

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

A713/2002

DATE:

5 MARCH 2004

5 In the matter between:

JONATHAN SWART

1st Appellant

JOSEPH CHOBELE

2nd Appellant

BOETIE DUBASIE

3rd Appellant

versus

10 THE STATE

Respondent

JUDGMENT

MEER, J

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On 6 December 1999 the first, second and third appellants were convicted in the Regional Court, Worcester, of robbery with aggravating circumstances and each sentenced to 12 years' imprisonment. In addition, the second and third appellants were convicted for unlawful possession of a firearm (count 2), and unlawful possession of ammunition (count 3), in contravention of Section 2 read with Section 39 of Act 75 of 1969. They were each sentenced to six months' imprisonment on count 2 and three months' imprisonment on count 3.

25 Second appellant only was convicted on an additional count of

pointing a firearm in contravention of Section (1)(ii) read with Section 29 (2) and 39 (3) of Act 75 of 1969 (count 4) for which he was sentenced to three months' imprisonment.

5 The appellants pleaded not guilty to the charges. Their convictions stemmed from a robbery committed on 21 December 1996 at Shoprite-Checkers, Russell Street, Worcester, in which cash in the amount of R106 760,70 was stolen. Appellants appeal against their convictions and sentence and in so doing seek condonation for the late filing of their notices of appeal. They cite an inability to obtain legal aid and administrative delays unrelated to them as reasons for the late filing. The se, I am satisfied, constitute just cause and condonation is accordingly granted.

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The State's case in broad terms was that the appellants had planned the robbery for 21 June 1996 and had enlisted the assistance of two employees at the Shoprite Centre, namely Riaan Solomons and one Rossouw. Unbeknown to the appellants, Solomons informed both the police and Checkers management about the planned robbery. On the day in question all three appellants were arrested; appellants 2 and 3 near the cash control office, and appellant 1 outside Checkers.

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The evidence upon which appellants were convicted was as follows; Stephen Dauce, the store manager, testified that the police informed him about the planned robbery two weeks prior t hereto. He was given a description of first appellant and told to watch out for him. In anticipation of the robbery, Dauce had arranged extra security at the store. On the morning of Saturday, 21 December 1996, he recognised the first appellant at the bakery counter in the store just before 9 am. He said that as per usual the cash pick-up from the till occurred around mid-morning. This involved the cash from each till being emptied into red bags which were then put into a large bag and taken up the stairs to the cash office, a floor up. Dauce himself accompanied the security personnel during the "pick-up" and upstairs to the cash office. There the money was put on the desk for the four women who worked in the cash office to attend to.

Dauce then returned to the shop floor and shortly thereafter received a message to go back to the cash office. At that point the police entered the store with guns and he realised the robbery was in progress. Shoppers started to panic. Dauce proceeded to the cash office. On the stairs he encountered the police with appellants 2 and 3 in captivity. By that stage chaos reigned in the store, Dauce returned to the shop floor and assisted in evacuating the public. He saw the

two appellants being taken away by the police. Thereafter he returned to the cash office in search of the four women staff, but they were nowhere to be found. He unlocked the built-in safe and discovered that they had been locked in there together with Riaan Solomons. Solomons had blood on his head. After Solomons and the women were taken to hospital, Dauce went to the police station where he recovered the money, still in the red Shoprite bags, all R106 000, 00 of it.

10 Riaan Solomons, a cleaner at the Shoprite Centre, shed light on how the robbery was planned, and explained his role in facilitating events that day. Two weeks before the robbery, first appellant, whom he knew as "Uile", approached him to assist in the robbery. He asked for a map of the shop and details about the cash "pick-ups". Solomons referred him to 15 Rossouw who worked at the centre for Gray Security. Soon thereafter Solomons testified first appellant, Rossouw, and him, travelled in first appellant's BMW to Zweletemba where they met the second and third appellants and discussed plans for the robbery. Solomons could not remember how many 20 times they met in Zweletemba.

Unbeknown to the appellants, Solomons went to the police and informed Captain Smit about the plans for the robbery. He 25 was unsure whether he had made this report after his first visit

to Zweletemba. He told the police that the robbery was planned for immediately after the cash pick-ups on Saturday 21 December 1996. He also said that the plan was that Solomons would signal by winking to first appellant who would be in the shop after the cash pick-up and once the money was taken to the cash office. Second and third appellants would then enter the shop dressed in blue overalls like ordinary workers. Solomons would go up to the cash office followed by them. Solomons would how his face at the office of the cash office door and the staff would open for him as he often went in to get money. He would light a cigarette and then nip it. This would be the sign for appellants 2 and 3 to storm into the office and take the money. They would then leave through the machine room and pass the money to first appellant through an opening which would be cut for that purpose in the fence outside the machine room.

Captain Smit told Solomons to play along with the planned robbery. On the Friday evening before the robbery, Solomons testified that he cut an opening in the fence outside the machine room and showed the appellants how the door of the machine room worked. Solomons testified that on the morning in question, first appellant had arrived at Shoprite at 7am. The other two appellants were also there. Everything went as planned. Solomons gave the agreed signal and appellants 2

and 3 entered the cash room. Appellant 2 had a gun and hit Solomons on the head with it, as planned. Appellant 3 took a black rucksack from his back and began packing the money into it. Appellants 2 and 3 then locked Solomons and the cash office staff in the safe. The staff remained there until Dauce unlocked the safe and they were taken to hospital. Solomons denied there had been any animosity between him and first appellant in the past and for that reason he had implicated first appellant in the robbery.

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Dorothy Issel and Eileen Wehr who were locked in the safe corroborated Solomons' account of what transpired in the cash office. In addition Issel testified that one of the robbers was armed and said "hou jou bek of ek skiet jou". Neither of them however identified second and third appellants.

Then there was the evidence of various policemen who had come to the scene in anticipation of the robbery. Captain Smit of the Crime Prevention Unit in Worcester with 15 years' experience in the police force, corroborated Solomons' testimony about plans for the robbery. Smit's evidence was as follows; After instructing Solomons to play along with the planned robbery, he obtained the assistance of the Reaction Unit in Paarl, a unit more accustomed to operations of this kind. Members of that unit met with him and Solomons to work

out the logistics for dealing with the robbery. Captain Smit was put in charge of operations outside the store, whilst Captain Korabie of the Reaction Unit was in charge of operations in the store. Those inside were instructed to look out for two black men in blue overalls, whilst those outside had to look out for a tall coloured man with "hangoe".

On the morning of the robbery the members of the police force took their positions, dressed in civilian clothes and were in cellphone and radio contact. Smit received a report that the men in blue overalls had entered the store. He proceeded inside the store and up the stairs to the cash office. There he encountered second and third appellants lying on the floor of the landing, having been caught by members of the Reaction Unit. A bag of money lay next to them. Their faces were injured. Thereafter, they were arrested. Smit had made a statement to the police about this but his statement had been mislaid.

The first appellant was known to Smit who had often seen him driving around in a cream BMW. He had also seen him being arrested and after his arrest, at which stage first appellant's eye was swollen. The appellants had all been taken to hospital for the injuries the day after the event. Finally, Smit made mention of a shooting in the store that morning, but this

was not confirmed.

Captain Korabie of the Paarl Reaction Unit who was in charge of operations inside the store and Constable Grobbelaar, a member of his team, testified about their observations of the appellants that morning as well as how they, together with Sergeant van Wyk, had effected the arrest of appellants 2 and 3 on the stairs outside the cash office. Korabie and Grobbelaar have twelve and six years' experience respectively in the police force. Grobbelaar observed first appellant that morning, initially alone at the bread counter, and then again later in the company of second and third appellants. All the appellants appeared nervous to him. First appellant, he said, had indicated the stairs to second and third appellants, whereafter he went outside. Second and third appellants then went up the stairs, the latter with a rucksack on his back. Soon thereafter a woman started screaming that there was someone with a gun, the customers began panicking, and Korabie, Van Rooyen and Grobbelaar went to the stairs. Korabie arrested second appellant at the bottom of the stairs. He had a gun. Grobbelaar and Van Rooyen caught third appellant at the top of the stairs with the bag of money on him. They pushed him to the floor and in the process Grobbelaar conceded first appellant's nose may have bled.

Grobbelaar seized the bag of money and transported it to the police station. Grobbelaar had also found the safe keys in the bag. These were later used to unlock Solomons and the others who were locked in the safe. Korabie testified that
5 when he caught the second appellant he removed a gun from him. The public he said was very aggressive towards the appellants and they had to be whisked into the police van for their own protection.

10 Sergeant Morgan, who has nine years' experience in the police force according to his testimony, gave an account of what he saw whilst on observation duty outside the store as part of the Crime Prevention Unit team. He had known first appellant as "Uile" as they had been in school together. He had seen all
15 three appellants nearby the store at the entrance to Pep Stores earlier that morning, and had pointed them out to Korabie. He too described the second and third appellants in blue overalls, the latter with a rucksack, which first appellant helped to put under his coat. He had also seen first appellant
20 hand a gun to second appellant. Morgan also saw second and third appellants lying on the stairs after they were caught by members of the Reaction Unit.

Inspector Snyman testified that he had seen all three
25 appellants in a cream BMW at 7.30 that morning. He too knew

first appellant from school. Captain Heunis, who was also on observation duty, said after second and third appellants had been caught, he received a message to this effect and was instructed to arrest the first appellant at that stage. He duly arrested first appellant, known to him as "Uile", who was standing at the opening of the clipped fence, in anticipation of the money being passed to him through the opening in the fence.

10 Finally, there was the testimony of Wolmarans, the fingerprint expert, about third appellant's palm imprint being on the door of first appellant's cream BMW. There was also the testimony of Inspector Engelbrecht to the effect that the fence had indeed been cut. That was the evidence on which the
15 appellants were convicted.

I now go on to consider briefly the versions of the appellants. First appellants' defence was a bare denial of any involvement in the robbery, as well as a denial that he knew the second
20 and third appellants. He testified that he had come to meet a Mr Bam that morning in connection with the sale of chickens and on his way to the bus stop near the Shoprite Centre he was assaulted by the police for no reason, thrown into the van and only later did he realise that he was being arrested for a
25 robbery. Solomons, he said, bore him a grudge because of a

physical altercation involving a girl at a dance some time previously. Solomons had falsely implicated him for that reason.

5 On appeal, Mr Pothier, for the first appellant, submitted that Solomons' evidence was not sufficiently credible to establish beyond reasonable doubt that first appellant had been part of planning the robbery. Solomons could not recall accurately and consistently when he informed the police about the robbery and whether he had read his statement to the police.
10 The Court should have treated Solomons' evidence with circumspection because of this. Mr Pothier questioned also the reliability of the identification of first appellant by the police officers.

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Appellants 2 and 3 did not testify at the trial. Their versions, as put by their legal representatives, also amounted to bare denial. Second appellant's version was that he was arrested in the shop at the door, taken to the stairs and assaulted by
20 the police. He had neither a rucksack, bag of money, nor a gun. Third appellant's version similarly is that whilst he was shopping, Constable Grobbelaar asked that he accompany him to the stairs where he was assaulted.

25 On appeal second and third appellants represented

themselves. The grounds for appeal relied on by them are, in essence, that the Court *quo* erred in accepting the State had proved its case beyond reasonable doubt and not accepting their version as being reasonably possibly true. It was also submitted that they were subjected to an unfair and biased trial. They too deny their involvement in the robbery. They highlighted also aspects of the evidence which were of concern to them and complained about the treatment meted out to them by the police, that they were assaulted by the police and conveyed in the boot of a vehicle, amongst other matters.

The Court expressed its concerns about these events. This notwithstanding, I am of the view that given the overwhelming, consistent and corroborative evidence against the appellants, their grounds of appeal simply cannot be sustained. In a well-reasoned judgment the learned magistrate accurately referred to a "golden thread" that ran through the evidence of the State, as witness after witness corroborated one another and implicated the appellants in the planning and execution of the robbery. Moreover, as was pointed to by Mr Badenhorst for the State with reference to S v Boesak 2000(1) SACR 633 (SCA), appellants 2 and 3 did not lead any evidence in rebuttal of the State's strong *prima facie* case, which consequently became conclusive proof upon which the Court was entitled to

make a finding of proof beyond reasonable doubt.

With regards to the conviction of second appellant on count 4
for pointing a firearm, Mr Badenhorst submitted that such
conviction was not in accordance with justice and stood to be
set aside. The pointing of the firearm was one continuous act
with the robbery by gunpoint and second appellant ought to
have been charged with one offence only. I agree. It is clear
that both acts were committed with a single intent and
constituted one criminal transaction (see S v Benjamin 1980(1)
SA 945 (A) 956E-H).

In view of all of the above, I find that the learned regional
magistrate correctly convicted the appellants on counts 1, 2
and 3 and that the conviction of second appellant on count 4
stands to be set aside.

I now turn to the question of sentence. It is accepted law that
the question of sentence is in the discretion of the trial Court
and that an appeal Court will only interfere with sentence in
the event of an irregularity or misdirection, of if the sentence
is shockingly inappropriate (see S v Rabe 1975(4) SA 855 (A)
at 857D-E). I can find no grounds to interfere with the
sentences imposed in respect of counts 1 – 3. The magistrate
reflected on all relevant factors in passing sentence, including

the personal circumstances of the appellants and their not negligible convictions, and he imposed sentences which were neither shocking nor inappropriate.

5 I would accordingly make the following order;

1. The APPEAL IN RESPECT OF COUNTS 1, 2 AND 3 IS
DISMISSED.

10 2. The CONVICTION OF SECOND APPELLANT ON COUNT
4 IS SET ASIDE.



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MEER, J

SELIKOWITZ, J:

I agree the convictions and sentences of the Court *a quo* are confirmed, save in respect of the conviction and sentence of
20 appellant number 2 on count 4, that is set aside.

SELIKOWITZ, J