

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A1246/2002

DATE:

5 SEPTEMBER 2003

5 In the matter between:

VUSIMUZI MAKELENI

Appellant

and

THE STATE

Respondent

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J U D G M E N T

COMRIE, J:

[1] The appellant was convicted by a Regional Court of:

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Count 2 - unlawful possession of a firearm in
contravention of Act 75 of 1969

Count 3 – unlawful possession of ammunition in
contravention of the same statute

Count 4 – armed robbery of and at Boland Bank,

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Strand, on 16 April 1998

Count 5 – armed robbery of Mr Bernardi at the
same bank on the same day

Count 7 – attempted murder of Inspector Stofberg
of the South African Police Service on the same

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day.

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The appellant was sentenced as follows:

Count 2 – nine months' imprisonment

Count 3 – nine months' imprisonment

Count 4 – 15 years' imprisonment

5 Count 5 – eight years' imprisonment

Count 7 – seven years' imprisonment

None of the sentences was ordered to run concurrently.

The total or aggregate period of imprisonment therefore came to 31½ years' imprisonment. The appellant
10 appeals against the convictions and the sentences.

[2] The notice of appeal is a strange document. The
appellant appeals in respect of some charges of which he
was not convicted and against some, but not all of the
15 charges, of which he was convicted. Because the case
largely turns on identity and identification, I propose to
look at the position overall.

[3] Ad the convictions. The evidence reveals that on the
20 morning of 16 April 1998 an armed robbery took place at
Boland Bank in the Strand. The robbers took over R150
000 of which over R100 000 was recovered. During the
robbery a customer of the bank, Mr Bernardi, entered the
premises intending to make a deposit. He was robbed of
25 over R7 000 in cash and a deposit book. The latter plus

a small amount of cash was recovered. Bank officials managed to alert the police while the robberies were in progress. The police hastened to the scene.

5 [4] Near to the bank they saw what appeared to be the tail-end of a "hijack" of a red commercial bakkie belonging to Messrs Alofix. A report to that effect was made by the driver of the bakkie. The police set off in hot pursuit of the red bakkie. There were four men in and on the
10 bakkie, two inside the cab and two on the open rear portion. The chase proceeded at high speed from the Strand past the Somerset West shopping mall and on to the N2 towards Cape Town.

15 [5] At the Baden Powell exit the bakkie took the road towards Strandfontein and then drove into an area of Khayelitsha containing squatter housing. The police followed. On the way from the Strand to Khayelitsha, gunshots were exchanged between the police and the
20 men on the back of the bakkie. One of those men appears to have been injured. He took to loading firearms which he handed to the other man, who then started shooting with firearms in both hands. Prior to
25 that these two men had let down the rear flap or tailgate of the bakkie and turfed the equipment into the road

thereby presenting obstacles to the pursuing police vehicles. Those vehicles were not damaged by the shooting, nor were the policemen injured.

5 [6] At Khayelitsha the uninjured gunman jumped off the bakkie carrying a grey or greyish sports bag or tog-bag and a firearm. He was pursued by Inspector Stofberg who saw him disappear into a hut with only one door. Stofberg heard the loud voices of a man and a woman
10 inside the hut. He commanded the gunman to come out. The door was opened and, according to Stofberg, the appellant emerged, crawling on his stomach or his hands and knees.

15 [7] Inside the hut Stofberg found the grey bag with a substantial sum of money in it plus a gun which had recently been used. The serial number of the gun had been filed off. Also inside the hut was a woman. Stofberg and another police witness referred to the
20 jersey or top which the appellant was wearing. I shall deal with this later.

[8] The appellant's defence was one of mistaken identity. He claimed to have been relieving himself at a public toilet
25 made of cement. When he emerged from this structure

he was arrested without cause. He did not see the grey bag. He had nothing to do with the robberies or the other events which I have summarised.

5 [9] The magistrate, in a comprehensive judgment, disbelieved the appellant. She accepted the substance of the prosecution case and, in particular, the police evidence identifying or tending to identify the appellant. At trial none of the witnesses could identify the appellant as one of the robbers at the bank. The bank and police 10 witnesses referred to a grey bag which was used by the robbers, recovered by Stofberg and eventually handed later that day to the bank with money in it. At the trial some two and a half years later, the police witnesses 15 could no longer identify the appellant as one of the men on the back of the bakkie, or as the man whom Stofberg eventually arrested. It was not disputed, however, that the appellant was the arrestee.

20 [10] I am satisfied that the proper inference to be drawn from the evidence is that the men who commandeered the red bakkie were the self-same men who had just robbed the bank and Mr Bernardi. It was this bakkie with those men aboard which was chased by the police all the way from 25 the Strand to Khayelitsha. The man who jumped off the

bakkie at Khayelitsha carrying the grey bag and a firearm was undoubtedly one of the robbers. The question then is whether Inspector Stofberg arrested the right man, i.e. the man with the grey bag.

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[11] A bank witness, a Mrs van Breda, stated that one of the robbers was wearing a dark blue top "met rooi strepe op die mou". In cross-examination she said there was definitely something red on the sleeve but not all over the garment. Stofberg described the suspect whom he arrested as wearing "n trui met rooi, blou en groen kleur kolle". The distance between the bakkie and Stofberg's vehicle, driven by Sergeant van der Wag, varied from 100 to 200 metres until they reached Khayelitsha when it shortened to 50 metres. The arrestee was in Stofberg's sight throughout the chase on foot.

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[12] In cross-examination it was suggested that appellant at the time of his arrest was wearing a top with blue, green and red diamond shapes on it. Stofberg testified that he is very fit and almost caught up with the suspect when chasing him on foot. He got to within eight metres.

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[13] Sergeant van der Wag who drove the vehicle in which Stofberg was the passenger, also described the

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arrestee's top as having "rooi, groen en blou kolle voorop". While Van der Wag could not identify the appellant in court, he stated that when Stofberg brought the appellant back to the police vehicles in Khayelitsha he recognised the appellant.

[14] The appellant in his evidence described his jersey as having "dobbeltstene op, die kleure was groen en rooi". The descriptions of the jersey or top are less than definitive. I think the significance is that Stofberg was able to concentrate on the suspect who ultimately did most of the firing and whom he chased through the squatter housing. The appellant's jersey on arrest corresponded in general terms with the foregoing colour scheme. The grey tog-bag is a cogent link with the robbery at the bank.

[15] We need to remember that in an appeal on fact, the trial Court's findings of fact and credibility are presumed to be correct in the absence of material misdirection or unless those findings are clearly wrong. On the question of identity I am unable to fault the magistrate's judgment in either respect.

[16] Counsel for the appellant, Mr Hutton, has pointed to a number of shortcomings in the prosecution case and some of his criticisms have merit. On the evidence as a whole, however, I can find no reason to disturb the trial Court's conclusion that appellant was one of the robbers of the bank and that he was one of the men on the back of the bakkie who exchanged gunfire with Inspector Stofberg.

10 [17] Appellant's guilt on count 4, the bank robbery, was, in my opinion, clearly proven. I am also of the opinion that appellant's guilt on count 7, the attempted murder, was established. In this regard I note that the shooting continued once the Van der Wag/Stofberg vehicle was within fairly close range of the bakkie. At least *dolus eventualis* was proven by inference.

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[18] With regard to count 5, the robbery of Mr Bernardi, I am satisfied that there was not a duplication of convictions. A separate intention to rob him was required. There was a separate implied threat of violence and a separate *contractatio*. Additional evidence was required to prove this crime. On the main tests and as a matter of judicial common sense it seems to me that the robbery of Mr Bernardi constituted the commission of an offence

different to the robbery of the Boland Bank, even though they happened at the same time.

5 [19] The evidence does not establish that it was the appellant who physically carried out the robbery of Mr Bernardi. Indeed, there is some slight indication to the contrary. The appellant's guilt accordingly depends on the ambit of the common purpose of the robbers. It may be accepted that such purpose was at least to rob the bank and its 10 officials and that that was the primary purpose. While there was no evidence that other customers besides Mr Bernardi were robbed, the *prima facie* inference, in my view, is that the robbers resolved, expressly or by implication, to rob whomever they found inside the 15 building according to opportunity. By the nature of the defence, no evidence in rebuttal of that inference was forthcoming. I would conclude that the robbery of a customer such as Mr Bernardi was within the common purpose of the robbers.

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[20] No argument was addressed to us with regard to the firearm and ammunition convictions (counts 2 and 3) save those arising from the appellant's identity.

[21] For the foregoing reasons I would confirm the several convictions.

[22] *Ad sentence.* As I mentioned at the outset of this judgment, the aggregate sentence imposed on the appellant amounted to 31½ years. Counsel for the appellant urged that this was far too severe. I do not agree. If one has regard not only to what happened at the bank, but also to the appellant's conduct thereafter, it is apparent that he is a menace to society. Apart from the money which was taken, a number of bank officials were threatened by the robbers, as was Mr Bernardi, the unsuspecting customer who walked into the robbery in progress. During the robbery of Mr Bernardi a shot went off, it would seem by accident, demonstrating the dangers inherent to all the victims.

[23] In giving chase, the conduct of Stofberg and Van der Wag and other police officers was nothing less than heroic. They are to be commended for their dedication to duty.

[24] The magistrate, in the exercise of her sentencing discretion, differentiated between the various offences. She specifically had regard to the cumulative effect of

the sentences. The appellant is still a young man and his personal circumstances are not unusual. They were taken into account and there is no reason to think that they were under-valued. The appellant has previous convictions for robbery, theft and housebreaking dating back to 1992 and 1994, when he was still a youth. But these were not over-emphasised in the judgment on sentence. As the magistrate correctly pointed out, there was no indication of remorse.

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[25] In short, I can find no material misdirection in the judgment on sentence. The aggregate sentence, although a long one, does not shock me when account is taken of everything which the appellant did that day. I would therefore confirm the sentences.

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[26] The appeal is dismissed. The convictions and sentences are confirmed.

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P. G. Comrie.

COMRIE, J

5/7/2008.

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LE ROUX, AJ: I agree.

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LE ROUX, AJ

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