

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case Number: A610/09**

In the appeal between:

**FREDDIE BOOYSEN**

First Appellant

**PIETER MENTOOR**

Second Appellant

**DIMITRI VISAGIE**

Third Appellant

**DIMITRI SWARTS**

Fourth Appellant

and

**The State**

Respondent

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**JUDGMENT : 7 MAY 2010**

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**NGEWU, AJ**

[1] The four appellants were convicted of one count of robbery with aggravating circumstances in the Regional Court, Paarl, on 27 May 2009 and were sentenced to 15 years direct imprisonment.

[2] On the same date they made an application for leave to appeal which was unsuccessful. They petitioned this court for leave to appeal

against both the conviction and sentence. With the leave of this court they now appeal against conviction only.

[3] They had all pleaded not guilty to the charge and were throughout trial represented by Mr Cook. Their defence was an alibi and bare denial of all the allegations against them.

[4] The State led the evidence of Martiens Jantjies, Naas Van Wyk, Brian Christiaans, Inspector Hendrik Johannes Botha, Inspector Wilfred Solomon Alkaster and Henzil Verster.

[5] The evidence of Martiens Jantjies was briefly that for the whole day on the 1<sup>st</sup> November 2005, he was doing Liebco deliveries until about 20h00 in company of Naas Van Wyk. He was the truck driver and Naas was his passenger. Their last point of delivery was Saron. Whilst at Saron, Brian Christiaans called him twice. Brian asked him where they were and he responded that they were in Porterville, misleading him.

[6] Whilst proceeding home, ie. to Piketberg, at a T-junction he had to wait for oncoming traffic at the stop street. He yielded and saw someone across the road. Simultaneously he heard his door being hit with an object and the glass broke. The person on his side hit him continuously. He warded off the blows with his arm and got injured and he sustained abrasions on his hand. Naas was forced out of the

vehicle and the suspects demanded the black bag containing money. Naas was lying right in front of the vehicle and he could not drive over him. The suspects cocked the firearm. They found the black bag behind the driver's seat. They took it and ran away with it in the direction of Gouda. He saw motor vehicle lights at a distance of about 200 metres from the scene. They called Mr Liebenberg, the owner of Liebco, and asked him to call the police. Saron police came to the scene.

[7] He knew all four appellants by sight from Piketberg as well as their residences. He also knew the names of the first and second appellants. He was shocked and confused during the incident. It was dark. He could not identify the four assailants. Others had beanies or balaclavas over their heads. He did not know how much money was contained in the bag. He suffered stress as a result of the incident and has not recovered. No one had a right to rob them. The bag and the money were not recovered.

[8] Under cross-examination he further testified that the one on his side had a firearm. He could not say what object was used in shuttering the window on his side. He suspected that the one on his side was the third appellant, though he was not certain. He was not sure if there were three or four culprits at the scene or in the getaway vehicle. He had known Brian prior to the incident. It is Brian who called him, he knew his voice well and Brian further identified himself when he called.



[9] Naas Van Wyk testified that they were from Saron on the night of the incident. At the stop street, they stopped for oncoming traffic. Three males approached and shattered the right window of the truck and opened the doors. They pulled him out and forced him to lie on the ground and he lay motionless. They were also busy with the driver demanding the bag. They had a panga and a pistol. The pistol was with the one who went for the driver. All three wore balaclavas. He did not see their faces and could not recall how they were clad. They took the bag and ran towards Gouda's direction where there was a parked vehicle in which they drove off. The four appellants were friends, he knew them from Piketberg. He also knew their names. The bag contained about R17 000.00 – R18 000.00 in cash. He had not given the assailants permission to take the money. At the time of the incident he had been in the employment of Liebco for four years. At the scene there were three culprits. Two of them had firearms. It was getting dusk. He was shocked and confused. He schooled with third and fourth appellants. He did not recognise them or their voices that night.

[10] Brian Christiaans testified that he had been in the employment of Liebco until he lost his employment on 10<sup>th</sup> October 2005. His salary and pension monies were withheld. For that reason he planned an armed robbery together with the four appellants. They initially planned to execute it on a certain Sunday, but he was afraid. Before the robbery they went to check the scene at Saron in order to plan how they would commit the robbery. On Monday they all agreed to

execute the robbery on Thursday that very week, being the 1<sup>st</sup> November 2005.

[11] In the afternoon of that Thursday he went to Freddie Booysen's house. Freddie gave him R80.00 for petrol. He went to the garage and filled R150.00's worth of petrol and then returned to Freddie Booysen's house where they got a black bag, a panga, screwdriver, firearm and balaclavas which they put in the bag together with dark clothes that they would change into at the scene. The screwdriver would be used to puncture the truck's wheels in order to inhibit anyone from contacting the police. The first appellant also took out a firearm from under his bed and kept it on himself.

[12] With this plan in place, he and the appellants went with his vehicle to the R44 close to the Saron crossing where they waited for the truck of Liebco. Between 17h00 and 17h30 the delivery vehicle drove past them in the direction of Saron. According to the plan he dropped the appellants next to the R44 where they would act as hitchhikers. Mr Christiaans then as per plan followed the delivery truck to Saron and reported to the first appellant the whereabouts of the vehicle.

[13] While Mr Christiaans was in Saron he received a telephone call from the first appellant who enquired about the whereabouts of the truck. Mr Christiaans as agreed, parked his vehicle in the vicinity of



the scene where he waited for the appellants. After the robbery was completed the appellants got into Mr Christiaans' vehicle and drove off. Mr Christiaans then dropped off the appellants in Piketberg at the residence of the first appellant. Thereafter, he went to his own residence.

[14] The next day the first appellant sent him R2000.00 in cash with the fourth appellant which he used to buy food as well as to change the registration number of his vehicle. Mr Christiaans was arrested Friday, 4 November 2005, three days after the robbery. On the day of his arrest he made a confession to the Magistrate wherein he implicated the appellants as co-culprits. As a result, the appellants were also arrested. After the appellants were released on bail, the first appellant sent the particulars of an attorneys' firm to Mr Christiaans with the request that he go and consult them, which Mr Christiaans then did. On advice from the attorneys, Mr Christiaans pleaded guilty on a count of robbery and got a suspended sentence.

[15] Inspector Hendrik Johannes Botha testified that he had 15 years experience in the South African Police Services and was the investigating officer in this case. Two weeks after the incident they suspected and interrogated Brian Christiaans as he was a dismissed employee and former truck driver at Liebco doing deliveries on the same route. He, Brian, knew exactly where the complainants would collect money and how much would be collected. He told him and Inspector Alkaster that he was part of the robbery. He was taken

before a magistrate for a confession. They obtained a search warrant for first appellant's premises. Under his bed they found a plastic toy revolver. They also found a cell phone and cash to the value of R1065.50. They did not find the bag.

[16] They arrested him and the fourth appellant was arrested at a different address. Inspector Alkaster found clothes at first appellant's place outside. He got the impression that Brian could not differentiate between a real revolver and a pistol. To him he only mentioned a firearm. At the time the four appellants were arrested their High Court case that had been pending was long finalised and they were acquitted. When the appellants were out on bail, Brian called him telling him that he was being threatened and there were messages that were sent to him and he feared for his life. The appellants' bail was not withdrawn though.

[17] Inspector Solomon Alkaster testified that he was stationed at Saron and had 19 years service with the South African Police Services. On a certain Friday, he and Inspector Botha interrogated Brian Christiaans. After a long time Brian told them that he was involved in the commission of the offence together with the 4 appellants. Inspector Bindeman took Brian before the magistrate for a confession. They obtained two search warrants. The second and fourth appellants were arrested in the street and the first and third appellants were arrested at 6 Maglo. They searched the second appellant's premises at 14 Alwyn and found nothing. At 6 Maglo they



found nothing in the bottom of the bin. The T-shirt they found was identical to the one the third appellant was clad in in the Piketberg police station photo album. Other clothes were dark coloured.

[18] Henzil Verster testified that Brian Christiaans had approached him requesting that he accompany him to Tulbagh Court as he did not know the type of sentence that he would get. He asked him to take his vehicle and other items home in the event of him being sentenced to direct imprisonment. He waited for him in the vehicle for a long time. After a while Brian came out saying that he was lucky he did not get a prison sentence. They then drove back

[19] The conviction was attacked on one or more of the following grounds:

- 19.1 The court erred in finding that the state had proved its case beyond reasonable doubt.
- 19.2 Brian Christiaans was a single witness and an accomplice. Different cautionary rules applied and the magistrate failed to properly evaluate his evidence and to apply the necessary caution.
- 19.3 Brian had a motive to falsely implicate the four appellants and his evidence was not satisfactory.
- 19.4 Contradictions and self-contradictions in the evidence of Brian Christiaans and the two complainants were not properly considered.



- 19.5 Whilst the appellants were out on bail, Brian falsely accused them to ensure that they were kept in custody, but in vain.
- 19.6 Brian falsely incriminated them because he is a member of Piketberg Community which does not like the appellants as they were once arraigned for murder in the High Court.
- 19.7 The magistrate erred in rejecting the version of the appellants which was reasonably possibly true, and accepting that of Brian Christiaans which was fraught with improbabilities.
- 19.8 The Magistrate erred in not comparing the handwriting on the electricity voucher and on the house sketch on which first appellant had written. The two are not the same. Brian wrote on the electricity voucher and members of the public had access to the trash bin. Brian is falsely incriminating the appellants.
- 19.9 Thus the trial magistrate failed to properly analyse and evaluate the evidence before her and misdirected herself.

[20] It is trite that it is the duty of the state to prove its case beyond reasonable doubt. Proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt. See *S v Glegg 1973 (1) SA 34 (A)*. There is no obligation upon the state to close every avenue of escape which may be said to be open to an accused.

It is sufficient for the state to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. See *S v Phallo and Others 1999 (2) SACR 558 (SCA)*.

[21] It is so that Brian Christiaans was a single witness and an accomplice. To this end his evidence needed to be approached with caution.

[22] It is well established that what the cautionary rule requires is, firstly, that the court should consciously remind itself to be careful in considering the evidence which practice has taught should be viewed with suspicion, and secondly, that the court should seek some or other safeguard reducing the risk of a wrong finding based on suspect evidence. Exercise of caution should not be allowed to displace the exercise of common sense and the application of the cautionary rule does not affect the standard of proof.

[23] In the present case it has not been shown that Mr Christiaans had a special motive to give false evidence against the appellants. At the time he testified he had already stood his trial and had been given a suspended sentence. His aim cannot have been to obtain some form of clemency for himself or to even shield a culprit and incriminate the four appellants.



[24] There has been corroboration directly linking the appellants with the commission of the offence in that the toy gun was found under the bed of first appellant by the police. According to Mr Christiaans first appellant had drawn the firearm under his bed at the time they planned to execute the robbery. Brian Christiaans did not have any expert knowledge on firearms and could not have been expected to differentiate between a real firearm and a toy gun or whether the firearm was a revolver or pistol. The T-shirt that was found in the bin was the T-shirt the third appellant wore in the photo album at Piketberg Police Station. The witness Brian Christiaans was friends with the appellants. All the above are factors which tend to reduce the risk of false incrimination and serve as sufficient pointers to the truth rendering the evidence of Mr Christiaans reliable. In my view, the trial magistrate properly understood and appreciated the danger inherent in accomplice evidence and properly rejected the version of the accused.

[25] Section 208 of the Criminal Procedure Act 51 of 1977, as amended, permits conviction on the single evidence of a competent witness. All that is required is that the evidence must be clear and satisfactory in all material respects. In *State v Sauls and Others 1981 (3) SA 172 (A)* Diemont JA stated the position as follows:

*“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness... The trial judge will weigh his evidence, will consider its merits*

*and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told... The cautionary rule may be guide to a right decision but it does not mean that the appeal must succeed if any criticism, however slender of the witnesses' evidence were well founded. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense".*

[26] The evidence of Brian Christiaans is in a way supplemented by the version of the two complainants in that the robbery was carried out in the same way as planned with the four appellants. Brian's version cannot simply be rejected on the basis that he was an accomplice. It is not in dispute that the robbery had occurred. Brian played open cards with the police and the court. He was honest in even tendering the reason why he resorted to planning the robbery with the appellants. He was very loud and clear in detailing how they orchestrated the plan. There would be no basis to suggest that he is now misleading the court when it comes to the identity of the co-culprits. Given the fact that he got a suspended sentence, there is no apparent reason why Brian would harbour a motive to falsely incriminate the four appellants. From the date of his sentence there was no animosity shown between him and the co-culprits. He testified about two years after his own date of conviction and he stood <sup>nothing</sup> ~~nothing~~ to gain from the false incrimination at all. He came across as a credible and reliable witness who had no interest or bias adverse to the appellants. There



can be no merit in the contention that the Piketberg community was animous toward the appellants. First Appellant conducted a tuck-shop business from his own residence in Piketberg. It is the Piketberg community that supported him even after he was acquitted on the murder case that allegedly angered them.

[27] The contradictions Mr Cook referred to in the Notice of Appeal were not that relevant, some were far-fetched and had no bearing on the case at hand at all. In the court's view the evidence of Mr Christiaans safely passed the cautionary standards required of it and this court cannot fault the finding of the trial magistrate to that effect.

[28] All four appellants had raised an alibi that they were in their respective residences at the time of commission of the offence.

[30] The five principles identified as correct in assessing an alibi defence were detailed in *S v Malefo 1998 (1) SACR 127 (W) at 158 a – e* as the following:

- a) There is no burden of proof on the accused to prove his alibi.*
- b) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given a benefit of doubt.*

- c) An alibi must be weighed against the totality of the evidence and the court's impression of the witnesses.*
- d) If there are identifying witnesses, the court should be satisfied, not only that they are honest, but also that their identification of the accused is reliable.*
- e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt, and for this purpose the court may take into account the fact that the accused had raised a false alibi.*

[31] There is direct evidence of identification of the four appellants by Mr Brian Christiaans. He is the one who delivered them at the scene, he planned with them how the crime would be committed, and they had all visited the scene prior to the actual commission of the offence. He planted them at a certain spot after the Liebco truck drove past and he followed the truck. After the robbery he drove away with the four appellants as planned. They had brought the money with and the following day they shared the money and gave him R2000.00.

[32] When the court considers the alibi in the light of totality of the evidence and the court's impression of the witnesses, the inevitable conclusion is that the appellants raised a false alibi. There is strong evidence that they were at the scene and are the very culprits. The trial court safely rejected the version of the appellant. Thus, the state proved beyond reasonable doubt that they were the culprits.



[33] There is no way that this court can fault the verdict arrived at by the trial court. In the circumstances I would dismiss the appeal and confirm the conviction of all four appellants.



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**NGEWU, AJ**

**I agree, and it is so ordered.**

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**ZONDI, J**