IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A324/2010

DATE: 3 SEPTEMBER 2010

In the matter between:

SIPHELO DAVID KANI Appellant

and

THE STATE Respondent

J U D G M E N T

FOURIE, J:

Appellant appeared in the Regional Court at Wynberg on one count of housebreaking with the intent to rob and robbery. He pleaded not guilty, but after hearing evidence, the presiding magistrate found him guilty of robbery with aggravating circumstances and sentenced him to 11 years imprisonment. He now appeals, with the leave of the court *a quo*, against both his conviction and sentence.

It is common cause that in the early hours of 3 May 2007, the

residential dwelling occupied by the complainants, was entered by three persons who robbed the complainants of their possessions. These items were loaded into the boot of a motor vehicle, belonging to one of the complainants, whereafter the perpetrators attempted to flee from the scene with the vehicle. However, the vehicle stalled close the complainants' residence, whereafter the robbers fled on foot.

The appellant was subsequently apprehended due to his fingerprints which were taken in the complainants' house and in the motor vehicle in which the robbers attempted to flee the scene. The appellant raised the defence of necessity. He says that he was one of the persons who entered the house of the complainants and took their possessions and loaded same into the car. His version, however, is that he was threatened by one of the other perpetrators, a person by the name of Sawso, to partake in the robbery and that it was never his intention to harm the complainants or to rob them of their possessions. He says that if it were not for the conduct of Sawso, he would not have partaken in the robbery.

The defence of necessity is recognised by our courts. See S v Goliath 1972(3) SA 1 (A). As explained in Goliath, the validity or not of a defence of duress or compulsion will depend on the particular circumstances of each case and the whole factual

matrix will have to be carefully examined, and adjudicated upon with the greatest care. If no immediacy of life threatening compulsion was present and/or an accused had other choices rather than to commit the offence with which he is charged, the defence will fail. See also S v Mandela 2001(1) SACR 156 (C).

In his thorough judgment, the regional magistrate carefully weighed all the relevant facts and circumstances in considering whether appellant had acted under duress or compulsion. In my view a conspectus of the evidence as a whole clearly justifies the finding of the magistrate that this defence could not succeed and that the version of the appellant should be rejected as not being reasonably possibly true.

I am further of the view that the version of the appellant is not only improbable, but clearly false. In arriving at this conclusion, the following should be emphasised:

1. According to the State witnesses, all three perpetrators partook in the execution of the robbery and even took turns in watching over the family members.

2. Mr McNicol observed that all three robbers attempted to

flee the scene in the stolen vehicle and that they fled on foot when the vehicle stalled.

3. Appellant did not only partake in the robbery, but even instructed one of his co-perpetrators to ask the occupants of the house to tell him how the immobiliser of the motor vehicle works. He was accordingly not a mere passive bystander.

4. When the authorities arrived on the scene, appellant did not come forward to identify himself as an innocent bystander, but rather hid away in the reeds until the next day. He also failed to report the incident after he got home the next day.

5. There appears to have been ample opportunity for appellant to make a getaway during the course of the robbery, which lasted nearly three hours. However, he at no stage attempted to distance himself from the robbery.

6. It is not only improbable but illogical in the extreme that the robbers would take appellant along as a potential witness on their robbery excursion. They surely would have realised that appellant, whom they allegedly caused to act under compulsion, could easily turn against them if

apprehended.

To all of this I should add that appellant's version as to how he came to be involved with the others, is totally unconvincing. It seems highly improbable, if he was requested to assist Sawso to collect a vehicle which he, Sawso, had bought from his employer, that they would have driven around from 7 p.m. until the early hours of the morning before reaching the house where the car ought to have been collected. Also on his version, appellant was not threatened by the other two to partake in the robbery and he testified that the reason why he did not leave the scene of the robbery was that he was unfamiliar with the area. This does not constitute a valid defence of necessity. I, therefore, conclude that there is no merit in the appeal against his conviction.

As far as the sentence is concerned, it is trite that a court of appeal will only interfere if there has been a failure by the sentencing court to properly exercise its discretion. An approach which is often used is to ask whether the court of appeal, had it been the court of first instance, would have imposed a sentence which differs substantially from the sentence imposed by the trial court. The magistrate properly considered the provisions of Act 105 of 1997, which prescribes a minimum sentence of 15 years imprisonment in the case of

robbery with aggravating circumstances. He concluded that there are substantial and compelling circumstances justifying a lesser sentence, particularly having regard to appellant's personal circumstances. In my view, there is no basis for a finding that the magistrate misdirected himself in regard to sentence and the sentence imposed does not differ substantially from the sentence which I would have imposed had I been the court of first instance.

In the result I propose that the appeal be dismissed and that the conviction and sentence be confirmed.

ROUX, AJ: I agree.

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ROUX, AJ

FOURIE, J: It is ordered accordingly.

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FOURIE, J

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