



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 233/13
Not Reportable

In the matter between:

BOY WILKEN 'WILLEM' SLINGER

Appellant

and

THE STATE

Respondent

Neutral citation: *Slinger v The State* (233/13) [2013] ZASCA 197 (2 December 2013)

Coram: Lewis, Leach, Theron, Pillay and Petse JJA

Heard: 22 November 2013

Delivered: 02 December 2013

Summary: Criminal procedure – appeal against decision of high court refusing leave to appeal on petition to it following magistrate’s refusal of leave – merits of magistrate’s decision to convict and sentence applicant not an issue before SCA – appeal to SCA limited to whether high court had correctly refused applicant’s petition.

Robbery – several persons robbed – possibility of duplication of charges raised but not decided.

Unlawful possession of firearm – joint possession – approach in *S v Mbuli* 2003 (1) SACR 97 (SCA) para 71 affirmed.

O R D E R

On appeal from: North Gauteng High Court, Pretoria (Botha J and Mabuse AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the high court of 5 May 2008 dismissing the appellant's application for leave to appeal is set aside and replaced with the following:

'The application for leave to appeal to the North Gauteng High Court against both convictions and sentences is granted.'

J U D G M E N T

LEACH JA (LEWIS, THERON, PILLAY AND PETSE JJA CONCURRING)

[1] Arising out of events that occurred at Eldorado Park on 22 July 1998, the appellant and two others were arraigned in the Vereeniging Regional Court on four counts of robbery with aggravating circumstances, three counts of the illegal possession of a firearm, two counts of kidnapping and a single count of the illegal possession of ammunition. The appellant denied his guilt on all charges and the trial which followed dragged on for years. During the course of the proceedings, both of the appellant's co-accused passed away and, by the time judgment was delivered in May 2002, only his guilt was still in issue. The trial court convicted him on three of the four counts of robbery as well as on both counts of kidnapping and a single count of having been in illegal possession of a firearm. The appellant immediately absconded and it took 4½ years before he was rearrested and brought back to court. As a result it was only on 28 November 2006 that he was sentenced, an effective term of 23 years' imprisonment having been imposed.

[2] The appellant proceeded to apply to the trial court for leave to appeal against both his convictions and sentences. His application failed, and a petition to the high court for such leave was similarly dismissed on 5 May 2008. More than three years later, on 17 October 2011, the appellant appeared in person before the high court and persuaded it to grant leave to appeal to this court 'against the dismissal of his petition, both in respect of the conviction and sentence'.

[3] In his heads of argument the attorney then representing the appellant (who did not appear in the appeal) suggested that this court ought to interfere by either setting aside the appellant's convictions or by reducing his sentences. This overlooked that the present appeal lies against the high court's refusal of the appellant's application for leave to appeal, and it is well established that the issue to be determined at this stage is therefore not the merits of the appeal against conviction and sentence but whether the high court should have granted leave to appeal against the magistrate's judgment.¹ Indeed the attorney who ultimately appeared for the appellant conceded this to be the case and limited his argument to the refusal of leave to appeal in May 2008.

[4] In order to succeed, the appellant has to show not that the trial court erred either in convicting or imposing sentence but that there are reasonable prospects of the appeal succeeding in respect of those issues. In that regard more is required than establishing the existence of the possibility of success or that the appellant's case is arguable and not hopeless; instead it must be shown that there is a sound and rational basis justifying the conclusion that an appeal court could reasonably arrive at a different decision to that reached by the trial court.²

[5] The appellant's case is that he was in no way involved in the incidents that gave rise to the charges levied against him. The trial court concluded otherwise. As this is a question of fact, it is necessary to deal with the evidence implicating the appellant.

¹ See *Matshona v S* [2008] 4 All SA 68 (SCA), *S v Smith* 2012 (1) SACR 567 (SCA) and *S v De Sousa* also referred to as *AD v The State* (334/2011) [2011] ZASCA 215.

² See *Smith* para 7 and *S v Mabena* 2007 (1) SACR 482 (SCA) para 22.

[6] The evidence of the State may be summarised as follows. On the morning in question a Nedbank employee, Mr Bevin Kyde,³ and a security officer, Mr Schalk van der Merwe, travelled in a Nedbank motor vehicle to service a number of the bank's ATM machines. They stopped on the way in order to get something to eat. While seated in their vehicle eating their meal, they were approached by three or four armed men, at least one of whom was a co-accused of the appellant, who held them up at gunpoint. Kyde was dispossessed of a panic button while Van der Merwe was robbed of his watch and service pistol. Another motor vehicle drew up nearby, into which Van der Merwe was forced and taken to a house where he was interrogated for several hours about his employer's methods of operation. He was released later that afternoon.

[7] Meanwhile, several members of the armed gang used the Nedbank vehicle to take Kyde to a house at Orange Farm. There a white Nissan Sentra motor vehicle arrived in which, according to Kyde, the appellant was a passenger. Kyde alleged that the appellant and several other members of the gang proceeded to threaten him and told him that if he did not do what he was told, he would be shot. He was then taken to a Nedbank ATM at Walkerville which he was forced to empty of money which he handed over to his abductors. He was then taken to Ennerdale where the process was repeated at another Nedbank ATM. According to Kyde, at that stage he again saw the appellant close to the ATM cubicle while he emptied it. Kyde was then taken to another place where his cellphone, his wallet containing R120, a pager and his keys were taken from him. He was then left in the Nedbank vehicle, the keys of which had also been removed.

[8] The trial court accepted Kyde's identification of the appellant. This finding was attacked on appeal, particularly as Kyde had been a single witness. Indeed, leave to appeal was granted to this court pre-eminently on the basis that the identification may have not been reliable. However, for the reasons that follow, the matter can be disposed of in favour of the appellant even on the assumption that Kyde's identification of the appellant can be accepted.

³ He was also referred to in the papers as being B van Hyde and Bevan Hyde — whatever his correct name may be, I intend to refer to him as Kyde for purposes of this judgment.

[9] The four counts of robbery levied against the appellant as a result of these events related to the following: on count 1, the theft of Kyde's keys, his pager, the cash in his wallet and his cellphone; on count 2, the theft of Van der Merwe's CZ pistol and watch; on count 3, the money taken from the Walkerville ATM; and count 4, the money stolen from the Ennerdale ATM. The trial court concluded that the last two counts in fact amounted to a single count of robbery involving the theft of money from Nedbank and that it would amount to an impermissible duplication of convictions to find the appellant guilty on both such counts. However, it further concluded that the theft by force of the items I have mentioned were separate individual offences, and that the appellant had formed part of a crime syndicate which had acted with a common purpose to rob Kyde, Van der Merwe and Nedbank. On the strength of these findings, the appellant was convicted of three counts of robbery.

[10] In my view, as the appellant appeared on the scene only after Kyde had been taken to Orange Farm, there is a more than reasonable prospect of another court finding that the State had failed to show that he had been associated in any way with the events that occurred before then. There is also nothing to show that the appellant was present when Kyde was dispossessed of the various items I have mentioned after the second ATM had been robbed. That being so, there appears to be a reasonable prospect of the appellant succeeding on appeal in respect of his convictions of having robbed both Kyde and Van der Merwe. Moreover, as there is nothing to show that the appellant was even aware of Van der Merwe's abduction let alone in any way associated therewith, there is a more than reasonable prospect of his conviction on the charge of kidnapping Van der Merwe being set aside on appeal.

[11] In addition, even if at the end of the day it is held that the appellant had indeed acted in association with the actual perpetrators of the robberies throughout, there appears to be a reasonable prospect of another court finding that the facts showed there to have been a continuous stream of events involving the theft by violence

from Nedbank and its employees and that, as a matter of 'common sense' there was in truth only one robbery involving Kyde, Van der Merwe and Nedbank.⁴

[12] Then there is the question of whether it was shown that the appellant was in unlawful possession of a firearm. His conviction on this count was based upon the finding that Van der Merwe had been dispossessed of his firearm; that one of the robbers had therefore been in the unlawful possession of that firearm; and that as the appellant had acted with common purpose with the robber who had possessed it he, too, was guilty of its unlawful possession. In reasoning in this way, the trial court relied upon the reasoning of this court in *Khambule*⁵ that the mere intention of members of a group of robbers to use their weapons during a robbery will suffice to show joint possession justifying a conviction. However on that issue *Khambule* was disapproved by this court in *Mbuli*⁶ and can no longer be regarded as a correct reflection of our law.⁷ In these circumstances the appellant's conviction on this count can almost undoubtedly not stand.

[13] In these circumstances, irrespective of whether the appellant was reliably identified as being a member of the gang (about which it would be best not to express any view at this stage, given that the matter will be fully argued in later proceedings), it is clear from what I have said that the appellant has a reasonable prospect of success in respect of various convictions. Accordingly, both the trial court and the high court erred in refusing the appellant leave to appeal against his convictions, and counsel for the respondent correctly conceded that to have been the case.

[14] It is unnecessary to say much in regard to sentence. It may well be that if the appellant succeeds in respect of certain of his convictions, but not others, the entire question of what is an appropriate sentence will have to be reconsidered afresh. In

⁴ Compare *R v Kuzwayo* 1960 (1) SA 340 (A); but see contra *S v Dlamini* 2012 (2) SACR 1 (SCA).

⁵ *S v Khambule* 2001 (1) SACR 501 (SCA) para 10.

⁶ *S v Mbuli* 2003 (1) SACR 97 (SCA) para 71.

⁷ See further: *S v Kwanda* 2013 (1) SACR 137 (SCA) para 5 and *S v Molimi and another* 2006 (2) SACR 8 (SCA) paras 37-38.

these circumstances, it would be inappropriate to limit the appeal solely to the appellant's convictions.

[15] The following order is issued:

1 The appeal is upheld.

2 The order of the high court of 5 May 2008 dismissing the appellant's application for leave to appeal is set aside and replaced with the following:

'The application for leave to appeal to the North Gauteng High Court against both convictions and sentences is granted.'

L E Leach
Judge of Appeal

APPEARANCES:

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Instructed by:

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