

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

CASE NUMBER:

A403/2010

5 **DATE:**

10 SEPTEMBER 2010

In the matter between:

CECIL MCDONALD SEPTEMBER

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T

15 **BUIKMAN, AJ:**

The appellant was granted leave to appeal to this court by way of a petition on 29 March 2010. The appeal is in respect of the conviction only, the appellant having been found guilty of robbery with aggravating circumstances.

A summary of the evidence in the court *a quo* is as follows:

The State led the evidence of the complainant, Mr Andrews, who was a single witness and who testified as follows:

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1. On 17 August 2007 he left the Bellville Magistrate's Court with one Bradman Heuwel;
2. Heuwel was speaking with the appellant, who was unknown to the complainant. They all walked together to the taxi rank, which leads from the magistrate's court under a bridge. Heuwel and the appellant evidently walked ahead of the complainant. He noticed that they were deep in discussion;
3. When Heuwel and the appellant parted ways, the appellant turned around and walked in his direction. He did not know what had happened to Heuwel. The appellant then grabbed him by his neck and he felt something hard and cold being pressed thereto. He was then forced to walk together with the appellant under the bridge where there were no people present;
4. The appellant was joined by another gunman;
5. The appellant reached for his exact trouser pocket in which he was carrying approximately R140,00. He had put the change from his lunch time purchase in this trouser pocket. Heuwel knew that the complainant had R1 700,00 on him, but Heuwel did not know that he had put R1 500,00 thereof in his sock;

6. He suspected that Heuwel had told the appellant that the complainant had a large amount of money on his person and this is why he was robbed;
7. An argument arose between the appellant and his friend. The complainant used this opportunity to struggle free, during which time the appellant's gun, a black 9 mm pistol, fell to the floor;
8. The complainant ran away and almost immediately enlisted the assistance of the police, who came back to the scene with him;
9. Back at the scene, he witnessed the unknown robber picking up the gun, swopping it with his own and running off with the appellant's firearm. The police did not manage to catch him;
10. The police then ran after the appellant and the appellant threw the gun, which had been swopped with his own, over the wall. The appellant was arrested and searched and the police found R40,00 in coins;
11. A search of the neighbouring property yielded a plastic silver coloured toy gun;
12. Later at the police station another search of the appellant was conducted, which produced a further R100,00 note;
13. The complainant was asked to make a statement

that day, which he did in the presence of Heuwel.

During cross-examination, the complainant was primarily asked about the contradictions in his testimony in court, as compared
5 with the prior statement he had made before the police on the day of the incident. In his statement made to the police, the complainant had stated that:

10 "While we were passing Bellville Night Shelters, an unknown Coloured man approached us, asking us to borrow him a cigarette light. While Bradwin was giving the guy the light, the other Coloured man who was with him, (unknown man), pull out a firearm and grabbed me with my clothes and
15 demanding money from him. I told him I do not have money and then he put his hand on my pocket. Het took R140,00 on my pocket and we ran around the corner. We immediately found the police and informed the matter to the police and we pointed
20 the suspect to them. So we and the police chased him and caught him by the railway station. I did not give permission to this guy to rob me my money. The police informed me that it was a toy gun that this guy used to robb me." (My emphasis)

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The complainant conceded that the statement that he had made was not in accordance with the events that took place on 17 August 2007. He testified that Heuwel had pressurised him into giving a watered down version to the police of what had happened, in order to give the appellant a chance.

He said that although he suspected that Heuwel must have told the appellant of the money that he had in his possession, he did nothing to implicate Heuwel, as he was looking after him at the time. Heuwel was only 17 years old.

The complainant testified that all he wanted was the return of his money which had been confiscated. He had on four occasions attempted to have the charges against the appellant withdrawn.

The appellant's version that was put to the complainant was merely that he had denied being in possession of a gun and that he did not rob the complainant. The appellant's version of the events, however, differs from the complainant, only in respect of what is said to have happened under the bridge. The appellant denies that he robbed the complainant or that he had a gun and stated rather that he took money out of his pocket, which he then told the complainant and Heuwel that he was going to use to buy drugs. According to him, Heuwel and

the complainant then left him there, only to return with the police who had asked him for the gun and R100,00. He was thereafter arrested for no reason.

5 It appears therefore that it is common cause that the appellant and the complainant met each other for the first time on the day of the incident; that they had walked together in the direction of the Bellville Station along the footpath with Heuwel; the scene where the crime allegedly took place was
10 the bridge near the Bellville Station; that the complainant returned to the scene with the two policemen; that the police, after the appellant was pointed out to them, arrested the appellant at the scene of the crime; that there was a search conducted for a gun; that a gun was found in the adjacent
15 property and that a search of the appellant yielded approximately R150,00, of which only R100,00 was returned to the complainant.

The magistrate in the court *a quo* considered the evidence of
20 the complainant carefully and was mindful throughout his judgment that the complainant was a single witness and applied the so called cautionary rule. The magistrate found, however, that the complainant's evidence was such that it was trustworthy and true. The magistrate gave a detailed summary
25 of the decisions regarding the cautionary rule and I do not

intend to repeat them here. He, in particular, considered the fact that there were various contradictions in the evidence given by the complainant, which conflicted with his statement. He concluded that there was no bias on the part of the
5 complainant towards the appellant, who did not seek to implicate him as, it was common cause, that they had met for the first day on the incident and that he had previously tried to withdraw the charges against the appellant.

10 Notwithstanding the inconsistencies in the statement made to the police, the magistrate concluded that, having regard to the totality of the evidence and the explanation given by the complainant, as well as the impression that the complainant made on the court during his evidence during cross-
15 examination, he was prepared to accept the evidence of the complainant.

On a careful reading of the evidence on record in the court a *quo*, as well as the statement made by the complainant on the
20 day of the incident, it appears to me that the magistrate did not correctly interpret the evidence of the complainant in relation to the statement when finding that the complainant intended, in the statement, to protect the appellant. According to the magistrate the complainant, in his statement, had
25 identified the appellant as being the man who had asked for a

light and that the appellant did not have a gun.

If the complainant's statement is read carefully, it is clear that the complainant stated that it was the gunman who was the person who had robbed him and who was arrested by the police. This can undoubtedly only be a reference to the appellant. If it was anyone who the complainant was protecting in his statement, it was Heuwel, who was stated therein as having been in his company throughout the incident and who assisted him and the police in apprehending the appellant. This was also consistent with the complainant's evidence in the court *a quo*, namely that the complainant intended to protect Heuwel, who he suspected played a part in the robbery.

Although it cannot be disputed that there were inconsistencies in the complainant's prior statement compared with his evidence in court, it is clear that these do not relate to the appellant's involvement in the robbery. His evidence as to how the actual robbery took place was consistent throughout.

The evidence of the appellant in fact corroborates that of the complainant in material respects and specifically in relation to where the incident took place and that a toy gun was found in the neighbouring property. Where the evidence differs,

however, it is so implausible that it is not difficult to see why the court rejected it. It is highly improbable that the complainant would have turned to the police to assist him in stealing the appellant's money. More important, is that the
5 appellant would have this Court believe that the gun that was found on the adjacent property to the incident, was a mere coincidence and it had nothing whatsoever to do with the crime. To this must be added the fact that many exculpatory statements made by the appellant during his evidence, were
10 never put to the complainant, such as the fact that the complainant was alleged to have offered him R10 000,00 to get rid of a State witness.

Although the versions of the complainant and the appellant
15 conflict as to whether or not the complainant had been robbed, I concur with the magistrate that the probabilities in this case dictate that the evidence of the complainant should be accepted over that of the appellant.

20 I also agree that aggravating circumstances were present. Even if the gun that was used was a toy gun, it is clear that at all times, even during the evidence in the court *a quo*, the complainant was under the impression that it was a real gun. The complainant testified that he feared for his live.

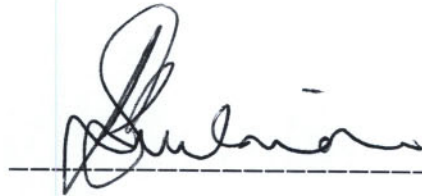
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In all the circumstances, I am satisfied that the appellant is guilty of robbery with aggravating circumstances being present and accordingly I would dismiss the appeal.

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BUIKMAN, AJ

VELDHUIZEN, J: It is so ordered, the appeal is dismissed
and the conviction and sentence confirmed.

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VELDHUIZEN, J