IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

30/09/2014

Case Number A345/14

In the matter between

LAZARUS JOSEPH MAKHANYA — Appellant

and

THE STATE — Respondent

JUDGMENT

BAM J

1. The appellant was convicted in the Regional Court, Volksrust, on two counts; count 1, pointing of a fire-arm, and count 2, robbery with aggravating circumstances. On count 1 he was sentenced to 4 years imprisonment and on count 2 to 20 years imprisonment. It was ordered that the sentences should run concurrently. Leave to appeal was refused by the trial court but subsequently granted upon petition.

2. The evidence that the complainant was accosted on 16 July 2006, pointed with a fire arm and robbed, was not contested. Only the identity of the attackers was at stake. The complainant was attacked whilst she was getting into her vehicle. The attackers forced her onto the back seat of her car and they drove off. One of the assailants kept pointing a firearm at her. When she told them she was living alone they reversed back into her drive way. The perpetrators then unlocked the front door, entered the house and proceeded to gather her property. The robbers then tied her up but she managed to alert her mother with her cell phone. Subsequently her brother and father arrived but were also held up by the robbers. A security guard also arrived but was similarly, but after a struggle and after a gunshot had been fired, overcome by the perpetrators. The robbers left with her Golf GTI motor vehicle and other property. The next day her vehicle was found on the Vrede road in a damaged condition. She was later informed that a fingerprint had been lifted from her car. After the arrest of the appellant she, in November 2009, attended an identification parade but was unable to identify the appellant as one of the perpetrators.

3. The evidence adduced by the State linking the appellant to the incident was a fingerprint found on the vehicle of the complainant. The finger print expert, Warrant Officer Budesh Budram, stated that he had 17 years police service, of which 11 as a fingerprint expert. He told the court that on 27 July 2006 he found several fingerprints on the complainant's vehicle. The witness subsequently established that one of the fingerprints lifted from just above the door handle on the outside of the drivers' door, was the left thumb print of the appellant.
   The expertise of this witness and the acceptance of the evidence of fingerprints were challenged in cross-examination.

4. The appellant denied that he knew anything about the incident described by the complainant. He said he did not know how his finger print could have been found on the door of the complainant's vehicle. On the day the incident occurred he was working as a contractor at Sasol where he worked from 7 to 5. (Cognisance can be taken that Sasol is about 150 kilometres from Volksrust.)

5. Before us Mr Moeng argued that even if the evidence of the fingerprint expert is accepted, the State failed to prove when and in what circumstances it came to be on the complainant's vehicle. Mr Moeng submitted that the fingerprint could have been affected to the vehicle in a totally innocent way. However it must be taken into account that the complainant's vehicle was found the very next day after the robbery of the vehicle and that the fingerprint was lifted from a prominent place, to wit the driver's door close to the door handle. The vehicle was on the probabilities in police custody from the day it was found. The fact that the finger print was lifted some 9 days later is of no consequence. There is no indication that the appellant's fingerprint could have been applied innocently during that period or any time before the robbery.

6. The attack on the evidence of the fingerprint expert and whether it was proved that the fingerprint belonged to the appellant, was correctly rejected by the magistrate. The State proved beyond reasonable doubt that the appellant had been one of the perpetrators.

7. However, in respect of the appellant's conviction on count 1, pointing of a fire arm, I am in agreement with Mr Moeng that the pointing was indeed part of the *actus reus* of the eventual robbery. Accordingly the appellant was wrongly convicted on that charge. The conviction and sentence on count 1 should therefore be set aside.

8. In respect of sentence it is trite that this Court's powers to interfere are limited. This may happen only in the event where the trial court has erred in some or other material respect, or misdirected itself, or imposed a sentence that is disturbingly inappropriate.

9. The prescribed minimum sentence for robbery with aggravating circumstances, in terms of the provisions of section 51(1) of the Minimum Sentences Act, No. 105 of 1997, is 15 years imprisonment. In terms of subsection 51(3) a trial court has the discretion, in given circumstances, to increase the minimum sentence with a further 5 years. This is what happened in this case. However, it has been required by our courts, as submitted by Mr Moeng, that in such an event the defence should be alerted of the court's considerations in that respect. Mr Kotze, appearing for the respondent, on the other hand, argued that even if the magistrate had informed the defence of his views in that regard, it is totally improbable that the defence would have tendered any further evidence in mitigation.

10. Although Mr Kotze may be correct in making that submission, the appellant's legal representative, if alerted, could at least have addressed the trial court on the issue of a possible increase of sentence. As a result of the legal representative not having been granted the opportunity to do so, which was irregular, the appellant was prejudiced. In any event, the magistrate did not mention at all why he increased the minimum sentence.

11. In view of the fact that no substantial and compelling circumstances existed justifying a lesser sentence, the prescribed minimum of 15 years imprisonment was applicable. Robbery with aggravating circumstances is a very serious crime. That is why the legislature prescribed a minimum sentence of 15 years. Unfortunately the magistrate did not state why he considered an increased sentence appropriate.

12. After having considered all the relevant circumstances I could not find any reason justifying the increase of 5 years. There were no extraordinary aggravating features.

13. Accordingly I propose that the following order be made.
    1. The appeal against the conviction and sentence on count 1 succeeds. The conviction and sentence on count 1 are set aside.
    2. The appeal against the conviction on count 2 is dismissed. The conviction is confirmed.
    3. The appeal against the sentence on count 2 is upheld. The sentence of 20 years imprisonment is replaced with a sentence of 15 years imprisonment.

A J BAM JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M L MOLOPA- SETHOSA JUDGE OF THE HIGH COURT

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