹

The lack of the charge-sheet to refer to common purpose

[11] In oral argument counsel for both appellants conceded that due to the fact that the appellants did not testify in the court *a quo* they had a heavy burden to convince this Court that the state did not prove its case beyond a reasonable doubt. On behalf of the appellants' reliance was placed on the fact that the charge-sheet did not refer to common purpose and that therefore the appellants could not have been found guilty of aggravated robbery: i.e. the state did not prove that they had common purpose to use a fire-arm in the commission of the offence.

[12] The court *a quo* found that the appellants were identified as being on the scene and in fact robbed the driver of the truck. The identity of the first appellant was proven beyond doubt. He was identified by a tattoo on his neck and by the truck driver and eye witness at an identity parade. The second appellant was on his own plea explanation with the first appellant in the truck when it took off. He was found in the truck a few kilometres away from the scene where the robbery took place. It was put to the witnesses, that he had asked for a lift. Also that he was asked to help load and that he was picked up at Heidelberg, but then changed his plea explanation to that he travelled from where the truck started its journey with the first appellant. The court *a quo* correctly assessed the circumstantial evidence against the second appellant to exclude the reasonable possibility that the explanation given by the second appellant was true. The inference that the second appellant was on the scene to rob the truck - driver of the truck excluded the reasonable possibility that the second appellant provided. The court stated the following regarding assessment of circumstantial evidence in ***S v Reddy and Others 1996 (2) SACR 1 (A)*** at 8c-d:

¹ *S v Mafaladiso and Another* 2003 (1) SACR 583 (SCA); *S v Pistorius* 2014 (2) SACR 314 (SCA)

“In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such ‘that they exclude every reasonable inference from them save the one sought to be drawn.’”

[13] Accordingly common purpose need not have been proven; they were the perpetrators. The question is whether they had common purpose to rob with other perpetrators that had fire-arms. I agree with the respondent’s counsel that the aggravated robbery lies not only in the fire-arms present, but also in the violence that accompanied the robbery. Mr. Moyo was assaulted, pushed out of the truck, and his arm was broken. The definition of aggravating circumstances in section 51 of the Act includes the infliction of grievous bodily harm or a threat to inflict bodily harm. Robbing the truck from a driver would foreseeably lead to infliction of bodily harm and the appellants’ conduct can be ascribed to each other and the other participants.² I am thus satisfied that the appellants were correctly found guilty of aggravated robbery as charged.

Ad sentence

[14] Both counsel for the appellants submitted that the sentence should be reduced to 10 years if this court was in agreement with them that the conviction should be one of robbery only and not aggravated robbery. If it was aggravated robbery then the sentence should be reduced because of their time spent in custody awaiting trial. I am satisfied that the Magistrate correctly found that there were no substantial and compelling circumstances rendering a deviation from the prescribed

² S v Cooper 1976 (2) SA 875 (T)

sentence and the time spent awaiting trial on its own did not constitute a substantial and compelling circumstance.

[15] I accordingly propose that the appeals against conviction and sentence are dismissed.

S. POTTERILL
JUDGE OF THE HIGH COURT

I agree

J.S. NYATHI
JUDGE OF THE HIGH COURT

CASE NUMBER: A243/2019

HEARD ON: 19 April 2022

FOR THE FIRST APPELLANT: ADV. M. VAN WYNGAARD
INSTRUCTED BY: Legal Aid South Africa

FOR THE SECOND APPELLANT: MR. H. ALBERTS
INSTRUCTED BY: Legal Aid South Africa

FOR THE RESPONDENT: ADV. L.A. MORE
INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 13 May 2022