IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

30/7/2014

Case Number: A1045/13

In the matter of

BOY WILKEN SLINGER — Appellant

and

THE STATE — Respondent

JUDGMENT

BAM J

1. On 9 May 2002 the appellant (accused 3) was convicted in the regional court Vereeniging on three counts of robbery with aggravating circumstances (counts 1, 2 and 3), one count of illegal possession of a firearm (count 5), and two counts of kidnapping (counts 9 and 10). On 28 November 2006, the appellant was sentenced to 15 years imprisonment on each of the robbery charges, (which sentences were ordered to be served simultaneously), 3 years imprisonment on count 5; and 5 years imprisonment on each of counts 9 and 10, (it was ordered that the sentence on count 9 should be served concurrently with the sentence on count 10.) The effective sentence was therefore one of 23 years. The appellant's two co-accused had passed away before his conviction.

2. Leave to appeal against both the convictions and the sentences was refused by the trial court as well as the High Court but eventually granted by the Supreme Court of Appeal.

3. The appellant, who was legally represented, pleaded not guilty to the charges and denied any involvement. His defence was an alibi.

4. The evidence adduced by the State can be summarised as follows.
On 22 July 1998 at about 9h00 an employee of Nedcor, Mr Kyde (complainant counts 1, 3 and 9), tasked to load bank's ATM'S with cash, accompanied by Mr Schalk vd Merwe(complainant counts 2 and 10), a security guard, were sitting in the bank's Nissan Sentra vehicle, parked close to a shopping centre in Vereeniging. They were then approached by three men. One was armed with a fire arm. The two complainants were taken out of the vehicle and searched. A blue Skyline arrived at the scene and Mr vd Merwe was put in that vehicle. Mr Kyde was put into the back of the Sentra after a firearm had been pointed at him. The two assailants in the front seat threatened to kill him should he not co-operate. He noticed that Mr vd Merwe's fire arm had been taken from him. They were then taken to a place called Fun Valley where he was instructed to sit on the front seat. Another person, pointed out by Mr Kyde as accused 1, then boarded the vehicle. They then drove to Orange farm where they stopped at a face brick house. The Skyline had in the meantime disappeared. At the house he noticed another Sentra. In court Mr Kyde pointed the appellant out as an occupant of that Sentra. Appellant and the former accused 2, whose body was identified by Mr Kyde at a mortuary before the trial, approached Mr Kyde where he was sitting in the bank's Sentra and threatened to kill him should he not do as instructed. Both Sentra's then left and at two destinations the safes of the ATM'S were unlocked by Mr Kyde and the cash removed and stolen by the perpetrators. The Sentra in which appellant allegedly was, was present at all relevant times. They then drove to another place close to Ennerdale where the robbers took his cell phone, pager and his purse containing R120, as well as his keys, but left the bank's Sentra. The remaining robbers drove away in the other Sentra. Mr Kyde was able to describe in detail what each of the accused did on that day. Mr Kyde also described to the Court that the appellant was dressed in black jeans and a black skipper, that he wore a woollen cap and sometimes sunglasses.
Subsequently, on different occasions Mr Kyde identified all three accused.
On 27 January 1999 Mr Kyde attended a photo identification parade at the police station, Vereeniging. He was shown 5 photographs amongst which he identified the appellant. During cross examination it was pointed out to Mr Kyde that he had not given a description of the appellant in the witness statement he made shortly after the incident. Despite tedious cross examination by the representative of accused 1, Mr Spies, Mr Kyde was adamant that appellant had been at the scenes as described by him.
During cross examination by Mr van Drunick, the representative of appellant, Mr Kyde, however, conceded that a day or so after the incident he was shown photographs which could have included a photograph on which the appellant appeared.
Mr vd Merwe was unable to identify any of the robbers.

In regards to the identification of appellant, Inspector Alberts of the SAPD testified and explained why a photo ID parade had been held. He told the court that he could not find other people of a similar physical appearance. He then arranged for a photo identity parade. At the parade, where the appellant was represented by an attorney, Mr Kyde identified appellant as one of the people involved. Inspector Alberts did not know anything about any photo of appellant that was shown to Mr Kyde beforehand.

5. There can be no doubt that the crimes mentioned above were in fact committed. The main issue in this appeal, however, is whether the State proved beyond reasonable doubt that appellant was correctly identified by Mr Kyde. Secondly, in the event of a finding that the appellant's identity as one of the gang was proved, it remains to be considered whether the State proved that the appellant had participated in the commission of the said crimes. Obviously, if the first issue is decided in favour of the appellant, the second issue falls away.

6. It is trite that a cautionary rule applies where identity is at stake. Before evidence concerning identity of an accused can be accepted, it must be found that the identifying witness is both truthful and reliable. See *S v Mehlape* 1963(2) SA 29 (A). It must further be kept in mind that Mr Kyde was also a single witness in that regard.

7. The trial court found that Mr Kyde was indeed truthful and reliable and therefore accepted his evidence of the identity of appellant as one of the perpetrators. This finding was severely criticised on appeal.

8. The following considerations seem to be of importance:

   (i) Mr Kyde testified that he had noticed the appellant on several occasions. The first time when he was approached and threatened by the appellant; the second time when he noticed the appellant as an occupant of the Sentra vehicle used by the perpetrators; and he was aware of the fact that the appellant was an occupant of the said Sentra at all relevant times. It follows that Mr Kyde did have the opportunity to closely observe the appellant at the time he was threatened.

   (ii) Mr Kyde did not give a description of the appellant's bodily or facial features to the police. This is not in itself of much concern. It is a common phenomenon that a person can be identified without reference to any

specific feature. It appears from the record that the appellant did have rather prominent features. His face was round, his head bald and he is of short stature. However, according to Mr Kyde the appellant wore a woollen cap and sometimes also sunglasses. It therefore stands to reason that the above mentioned prominent features of the appellant were not really that prominent on the day the crimes were committed.

(iii) Mr Kyde attended a photo identification parade on 27 January 2009, about six months after the commission of the crimes, and pointed the appellant out as one of the people involved as described in his evidence. During cross examination by the attorney appearing for the appellant, Mr Kyde however conceded that he could have been shown a photograph depicting the appellant shortly after the day the crimes were committed, but stated that he could not remember.

(iv) At the photo identity parade, in pointing out the appellant, Mr Kyde said in Afrikaans *"Dit lyk of dit hy kan wees."* When confronted during cross examination that the words he used implied that he was not sure about the identification, he said he was at the time scared to be too specific due to the reason that he and his fiancé had been threatened that if he would proceed to point somebody out at any identification parade, harm would befall them. However, in his evidence in court Mr Kyde was adamant that he correctly pointed out the appellant.

(v) Mr Kyde also identified accused 1 at an identification parade. Accused 1 was linked to the crimes by other independent evidence. Mr Kyde also identified the former accused 2's body before the trial. Accused 2 was likewise linked to the crimes by independent evidence

9. The regional magistrate, in referring to *S v Moti* 1998(2) SACR 237 SCA, considered all the above and took into consideration that in respect of photo identification parades that a court should be cautious, and even sceptical, in evaluating the evidence. The trial court then found that Mr Kyde was honest in identifying the appellant. I could find no reason to say that the court *a quo* erred in that regard. I further agree with the court *a quo's* remark that even if Mr Kyde was shown a photograph of the appellant soon after the day the crimes were committed, that it is highly unlikely that Mr Kyde could have been influenced to point out the appellant on another photograph some six months later.

In considering the evidence of Mr Kyde, it appears that he never deviated from his version or contradicted himself in any material respect . Mr Kyde's evidence pertaining to the sequence of events and the individual rolls played by the perpetrators was remarkably clear, precise and specific. It is further of importance to note that Mr Kyde's identification of the two other accused was confirmed by other

objective evidence. In my view Mr Kyde was indeed a reliable, honest and trustworthy witness.

10. The criticism levelled at the photo parade is without substance. The appellant's attorney, who was present at the time, raised no objection against any aspect. The submission made on behalf of the appellant, based on *S v Ndika and Others* 2002(1) SACR 250 at 257j-258a, that a minimum of 8 photographs is required at such a parade is not correct. There is no prescribed number of photographs that should be used. Obviously more photographs may diminish any risk of wrong identification. However each case has to be considered on its own facts.

11. It is trite that in the event of a court finding that the State's case is unassailable, no room exists for a finding that the accused's exculpatory version may be reasonably possibly true. See *S v Trainor* 2003(1) SCACR 35 SCA, pars [8]and [9]. Accordingly the trial court, after having found that the State succeeded in proving the appellant's identification as one of the perpetrators, correctly rejected the appellant's defence.

12. The next issue to be addressed is the question whether the State has proved that the appellant had indeed participated in the commission of the crimes. In this regard no evidence was adduced by the State of any direct act of the appellant in respect of the alleged crimes before the incident during which the appellant threatened to kill Mr Kyde, should he not co-operate. In acting in this way the appellant's involvement in the whole operation was clearly established. He was actively involved. This situation was further confirmed by the appellant's subsequent continuous presence in the Sentra vehicle that was, at all relevant times, used by members of the gang. It follows that the appellant associated himself with the gang of robbers. It was accordingly proved beyond reasonable doubt that the appellant and the other perpetrators hadacted with a common purpose. See *S v Thebus and Another* 2003(2) SACR 319 CC at 335 par [18].

13. The submission made by Mr Van Rooyen, appearing for the appellant before us, that the conviction on the 3 counts of robbery represents a duplication of convictions is without substance. It appears from the evidence that the perpetrators primarily intended to rob the bank's ATM's of cash. That they did. However they also proceeded to rob the two people concerned, Mr Kyde and Mr vd Merwe, of their personal items. The appellant's contention that the taking of Mr Kyde's personal possessions, including his keys, and the personal possessions of Mr vd Merwe, were

incidental to the robbery of the ATM's, cannot be accepted. The fact that the robberies occurred in what may be said to be a continuous action, does not affect the situation that the bank and the two said people were separately robbed with separate intent. See *S v Dlamini* 2012(2) SACR 1 SCA. Accordingly the appellant was correctly convicted on counts 1, 2, and 3.

14. The same argument was raised by Mr van Rooyen in respect of the kidnapping of the two complainants, counts 8 and 9. The fact that the appellant and his co-perpetrators deemed it necessary to use the Mr Kyde to achieve their ultimate goal of robbing the ATM's, has to be carefully considered. In this regard it was conceded by Ms Harmzen, appearing for the State, that the force element in regards to the robbery of the ATM's, and for that matter the robbery of Mr Kyde as well, encompassed the same force element in respect of the kidnapping of Mr Kyde (count 8). The gang clearly pre-planned the whole operation by firstly kidnapping the people who could assist them to carry out their plan to rob the ATM's and the robbery itself. The gang's intention to deprive Mr Kyde of his freedom was clearly part and parcel of the execution of the robberies. Accordingly it follows that the appellant could not have been convicted of both the robberies and the kidnapping of Mr Kyde. The conviction constituted a duplication of convictions. It follows that the appellant's conviction on count 8 should be set aside.

15. Mr v d Merwe's situation (count 9), however, differs materially from that of Mr Kyde. Although it seems that the element of force in respect of the robberies, as far as it concerns Mr vd Merwe, to disarm and neutralize him by getting him out of the way in order to allow the gang to execute the robbery of the ATM's, initially coincided with the force in respect of the kidnapping of Mr vd Merwe, the evidence proved that Mr vd Merwe was still deprived of his freedom long after the completion of the robberies. The robberies were committed before noon that day and Mr vd Merwe was only released late afternoon. There is no evident reason why the gang decided to keep Mr vd Merwe incapacitated for the whole day. According to Mr vd Merwe he was apparently questioned by the gang about vehicles and movements of his security firm that had nothing to do with the robberies committed that day. It follows that the appellant was correctly convicted on count 9, the kidnapping of Mr vd Merwe.

16. In respect of count 5, the illegal possession of Mr vd Merwe's 9mm fire arm it is contended on behalf of the appellant that the State did not prove that the appellant,

at any stage, was in physical possession and control of the fire arm of Mr vd Merwe. In this regard the trial court convicted the appellant on the basis of common purpose, in accordance with the judgment in *S v Khambule* 2001(1) SACR 501 (SCA). In a later decision, *S v Mbuli* 2003(1) SACR 97 SCA, Par [71], it was ruled that in matters where the issue of possession of firearms come into play, where it is *used* for some or other illegal purpose it actually turns upon the issue of joint possession. It is therefore required that the State should have adduced evidence that the perpetrators involved had the intention to exercise possession through the actual detentor(s), and that the actual detentor(s) had the intention to hold the fire arm on behalf of the group. In this case however, it must be accepted that the gang, in pre-planning the crimes, knew quite well that an armed security guard was involved and that he would have to be disarmed and robbed of his firearm. It follows that all the members of the gang had the intention to exercise possession of the firearm through the actual detentor. The plan was meticulously executed. The firearm was then in the possession of the gang. There is no other reasonable inference to be drawn from the circumstances but that the actual detentor then possessed the firearm on behalf of the gang. This, in my view, satisfies the requirements in this regard as re-stated in *Mbuli.*

17. In regards to the appeal against the sentences imposed by the trial court, this Court's powers to interfere are limited. Before this Court may interfere it must be established that the trial court erred in some or other material respect, or misdirected itself or imposed a sentence that is totally inappropriate. See *S v Nkosi and Another* 2011(2) SACR 482 SCA, par [34]. The trial court considered all relevant issues pertaining to sentence. It includes the personal circumstances of the appellant, the nature of the crimes and the interests of the community. From the record it appears that the appellant disappeared after his conviction on 9 May 2002 until he was apparently again brought before court on 28 November 2006, about 4 1/2 years later. At the time of sentence the trial court was informed that the appellant was 56 years of age. It appears that the magistrate was doubtful in this regard when he pointed out that the appellant, at the time of his arrest in 1999 was noted to be 45 years. According to the SAP 69, depicting the appellant's date of birth, he was 52 at the time of sentence. The magistrate did not attach much weight to the appellant's previous convictions in view of the fact that the most recent one was dated 19 July 1999. In regards to counts 1, 2 and 3 a minimum sentence of 15 years per charge was applicable. In a comprehensive judgment the trial court considered the question whether substantial and compelling circumstances existed justifying a lesser sentence than the prescribed minimum. No such circumstances were found, in my view, correctly so. What was in fact aggravating is the situation

that the robbery was clearly carefully pre-planned and successfully executed with controlled precision.

18. In considering the cumulative effect of the sentences the trial court appropriately ordered that the sentences on counts 1, 2 and 3 should be served concurrently. The 3 years imprisonment in respect of count 5 seems to be appropriate. There is no reason to interfere with that sentence. The sentence on count 8 now falls away. What remains to be considered is whether the trial court did not err, in view of the initial reason of the robbers to deprive Mr vd Merwe of his liberty, in imposing 5 years imprisonment. The trial court, in my view, did not consider the issue of Mr vd Merwe's situation as allude to above. Accordingly this court is entitled to interfere with that sentence if it is deemed to be inappropriate. In my view the sentence of 5 years imprisonment was in the circumstance, despite certain aggravating features, including that the robbers threatened to kill Mr vd Merwe, indeed too severe and should therefore be replaced with 3 years imprisonment.

19. Accordingly I propose that the following order be made.

ORDER

1. The appeal against the conviction on count 8 succeeds. The conviction and sentence on count 8 are set aside.
2. The appeal against the convictions on counts 1, 2, 3, 5 and 9 is dismissed. The convictions are confirmed.
3. The appeal against the sentences on counts 1, 2, 3, and 5 is dismissed. The respective sentences of 15 years, 15 years, 15 years and 3 years imprisonment are confirmed, including the order made by the trial court that the sentences on counts 1, 2 and 3 should be served concurrently.
4. The appeal against the sentence of 5 years imprisonment on count 9 succeeds. 3 years imprisonment is substituted for that sentence.
   (The effective sentence is one of 21 years imprisonment.)
5. The sentence is deemed to have been imposed on 28 November 2006.

A J BAM JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

F G PRELLER JUDGE OF THE HIGH COURT 30 July 2014