IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A321/2011

DATE: 2011-09-20

In the matter between:

LULAMA BUQA Appellant

and

THE STATE Respondent

J U D G M E N T

BAWA, A J:

The appellant appeared in the Cape Town Regional Court on a charge of robbery with aggravating circumstances, as defined in section 1 of the Criminal Procedure Act 51 of 1977. The appellant and his co-accused were arrested on 12 January 2005, shortly after the offence was committed. The appellant and his co-accused pleaded not guilty. Both accused were refused bail.

The trial commenced on 7 September 2006. Both accused were legally represented. The appellant was convicted on 24

October 2006 and sentenced the following day to eight years imprisonment. The appellant was released on parole on 25 October 2010, having effectively served four years of his sentence.

The appellant applied for condonation and leave to appeal in 2009. Leave was granted to appeal both conviction and sentence.

The allegations against the appellant were that at approximately two a.m. on 12 January 2005 at Vredehoek he robbed the complainant of his VW Polo Playa with aggravating circumstances in that knives and a firearm were used in the robbery. I shall refer to the aforementioned vehicle as a "Polo".

The evidence which formed the basis of the appellant's conviction and sentence were briefly as follows.

Five men, driving a red BMW, had pulled up alongside the Polo. Two of the men jumped out of the BMW, threatened and attacked the two occupants of the Polo with knives and a gun and drove off with the vehicle. This hijacking was reported on the police radio. The Polo was sighted approximately half an hour later, travelling without lights at a high speed on the N2

highway. The police gave chase and the driver of the Polo lost control and collided with a light pole. Two occupants fled. One police officer pursued them, but they were not caught. The driver and the appellant, who was sitting in the back seat of the driver's side of the vehicle, were arrested by another police officer.

Both police officers testified, and there are no grounds to impune their evidence.

The evidence of the arresting officer was that the police vehicle had been parked on the right-hand side of the Polo a few seconds after it came to a standstill, and that the occupants on the driver's side of the vehicle could not escape.

The appellant closed his case without testifying or calling a witness to testify in his defence. His co-accused did, however, testify. Plea explanations were given on behalf of the appellant and his co-accused, in which it was admitted, inter alia, that they were offered a lift to Guguletu by a driver of a silver-brown BMW vehicle, and that, shortly thereafter, a Polo vehicle arrived, occupied by four males and two females. The appellant and the co-accused got into the Polo and the women got out. The Magistrate specifically enquired whether the appellant and his co-accused were prepared to admit, as part

of their plea explanations, that on 12 January 2005 at Rugby Road, Vredehoek they were in possession of a Volkswagen Polo Playa, CA174073. This was answered in the affirmative.

The appellant's co-accused testified that he and the appellant went to a club, Blue Bananas, at about one a.m. in the morning, and they then proceeded to catch a taxi at the taxi rank. As they were going towards the taxi rank, a BMW, fully occupied, stopped next to them. The driver had a discussion with them, during which they asked him for a lift to Guguletu. The driver told them that he had no place for them in his car, as it was full of occupants, but undertook to organise them another vehicle to take them to Guguletu. The driver drove away, and they waited for him.

Some 30 minutes later the BMW returned with a Polo driving behind it. This must have been after 01:30 a.m., on the appellant's co-accused's version, but this Polo could not have been at Blue Bananas at 01:30, because, by this time, the complainant and his friend were already still travelling in it. The appellant could not have been in the Polo before it was stolen from the complainant. The probability is that he could only be inside the Polo after it was stolen.

In the circumstances, the appellant's defence, that he was in

this motor vehicle as a passenger after it was stolen from the complainant, is not only improbable, but it is beyond reasonable doubt false, and the Trial Court was, in the circumstances, entitled to reject it.

The Trial Court rejected the evidence of the co-accused as not being reasonably possibly true. It was not impressed with his evidence, as he changed his version as and when it suited him.

As far as the appellant is concerned, the Trial Court found that there were circumstantial evidence that he was with the co-accused when the Polo was robbed, or stolen.

The Trial Court accepted the evidence of the State witness, on the basis that the evidence was reliable in every material respect. It, accordingly, convicted the appellant and his co-accused.

Mr Klopper, who appeared on behalf of the appellant, submitted that the Trial Court erred in finding that the State had proved its case beyond a reasonable doubt on the basis that there might have been a strong suspicion. He argued that the Trial Court, in evaluating the evidence, should have taken into account the fact that there was absolutely no direct

evidence that the appellant was involved in the hijacking. The appellant was not identified as one of the perpetrators on the scene, or at the subsequent identity parade. The appellant was not in possession of the vehicle at the time of his arrest, but merely a passenger in the back seat of the vehicle, and he did not try to escape.

He accordingly submitted that the inference made by the Trial Court that the appellant was with the co-accused, does not establish beyond a reasonable doubt that the appellant was involved in the perpetration of the robbery.

It is correct that, in criminal cases, the onus is on the State to prove the accused's guilt beyond reasonable doubt, and that, if the accused's version is reasonably possibly true, he is entitled to be acquitted. In deciding whether the State has discharged the requisite onus, the Court must consider the totality of the evidence. The Court must weigh up all the elements which point to the guilt of the accused against all those which are indicative of his innocence, taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities, on both sides, and, having done so, decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. See S v Shabalala 2003(1) SACR 134

(SCA). A Court is not entitled to convict, unless it is satisfied not only that the explanation is improbable, but that, beyond any reasonable doubt, it is false. S v V 2000(1) SACR 453 (SCA).

Based on the evidence adduced by the State, and the fact that the appellant was found in a stolen vehicle shortly after the hijacking had taken place, the appellant clearly had a case to answer, but did not testify or make any attempt to call any witnesses. As such, the appellant must accept the consequences upon that choice. See Osman and another v Attorney General, Transvaal 1998(4) SA 1224 (CC), as well as S v Boesak 2001(1) SA 912 (CC). In the Boesak matter at para 24 the Court stated:

> "The fact that an accused person is under no obligation to testify, does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, a Court may well be entitled to conclude that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused. Whether such a conclusion is justified, will depend on the weight of the evidence."

What is stated above is consistent with the remarks Madala, J, writing for the Court in Osman and another v Attorney General, Transvaal, when he said the following:

> "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case, is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal (sic), the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election, is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of an adversarial system of criminal justice."

I am satisfied that the appellant's failure to testify had the effect, on the facts of this case, of strengthening the case of the prosecution. In convicting the appellant, the Magistrate considered and analysed the totality of the evidence, including the evidence of the co-accused. Am I satisfied that there was no misdirection of the Trial Court, and that the State had

proved the case against the appellant beyond a reasonable doubt.

Accordingly, the appellant's appeal against conviction should fail.

I now turn to consider the attack on the sentence of eight years imprisonment.

The sentence is attacked on the ground that the Trial Court did not attach sufficient weight to the appellant's personal circumstances. This contention must be considered in light of what the Trial Court considered in arriving at an appropriate sentence.

At the time the offence was committed, the appellant was 17 years old. The Trial Court correctly found that section 51(3)(b) of the Criminal Law Amendment Act 105 of 1987 applied, and considered the various sentencing options available to be imposed. It considered that the appellant was still young, and hence could be rehabilitated. It accordingly considered eight years imprisonment to have been an appropriate sentence.

The test for interference by an Appeal Court in a sentence imposed by a Trial Court, is well known and does not require a

restatement. Punishment is pre-eminently a matter for the discretion of the Trial Court, which a Court of Appeal should be careful not to erode.

In my view, the Trial Court took into account all the relevant factors, and, in sentencing, struck the appropriate balance between the personal circumstances of the appellant, the nature of the offence and interests of society. I see no reason to interfere with the exercise of the Trial Court's discretion in relation to the sentence imposed on the appellant.

I accordingly propose that THE APPEAL AGAINST BOTH CONVICTION AND SENTENCE BE DISMISSED.

BAWA, AJ

ZONDI, J: I agree that the appeal against both conviction and sentence should be dismissed and it is so ordered.

ZONDI, J