

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

Case No: A49/2013

In the matter between:

**MZAMO GAJI**

Appellant

and

**THE STATE**

Respondent

**JUDGMENT delivered 16 April 2013**

BOQWANA AJ

Introduction

- [1] On 16 July 2012 the appellant was convicted of one count of robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act<sup>1</sup> by the Bellville Regional Court, for which he was sentenced to 15 years direct imprisonment on 6 September 2012. On 6 December 2012 he was granted leave to appeal against both against conviction and sentence by the trial court.
- [2] At the commencement of the trial, the appellant was legally represented and his attorney withdrew from the proceedings during the examination in chief of the state's first witness. The appellant elected to conduct his own defence for the remainder of the trial.

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<sup>1</sup> Act No. 51 of 1977

### Brief facts

- [3] The appellant's conviction emanates from an incident of robbery with aggravating circumstances that occurred on 09 November 2011, near Boston in B [...] at approximately 19h30, where A.D.S. ('the complainant') was attacked and stabbed with a knife several times and his vehicle, a Toyota Corolla with registration number C [.....] unlawfully removed.
- [4] During the incident the complainant could hardly see his attacker but did notice that he was dark in complexion. At approximately 20h15, whilst patrolling along the R 300 highway, Constable Grobbelaar ('Grobbelaar') and his colleagues received information about robbery of the vehicle that had occurred earlier in the B [...] area. A few minutes later, they noticed a white Toyota vehicle with the same registration numbers as the one reported to be stolen, driving towards the direction of Mitchells Plain. They called for backup and received assistance from Warrant Officer Simon and Sergeant De Jager ('De Jager'). The group of policemen pulled the vehicle over on the N2 before Borchers Quarry in the direction of Cape Town. The driver of the vehicle stopped the vehicle abruptly and he was found standing next to the vehicle. Before the vehicle was pulled over, the appellant was identified by both Grobbelaar and De Jager as the driver of the vehicle. A knife was also found lying on the passenger seat of the vehicle. When asked about the vehicle found in his possession, the appellant told the police officers that the vehicle was not his but that he was sent by one, Zikesa or Botsotso from Nyanga taxi rank to fetch the vehicle. Upon reaching Nyanga taxi rank the appellant pointed at someone who turned out to be an innocent man.
- [5] The appellant denied that he was the driver of the vehicle. He testified that he was walking along the N2 Highway when a few speeding vehicles stopped in front of him. Police officers got out of the vehicles and assaulted him, asking him where his friend was. He testified that he had no option but to lie about an innocent man to relieve himself from the pain caused by the assault.
- [6] He testified that he is a traditional healer and was coming from Stikland that evening where he had gone to pick up his herbs. It was unfortunate that he was found on the road at that time.

### The findings of the Magistrate

- [7] When evaluating the evidence the magistrate found that the state witnesses corroborated each other in that both De Jager and Grobbelaar testified that they saw the appellant inside the complainant's vehicle shortly before he was stopped.
- [8] He further found that the two witnesses were good and honest, and there was no reason to find that they were not credible and reliable. No contradictions were found in both their testimonies. The magistrate also found the complainant to be a credible and honest witness and his testimony that the person who attacked him was a black or a coloured person corroborated that of other witnesses. Furthermore, the appellant was found fifteen to thirty minutes after the robbery with the complainant's vehicle and a knife found inside the vehicle.
- [9] On the other hand, the appellant's version was found not to be reasonably possibly true because he could not provide a reason why he falsely incriminated an innocent person in the Nyanga taxi rank. He also could not explain why he was walking on the highway at that time of the night. The medicine he allegedly went to dig up in Stikland which was never shown to the police. Further, the appellant did not admit even seeing a white motor vehicle. Because of this he denied ever seeing a knife inside the vehicle. He however confirmed that the police had shown the knife to him at the police station. The court rejected the appellant's version finding that the state had proven its case beyond reasonable doubt.
- [10] When imposing sentence the magistrate analysed case law and factors the court should take into account when sentencing. She took into account the appellant's previous convictions and found that the appellant was a second offender for the same charge of robbery with aggravating circumstances committed in 2005 and the appellant had shown no remorse for his actions. The appellant had been released on parole during 2010 and violated his parole conditions during October 2011. She also took into account the aggravating circumstances, which were that the complainant was [...] years old, frail and was brutally stabbed all over his body in his own home. She then considered the appellant's personal circumstances finding that the appellant was still very young, had minor children

and appeared to be trying to maintain his family. Accordingly, there were substantial and compelling circumstances to deviate from the prescribed minimum sentence of 20 years. For this reason the magistrate imposed a sentence of 15 years direct imprisonment.

### The appellant's grounds for appeal

- [11] On the conviction aspect, the appellant submits that the magistrate erred by placing greater emphasis on the state's version as opposed to his and by finding that there were no improbabilities on the state's version. Furthermore, the magistrate failed to have due regard to the fact that the state witnesses could have made a mistake as to the identification of the driver and should thus have treated the evidence on identification with caution.
- [12] As regards sentence, the appellant submits that the magistrate did not evaluate all the factors before her and did not place enough weight on the rehabilitation of the appellant and in so doing imposed a sentence which was shocking in the circumstances.

### Discussion

- [13] There is no direct evidence linking the appellant to the commission of the offence. The state's case therefore rested on circumstantial evidence. The correct approach in how to deal with this kind of evidence has been stated in the seminal case of *R v Blom*<sup>2</sup> where the court stated as follows:

- '(1) The inference sought to be drawn must be consistent with all the proved facts.  
If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other

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<sup>2</sup> 1939 AD 188 at 202 - 203

reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.’

- [14] In principle the court which has to deal with circumstantial evidence must not only look at the evidence of the state or of the accused in isolation but it must consider the cumulative effect of the circumstantial evidence in the case.<sup>3</sup>
- [15] In this case the question is whether an inference can be drawn that the appellant had assaulted and robbed the complainant of his motor vehicle on the night of 09 October 2011.
- [16] The facts presented by the state that robbery with aggravating circumstances was committed at approximately 19h30 in the Bellville area wherein the complainant was stabbed with a knife several times, and robbed of his white Toyota vehicle with registration number, C [...] and that motor vehicle was spotted some fifteen to thirty minutes later at a highway within the proximity of Bellville, driven by the appellant, who was the only one found standing next to the vehicle after being pulled over and a knife found inside the vehicle all point towards the appellant’s guilt.
- [17] Ms Levendall who appeared for the appellant could not go beyond the state’s version. She had to concede that the appellant’s version was highly improbable. The appellant could not explain why he was walking on the highway at that time of the night. His explanation that he had come from digging herbs in Stikland was unconvincing. These herbs were not even shown to the police.
- [18] Furthermore, the fact that the appellant was the only one found in close proximity with the vehicle that was robbed rules out any possibility that someone else was the driver of the vehicle. The appellant lied to the police, when caught by implicating an innocent man in Nyanga taxi rank as the person that sent him to fetch the vehicle. His excuse of assault is not supported by any evidence and is unconvincing.
- [19] It is highly improbable that the police would call back-up and focus all their attention on someone who was just walking along the highway.

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<sup>3</sup> See *Nxumalo v 5* [2009] JOL 24273 (SCA).

- [20] I am satisfied that the trial court was correct in finding that the only reasonable conclusion that could be drawn from the prevailing circumstances was that the appellant had committed the crime of robbery with aggravating circumstances on the day in question. There was accordingly no misdirection on the part of the magistrate in this regard.
- [21] Turning to sentence. The trial court delivered a well reasoned judgment in that respect also. As already indicated the appellant was a second offender for the same offence of robbery with aggravating circumstances which he committed in 2005. For a second offence, section 51 (2) (a) (ii) of the Criminal Law Amendment Act<sup>4</sup> prescribes imprisonment for a period of not less than 20 years as a minimum sentence. Furthermore, he had been released on parole. He contravened parole conditions.
- [22] Section 51 (3) (a) of the Criminal Law Amendment Act empowers any court to impose a lesser sentence if it is satisfied that substantial and compelling circumstances existed to do so. The magistrate took a balanced approach in considering the appellant's previous convictions, the aggravating, factors coupled with his personal circumstances and found that substantial and compelling circumstances existed and imposed a 15 year direct imprisonment sentence. There is no misdirection inducing a sense of shock and outrage with this sentence. In fact, the trial court's approach showed a level of mercy and lenience towards the appellant.
- [23] Counsel for the appellant was rightly constrained to concede that the effective sentence was appropriate. There is therefore no reason to interfere with the discretion of the trial court in sentencing the appellant.
- [24] In the circumstances the appeal on both conviction and sentence must fail.
- [25] I therefore propose an order in the following terms:
1. The appeal on both conviction and sentence is dismissed.
  2. Conviction and sentence imposed by the Regional Court against the

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<sup>4</sup> Act No. 105 of 1997

appellant are both confirmed.

N P BOQWANA

Acting Judge of the High Court

I agree, and it is so ordered

BM GRIESEL Judge of the

High Court