

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

A463/2007

DATE:

25/04/2008

5 In the matter between:

1. RASHIED DIEDERICKS2. RASHAAD TOFFA

versus

THE STATE

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JUDGMENT

WRAGGE, A J:

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On 18 April 2007, the first accused, Rashied Diedericks, and the second accused, Rashaad Toffa, were convicted of robbery with aggravating circumstances, in that on 4 March 2006 and in Cape Town they unlawfully and intentionally assaulted the complainant, Andre Hendricks, and with force took certain possessions from him. The aggravating circumstances were that during the robbery the complainant was held at knifepoint.

Both accused were sentenced to imprisonment for a period of

25 15 years.

This matter comes on appeal both in respect of conviction and sentence with the leave of the court *a quo*.

Three accused appeared at the trial, the first and second accused and Karriem Toffa. It appears that there was a fourth accused, Amanda Olivier, but that she had disappeared before the trial commenced.

In his evidence the complainant testified that on 4 March 2006, he was travelling along Somerset Street, Cape Town, on his way to visit a friend. The immobiliser in his car unexpectedly engaged and he came to a stop near a garage. At that stage four persons jumped into his car, three on the back seat and one next to him on the passenger seat. One of the persons who had jumped into the back seat pressed a knife or sharp object to his neck. He was then obliged to drive to the Bo Kaap where two of the men, who he later identified as the first and second accused, took him into a shack. At the time of their arrival, there was a female in the shack, who was later identified as a prostitute named Amanda Olivier. The complainant testified that he had not seen the accused before. One of the accused, whom he identified as the second accused, held him from behind and the first accused proceeded to punch his ribs and head. The first accused then took one of the two cellphones that he had in his possession

(one was for personal use and the other one was for business purposes), and obliged the complainant to contact his wife and require that she should bring him R30 000,00, otherwise they would kill him.

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The accused then bundled the complainant into the boot of his car and drove him some distance. The motor vehicle stopped and accused No 2 took the complainant out of the motor vehicle and bound him to a tree with one or more of the motor vehicle's seatbelts. The complainant was thereafter able to free himself and obtained assistance from a man who took him to the police station. However, he was hurt and in shock, and was unable to explain to the police where the shack in which he had been assaulted was. By this time it was morning on 15 the following day.

After returning home, where he spent a short while, he contacted a friend. He explained to his friend where he had been taken by the accused and he and his friend drove to the centre of Cape Town and made inquiries. These inquiries led him and his friend to the shack where he had been assaulted. They then went to the police station and in the company of the police returned to the shack where he identified accused No 1 and 2, who were at the shack. He was able to identify 25 accused No 1 by virtue of the fact that he had an unusual

nose, and accused No 2 was bald. The second accused is the first accused's father. The third accused was also arrested, who it turned out was the first accused's uncle. Amanda Olivier was also arrested.

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Amanda Olivier then told the complainant and the police that she would show them where the accused's (sic) motor vehicle was parked. They were taken to the motor vehicle which was parked in Woodstock and was in a damaged state.

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At a later stage, the police showed him a Seiko watch, which he identified as belonging to him (of some interest, the Seiko watch is not on the list of items allegedly stolen, which forms part of the charge sheet).

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The complainant was cross-examined at length by the accused's attorney. During the cross-examination it was put to him that the evidence of the accused would be that they had no knowledge of the incident, but they knew the complainant because he purchased drugs from them.

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Constable John Nagel of the Police Services thereafter testified that he had collected the accused on the instructions of Inspector Reyneke and had brought them back to the police station. After the accused had been taken out of the police

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van, he found a Seiko watch in the van. This watch was later identified by the complainant as belonging to him. Constable Nagel asked the accused about the watch and they told him that they knew nothing about it and that this was the first time
5 that they had seen it.

Constable Reyneke also gave evidence, which was in all material respects consistent with the evidence given by the complainant insofar as his dealings with the police were
10 concerned.

An application for discharge at the close of the State's case was unsuccessful and all three accused gave evidence.

15 Accused No 1 testified that he knew nothing about the incident. In fact on the day of the incident he had spent the afternoon drinking beer and had gone to bed early. He testified that he had seen the complainant on two or three occasions, as the complainant visited Amanda Olivier, and
20 Amanda Olivier purchased drugs and wine from his father, the second accused.

Under cross-examination he was unable to furnish any reason as to why the complainant should, for no reason, have
25 identified him as his assailant.

The second accused, the first accused's father, also testified that he was at home. i.e. at the shack, on the day of the incident and had in fact gone to bed even earlier than the first accused. On the following morning, he and the first accused, together with the third accused and other men, were sitting outside the shack when the police arrived and they were arrested and taken to the police station. The second accused also testified that he had seen the complainant on two or three occasions together with Amanda Olivier. He could also not give any reason as to why the complainant may have identified him as being one of his assailants.

Neither of the accused testified that the complainant himself had any dealings with them. This is contrary to what was put to the complainant during cross-examination that their evidence would be.

The third accused, Karriem Toffa, testified that he also knew nothing of the assault, as on the night in question he had been at a dance.

The magistrate convicted the first and second accused and discharged the third accused.

In a detailed judgment, the magistrate stated that the complainant had impressed him as being a good witness. He accepted the complainant's version of the events. He proceeded to confirm that the first accused had a reasonably prominent nose, which was a characteristic which could not easily have been mistaken. He also confirmed that the second accused was bald, as the complainant had testified. The magistrate attached importance to the fact that the complainant's wristwatch had been found in the police van in which the accused had been transported to the police station and that Amanda Olivier had taken the complainant and the police to the complainant's motor vehicle which had been left in Woodstock. Taking all of the circumstances into account, the magistrate found that there was sufficient evidence upon which to convict the first and second accused.

As regards the accuseds' sentences, a form SAP69 recording the various convictions of the second accused only was produced. No evidence as to any previous convictions of the first accused was produced. The first accused was therefore presumed, for the purposes of sentence, to be a first offender.

The magistrate accepted that the first accused was 23 years old at the time he was sentenced, he was unmarried and had two children. He had reached standard eight at school,

worked at a taxi rank and paid maintenance for his children.

He found, however, that he, the second accused, and the other persons involved in the abduction and robbery of the complainant all had a common purpose. The magistrate also accepted that the second accused, at the time that he was sentenced, was 47 years of age with three children. He had reached standard five at school and was the breadwinner for his family. The second accused has a formidable list of previous convictions.

The magistrate was unable to find any substantial compelling circumstances existed and therefore imposed the minimum sentence prescribed for the crime of robbery with aggravating circumstances, being 15 years imprisonment.

Mr Van Rensburg, who appeared for the appellants submitted that the evidence of the complainant, particularly his evidence relating to the identification of the accused, should be treated with caution. It is so that there has generally been recognised that evidence of identification based upon a witness' recollection of a person's appearance maybe unreliable unless approached with due caution (S v Mthetwa 1972(3) SA 766 (A) at 768A - D). However, a Court's powers to interfere on appeal with the findings of fact of a trial Court

are limited. In the absence of any suggestion that the magistrate misdirected himself, his conclusions, including his acceptance of the complainant's evidence, are presumed to be correct (S v Frances 1991(1) SACR 198 (A) at 204c - d). It was apparent from the judgment that the magistrate was at all times aware that he was dealing with the evidence of a single witness and that this, together with the fact that the State's case hinged on the complainant's identification of the accused, required him to exercise caution in the consideration and evaluation of the complainant's evidence. I can see no indication that the magistrate misdirected himself in any respect. I can see no reason to interfere with the magistrates' assessment and evaluation of the evidence, and his evaluation of the witnesses. The complainant testified that both of the accused has distinguishing physical characteristics, and this was confirmed by the magistrate in his judgment. The evidence of the complainant was also to an extent confirmed by the fact that a co-accused, Amanda Olivier, who disappeared before the trial, took the complainant and the police to the complainant's motor vehicle, and also by the fact that the complainant's Seiko wristwatch was found in the police van used to transport the accused from the shack where the assault occurred to the police station. The two accused were also not able to put forward any possible reason as to why the complainant should wish falsely to implicate them in

the offence. Whilst there is clearly no obligation on an accused to give reasons as to why a witness may have given untruthful evidence, the absence of any reason why the complainant might wish to implicate the accused in the crime is relevant to the weighing up of the different versions put before the trial Court. The magistrate found the complainant to be a reliable witness. In my view the record reveals this to be the case. The complainant was vigorously cross-examined, but his evidence as to the material respects remained consistent.

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In my view, therefore, the accuseds' appeal against their conviction must fail.

With regard to the sentence imposed by the magistrate, he found that there were no substantial and compelling circumstances which justified the imposition of a lesser sentence to that prescribed to the law of robbery with aggravating circumstances in Section 51 of the Criminal Law Amendment Act 105 of 1997 and therefore sentenced both accused to 15 years imprisonment, being the minimum period.

It is conceded on behalf of the accused that if their convictions stand and if the complainant's evidence is accepted, then it is difficult to point to any circumstance that the magistrate should have taken into account but did not which might have justified

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the imposition of a lesser sentence than the prescribed minimum sentence. I agree, when one weighs the seriousness of the offence with the circumstances of the accused, there is no indication of any substantial or compelling circumstances which would have warranted the magistrate imposing a lesser sentence than the sentence prescribed in Section 51 of the Criminal Law Amendment Act.

In my view, therefore, the accused's appeal against both their convictions and sentences should be DISMISSED.

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WRAGGE, A J

I agree. Accordingly the appeal against both the conviction and the sentence is DISMISSED.

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VAN REENEN, J

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