Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A167/2019

In the matter between:

SONWABO DLAKIYA Appellant

v

THE STATE Respondent

Court: Justice J Cloete *et* Acting Justice B Martin

Heard: 22 November 2019

Delivered: 22 November 2019

JUDGMENT

CLOETE J:

[1] The appellant, who pleaded not guilty, was convicted on 24 October 2018 in the regional court at Cape Town on one count each of housebreaking with intent to rob and robbery with aggravating circumstances. He was sentenced on 30 January 2019 to 5 years imprisonment on the first count and 10 years imprisonment on the second. It was further ordered that the sentences run concurrently in terms of s 280(2) of the Criminal Procedure Act 51 of 1977. With leave of the trial court he appeals against both conviction and sentence.

[2] The appeal was previously struck from the roll on 13 September 2019 due to the failure by the appellant's legal representatives to file heads of argument timeously. There appears to be some confusion in this regard. While heads of argument were most certainly not filed by the due date of 16 August 2019, according to the stamp of the registrar they were filed (but without proof of service on the State) on 4 September 2019. In a notice dated 5 September 2019 the State indicated that it would apply for the appeal to be struck on the basis that *'to date neither the appellant nor his attorneys have filed heads of argument'*. Annexed to the notice was a note informing the Judges concerned that *'…mail and email sent to appellant's attorney elicits no response'.*

[3] There is no formal application for condonation before us. In the heads of argument filed on the appellant's behalf the most bare, vague submissions were made, which boiled down to the following: (a) after the appellant was incarcerated it was difficult for his legal representatives to obtain instructions; (b) it took time for the appellant's family to raise funds; (c) he was thereafter only consulted again during July 2019

about his decision to prosecute the appeal and financial instructions were secured; and (d) his legal representatives were too busy to file heads of argument timeously. The submission was then made that *'the delay to submit heads of argument on time was due to no fault on the part of the appellant'* and in the circumstances condonation should be granted.

[4] The lackadaisical approach adopted by the appellant's legal representatives is wholly unacceptable and is to be strongly discouraged. It is settled law that condonation is not simply for the asking, and as was held in *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at paras [20] and [22]:

> *'[20] …the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success…*
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> *[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable…'*

[5] In these circumstances we are at liberty to strike the appeal from the roll for the second time, and order that it may only be re-enrolled when a substantive application for condonation is brought. However, being mindful of the confusion outlined above, and that an individual's liberty is at stake, we will deal with the merits of the appeal, but wish to send out a stern warning to the appellant's legal representatives that this will not be tolerated in future.

[6] The undisputed facts are as follows. In the early hours of 6 October 2016 the 60 year old complainant awoke in her home in Tamboerskloof to find a male person sitting on top of her. He grabbed her by the throat, punched her on the jaw and shoved a pillow over her face. She tried to fight him off but his hold on her throat was too strong and she could barely breathe. The man swore at her and demanded the keys to the safe and the whereabouts of her jewellery. Her nephew, a university student, was staying with her at the time. He had gone out with friends the previous evening, taking a set of house keys, and she had not activated the burglar alarm.

[7] The complainant refused to answer the man's demands until her nephew was brought to her. The man and his accomplices had accosted her nephew outside the house when he returned home, grabbing the keys from him and thus gaining entry to the house. Her hands were bound with a leather belt and her nephew was brought to her, gagged and bound as well. Because of the pillow over her face she could not see the faces of the perpetrators, but in her testimony stated that, from their voices, it appeared that there were two to three of them. The men continued to assault her intermittently while they ransacked the house, but were interrupted when one of them cut the electrical cord of the microwave oven in an attempt to remove it, causing the electricity supply to disconnect. A number of valuable items along with cash were stolen, as well as the complainant's white Toyota RAV 4 which was parked outside her home and, it would seem, used as the getaway vehicle.

[8] Two nights later, on 8 October 2016, Constable Gosa and his colleague Sergeant Botha of the Western Cape Flying Squad were on patrol near Ace's Tavern in Khayelitsha when they spotted a white Toyota RAV 4 without its rear number plate.

They followed the vehicle. The driver accelerated away at high speed and drove into a road behind the Tavern. The appellant jumped out of the vehicle and was chased and apprehended by Gosa while Botha established via radio contact that the vehicle was one stolen from the Cape Town central area. It was subsequently identified by the complainant as her vehicle. There was no evidence before the trial court that fingerprints were found on the vehicle, but it had been ripped apart inside, damaged on the outside, and a bullet was found in one of its tyres.

[9] The issues in dispute before the trial court were whether, as Gosa testified, the appellant was the driver and sole occupant of the vehicle or, as the appellant claimed, he was merely a passenger who had been offered a lift to Ace's Tavern by one Tyler; and whether or not, given that the case against the appellant was based entirely on circumstantial evidence, the State had proven the appellant's guilt beyond a reasonable doubt.

[10] Neither the complainant's nephew nor Sergeant Botha testified. The investigating officer, Warrant Officer Steyn, gave evidence that he had attempted to make contact with the nephew who was residing in KwaZulu Natal, but that his attempts were met with silence. Steyn also testified that Botha was subsequently diagnosed with severe depression, was confined to a desk job, and was unable to recall the details of the incident. The trial court was thus tasked to determine the first issue (i.e. the circumstances giving rise to the appellant's arrest) on the basis of the conflicting versions of Gosa and the appellant in light of the inherent probabilities. In this regard the trial court's reasoning and findings cannot be faulted. Gosa was clearly an

honest, credible and reliable witness, whereas the appellant was not. Moreover, Gosa's version was supported by the following.

[11] First, it was Gosa's unchallenged testimony that from the time the appellant alighted from the vehicle he remained in his direct line of vision until apprehended a short distance away. Second, Gosa's testimony that Botha immediately approached the stolen vehicle while he chased the appellant was similarly not disputed. If Tyler was indeed the driver then Botha would surely have seen and apprehended him as well. Third, the appellant's own testimony that he encountered Tyler while the matter was pending, but was too rushed to confront him because he was concerned he would be late for a job interview, cannot be accepted. The appellant, while maintaining his innocence, knew that he faced serious charges, yet did nothing whatsoever to notify the police that he had spotted the real culprit who had driven the stolen vehicle. Fourth, while it is so that a bullet was later found in one of the vehicle's tyres, there was nothing to counter Gosa's evidence that neither he nor Botha fired a shot at the vehicle to bring it to a halt (which was what the appellant claimed had caused him to leap out of the passenger seat and run for cover).

[12] Neither Gosa nor Botha knew at the time that the vehicle had been reported stolen. There would have been no reason for them to fire a shot at it in a side street behind the tavern. The vehicle had been stolen for close on 48 hours when it was spotted and there are any number of possibilities as to how the bullet came to be lodged in the tyre, particularly given the evidence about the exterior damage to the vehicle. The trial court was thus correct in rejecting the appellant's version of the circumstances giving rise to his arrest as being false beyond reasonable doubt.

[13] The more difficult issue is whether there was sufficient evidence before the trial court to enable it to conclude, as it did, that the appellant was one of the perpetrators of the armed robbery. As previously stated, there was no evidence of identification. There was also no forensic evidence linking the appellant to the robbery, or evidence that any of the stolen items (apart from the vehicle) were found in his possession. His alibi defence, supported to a degree by his mother with whom he lived, was that he would not go out in the evening during the week because he was the primary caregiver of his young daughter who spent weekends with her mother. The robbery occurred in the early hours of a Thursday and the appellant was found in possession of the vehicle shortly after midnight on the following Saturday.

[14] Ultimately, the trial court's finding of guilt hinged on the testimony of Gosa that the appellant was unable to satisfactorily explain how he came to be in possession of the vehicle, coupled with the rejection of his version concerning the circumstances giving rise to his arrest. As is evident from the judgment, the State relied on the doctrine of recent possession in arguing for a conviction.

[15] The magistrate reasoned that taking into account that the vehicle was not property that could easily be disposed of, the fact that it was found in the appellant's possession a mere two days after the robbery, and the circumstances of his arrest, the only reasonable inference to be drawn was that he participated in the robbery itself. In this regard the magistrate relied on *S v Skewiya* 1984 (4) SA 708 (AD) in which it was held that when applying the doctrine of recent possession to a charge of theft it is important to consider the nature of the goods involved.

[16] In *Skewiya* the appellant was found in possession of various items in the boot of his motor vehicle. They comprised a portion of goods stolen from certain business premises during a burglary 15 days earlier. He too failed to give the police a satisfactory explanation. The former Appellate Division set aside his conviction of housebreaking with intent to steal and theft, and replaced it with one of receiving stolen property, reasoning as follows at 716B-D:

> *'…I think that the fact that an accused person in the position of the present appellant did not give the explanation that he received the articles from the thieves, may be due to reluctance to admit that he was in possession of goods which he knew were stolen. The absence of such an explanation is of course a relevant consideration, but it is not conclusive.*
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> *In my view, the possession by the appellant of three of the stolen articles was not sufficiently recent to justify the conclusion that he was one of the thieves, and he should not have been found guilty as charged.*
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> *His counsel conceded however --- in my opinion correctly --- that all the circumstances clearly establish that he knew that the goods were stolen. The correct verdict should accordingly have been guilty of receiving two Hi-Fi sets, one bedspread and two cartons knowing that they were stolen.'*

[17] The appellant advanced 4 grounds of appeal against conviction, namely that the trial court erred in: (a) convicting him on two counts of what is essentially one continuing offence; (b) finding that the State proved its case beyond reasonable doubt; (c) accepting Gosa's evidence notwithstanding its unreliability; and (d) rejecting his own version as not reasonably possibly true. For the reasons already given it is only necessary to deal with grounds (a) and (b).

[18] In *S v BM* 2014 (2) SACR 23 (SCA) the test for splitting of charges was formulated as follows at para [3]:

> *'[3] It is apparent that charging Mr BM with two separate counts, arising out of what was clearly one and the same incident, involved an improper duplication (splitting) of charges. It has been a rule of practice in our criminal courts since at least 1887 that "where the accused has committed only one offence in substance, it should not be split up and charged against him in one and same trial as several offences". The test is whether, taking a common sense view of matters in the light of fairness to the accused, a single offence or more than one has been committed. The purpose of the rule is to prevent a duplication of convictions on what is essentially a single offence and, consequently, the duplication of punishment…'*

[19] Housebreaking with intent to commit a crime consists in unlawfully and intentionally breaking into and entering a building or structure, with the intention of committing a crime inside it: see Snyman*: Criminal Law 6th ed.* at 543 and fn 35. Snyman at 544, referring *inter alia* to *S v Zamisa* 1990 (1) SACR 22 (W) at 23d-e writes that:

> *'As "housebreaking with intent to steal" is a crime in its own right, X is charged with two crimes if he is charged with "housebreaking with intent to steal and theft". However, it is still uncertain whether a conviction of "housebreaking with intent to steal and theft" is a conviction of a single crime or of two crimes. In practice this is unimportant, for even if one holds that two crimes have been committed they are treated as one crime for the purposes of punishment…'*

[20] A distinguishing feature in the present case is that the vehicle was stolen from outside the complainant's home during the robbery. Accordingly, there can be no question of a splitting of charges in relation to the vehicle, and even if it could be argued that there was a splitting in respect of the other items stolen as a result of the

housebreaking, it was competent for the State to have charged the appellant with two separate offences. I am thus not persuaded that there is merit in ground (a).

[21] As far as ground (b) is concerned, it is apposite to quote from *S v Mavinini* 2009 (1) SACR 523 (SCA) at para [6]:

> *'[6] The magistrate accepted that the appellant had been driving the complainant's vehicle, and inferred from the proximity in time (less than 24 hours) that the appellant's possession was so closely connected to the robbery itself that in the absence of other explanation he must have been one of the robbers. The appellant does not attack this part of the magistrate's reasoning, for if he was indeed seen in the Audi so soon after the robbery, such recent possession, together with his elusive conduct, and from the false front number plate, overwhelmingly suggests criminal involvement in the robbery. What he disputes is the preceding premise: that he was seen in the Audi at all.'*

[22] The only real difference between the pertinent facts in *Mavinini* and the instant matter is that here the appellant was found in possession of the stolen vehicle within 48 hours of the robbery. His conduct too was elusive, the rear number plate of the vehicle had been removed and he was unable to provide any satisfactory explanation. In these circumstances, and having regard to the approach adopted by the Supreme Court of Appeal, by which we are of course bound, the magistrate's inferential reasoning that the State proved its case against the appellant beyond a reasonable doubt cannot be faulted. It follows that this ground too must fail.

[23] Turning now to sentence. As a first offender for robbery with aggravating circumstances the appellant faced the prescribed minimum sentence of 15 years imprisonment in terms of s 51(2)(a) of the Criminal Law Amendment Act 105 of 1997,

unless the court was satisfied in terms of s 51(3)(a) thereof that substantial and compelling circumstances existed to justify the imposition of a lesser sentence. In essence, the appellant contends that the magistrate failed to exercise her discretion judicially and erred in imposing a disproportionate sentence despite her finding of substantial and compelling circumstances.

[24] A reading of the judgment on sentence shows that the magistrate, who also had the benefit of pre-sentence and victim impact reports, carefully weighed all relevant factors, and her reasoning and conclusion on the sentence imposed for the armed robbery cannot be faulted. There was no misdirection and the sentence she imposed was most certainly proportionate in the circumstances.

[25] That leaves the sentence imposed in respect of count 1 for housebreaking with intent to rob. I have already referred to Snyman as well as *Zamisa*, in which it was pointed out that the practice is to impose only one sentence for a conviction of housebreaking with intent to commit a crime and the further crime for the purpose of which the housebreaking was effected. The robbery of the vehicle, which was separate from the housebreaking, has already been catered for in the sentence of 10 years imprisonment on count 2. In my view, the magistrate only misdirected herself by imposing two separate sentences for counts 1 and 2, even though she ordered that they run concurrently. Having regard to the settled authority, it is my view that she should instead have taken both counts as one for purposes of sentence. Apart from this, there is no basis to interfere.

[26] **I would thus propose the following order:**

1. The appeal against conviction is dismissed.

2. The appeal against sentence succeeds to the extent set out below:

"The convictions on counts 1 and 2 are taken as one for purposes of sentence, and the accused is sentenced to 10 (ten) years direct imprisonment."

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J I CLOETE

MARTIN AJ:

I agree.

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B MARTIN

CLOETE J:

It is so ordered.

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J I CLOETE