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IN THE HIGH COURT OF SOUTH AFRICA

Northern Cape Division, Kimberley

Case number: **CA & R 51/2015**

Date heard: **07 / 03 / 2016**

Date available: **20/ 05 / 2016**

In the matter between:

GRAHAM KAMMIES

Appellant

And

THE STATE

Respondent

Coram: Phatshoane, *J et* Erasmus, AJ

JUDGMENT ON APPEAL

Phatshoane, J

[1] The 33 year old appellant was arraigned before Regional Magistrate V Smith in the Kimberley Regional Court, Northern Cape, on one count of Robbery read with the provisions of s 51(2)(a) or (c) of the Criminal Law Amendment Act, 105 of 1997. He is accused of unlawfully and intentionally assaulting the 61 year old Ms S. M. S. and forcibly taking her diamond "ring" worth R436,000.00 on 16 October 2014 near Aviva and Cronin Streets, Hadison Park, Kimberley.

[2] The appellant pleaded not guilty to the charge. In his plea explanation he acknowledged that he had been present on the robbery scene but denied that he was involved in the commission of the offence. He therefore denies assaulting the complainant or taking anything from her. He claimed that he assisted her by intervening when she was attacked but was instead physically manhandled by a civilian man.

[3] On 06 August 2015 the appellant was found guilty as charged and a day thereafter was sentenced to 7 (seven) years imprisonment. With leave of the court below he is before us on appeal against his conviction only. Principally his grounds of appeal are that the trial court erred in finding that the State proved its case beyond a reasonable doubt and rejecting his version as inherently improbable.

[4] The State's case was that Ms S. M. S., the wife of a jeweller shop owner (the complainant), was driving along Aviva Road on the drizzly afternoon of 16 October 2014 when she heard a bang (blikgeluid) behind her vehicle. She looked in the rear view mirror and noticed a white vehicle very close to hers. She thought that this vehicle had possibly bumped her vehicle. She stopped to investigate if there was any damage to it. As she got to the back of her vehicle a man alighted from the driver's side of the said trailing vehicle. This person insisted that there were scratch marks on the complainant's vehicle whereas she could not observe any. The complainant told the man to wait while she fetched her umbrella to shield herself and assess the damage properly. She removed the car-keys from her vehicle. She spotted another man standing on the opposite side of her vehicle, where she had parked, on the pavement.

[5] The complainant opened the boot but before she took out the umbrella she was lifted off the ground (toe het ek my voete in the lug begin beweeg). The assailant forcibly removed her uninsured ring worth R436 000.00 from her finger. She screamed. One man

ordered the other to shut the complainant's mouth to muffle her screams. There were other men in the white vehicle but she cannot identify them.

[6] Mr Dawid Johannes Van Heerden was resident at the corner of Aviva and Cronin Streets. He had just parked his vehicle at his residence when he heard a scream approximately a block away. He moved to a vantage point and saw movement in the street but could not make a proper observation of these people because the gate obscured his view. They moved quickly to and fro whilst the screaming continued. He went to the gate for a better view of the situation and saw two men with their backs towards him. He noticed a white Mercedes with an open boot. He also saw a female's legs kicking about.

[7] Van Heerden hurried unobtrusively towards the scene. As he approached he noticed another vehicle parked left "vanwaar die vrou onder die man se bene gele het". The driver of this vehicle was keeping a watchful eye over the scene. Another man crouched over the complainant with the other next to her. Van Heerden unfolded a clasp knife he had with him. As he stalked the two men the driver in the other vehicle sped off.

[8] Van Heerden pounced on the appellant, who had been crouching over the complainant, and grabbed him by the chest. He brandished the knife causing the second man to flee from the scene. Van Heerden called his landlord and requested him to bring cable ties which he used to tie the appellant's wrists and ankles. The complainant was very confused "ontsettend verbouereerd". She cried and was hyperventilating. She tried to speak but she was almost voiceless. She later managed to say that she feared that they would shove her into the boot. People started to gather in the street and the police were summoned to the scene. Van Heerden denied that the appellant tried to rescue the complainant from her assailants.

[9] The State also called W/O Marcus Mafaro, the Investigating Officer. He stated that

the appellant exercised his right to remain silent and did not give any explanation or warning statement to the Police. This is remarkable given his version of the events.

[10] Following an unsuccessful attempt for his discharge in terms s 174 of the Criminal Procedure Act, 51 of 1977, the appellant took the stand. He claimed that he was walking on the pavement when he saw two vehicles collide close-by. He passed the trailing vehicle and proceeded to the complainant's vehicle to check the extent of the damage to it. The complainant alighted from her vehicle. He showed her a mark on the bumper of her vehicle. She fetched the car keys from her vehicle to open the boot. At the moment that she opened the boot some unknown men, who came from nowhere, subdued her. He moved away from her. A tussle ensued between the complainant and these men. He did not touch the complainant or assist these men or take anything from her.

[11] The appellant conceded having crouched over the complainant as described by Van Heerden. He said after the complainant had fallen he attempted to help her and enquired "what was going on". He says that the complainant did not respond to him because she was confused. It is illogical that the appellant made this enquiry when he had all along been present on the scene and witnessed what had transpired.

[12] In terms of the appellant's evidence he only attempted to assist the complainant after the attackers had run away. He then contradicted himself and said that when Van Heerden grabbed him one man fled the scene. Later on under cross-examination he claimed not to have known what happened to these men because he focused on Van Heerden.

[13] The appellant also conceded under cross-examination that when Van Heerden arrived at the scene two men were bending over the complainant. Realising that he might have painted himself in a corner he quickly changed course and said that his thoughts were

not on other people on the scene but on the complainant. He went on: "...ek was deurmekaar gewees vir die ding wat ek nou gesien het. Die een oomblik ry die een kar - die voertuig in die ander voertuig, die volgende oomblik vat hulle Ms Stokes se ring".

[14] The appellant further stated that he did not know what happened to the driver of the white vehicle or whether the driver alighted from his vehicle because he did not keep an eye on him. None of the unknown men attacked him.

[15] The appellant says that Van Heerden choked and manhandled him. He was facedown. He struggled to breath and was therefore unable to tell Van Heerden that he was merely assisting the complainant. He did not give any witness or warning statement to the police after the incident because his erstwhile attorney advised him against it.

[16] Mr Bence, for the appellant, argued that in view of the fact that the incident in issue happened on a rainy day, it was probable that the complainant was concentrating on the road and did not keep a proper look-out for the pedestrians in the vicinity of the scene. He contended that it was not improbable that the appellant came from the direction of the vehicle that collided with the complainant's vehicle to check the extent of the damage to the vehicle. Counsel further argued that it made no sense that the appellant did not follow the complainant when she retrieved the keys from her vehicle to open the boot. On this score, he contended, the appellant's conduct is inconsistent with that of a person who was at the scene to rob the complainant. He argued further that there is no evidence that the appellant had harmed or took anything from the complainant. Counsel was of the view that no finding could be made with regard to the man who stood next to the appellant when Van Heerden pounced on the appellant or where he came from because he did not get into the robbers vehicle, which was few paces way, but merely ran away.

[17] Mr Bence further argued that the Magistrate's reasoning that the robbers did nothing to the appellant is without any basis because there were several of them. In any event, he contended, there was nothing to suggest that the appellant stood in their way or hindered in or attempted to thwart their plans. In addition, he argued, it cannot be expected of an innocent bystander to intercede in a robbery and expose himself to a risk of harm.

[18] There is one inconsistency in the complainant's version which the defence devoted much attention on in an attempt to discredit her. She was confronted with the following statement to the police: "Ek kan nie se of hy agter die stuurwiel geklim het maar ek kan wel se dat hy vanaf die regterkant van die voertuig gekom het". She later conceded that she did not know whether the appellant came out of this vehicle but he was on its right side and came straight to her. Regard being had to the complainant's traumatic experience it cannot be expected that her recollection of this aspect would be perfect. In *S v Nyembe* 1982 (1) SA 835 (A) at 842E-G Diemont JA had this to say:

"Having analysed these contradictions he came to the conclusion that they did not warrant 'either in isolation or cumulatively a credibility finding favourable to the accused or against the State'. I can find no merit in counsel's criticism of this conclusion, particularly when it is borne in mind that the contradictions related to events which had happened some eight months previously. Moreover the contradictions were of a trivial nature. I am always surprised that witnesses can, or think they can, after a passage of weeks and months, recollect how they were seated in a motor car, what route they travelled and at what time they reached their venue. I am not surprised, however, when they fall into contradiction. The wise trial Judge knows that human memory is only too fallible."

[19] In *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426e - h the SCA cited with approval the following dictum in *Moshephi and Others v R* (1980 - 84) LAC 57 at 59F - H on

the correct approach to evidence and held:

"The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[20] The appellant placed himself on the scene. Before the complainant felt suspended above ground she was with him. The complainant's evidence as corroborated by Van Heerden was that, apart from the driver of the white vehicle who was keeping a watchful eye, there were only two people on the scene, the appellant and one man who stood on the pavement after the complainant had fetched her car keys. It was never disputed that one of these persons ordered the other man to shut the complainant's mouth when she began screaming. It is therefore probable that either the appellant or his companion made these utterances. This is proof that the robbers acted in tandem and in concert.

[21] It is trite that in the absence of demonstrable and material misdirection by a trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. See *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e - f; *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 - 706.

[22] Having considered the eye witness testimony of the complainant and Van Heerden and

having drawn certain inferences from the facts the Magistrate rejected the appellant's version as not reasonably possibly true. He reasoned:

22.1 Firstly, that if the appellant's version was true, the robbers ought to have noticed him on the scene. They did nothing to him. They did not push him out of their way or assault him. They were not scared of him nor did he raise the alarm.

22.2 Secondly, the Magistrate found that the man who stood next to the appellant when Van Heerden arrived on the scene was one of the robbers. When this assailant became aware of Van Heerden's presence he and the driver of the white vehicle, who the Magistrate also found was part of the group that robbed the complainant, fled the scene.

22.3 Thirdly, the Magistrate found no reason why, if the appellant was innocent as he claimed, he was unable to make certain observations on the scene. For instance, he did not check who the driver of the white vehicle was or if there was a driver in that vehicle or other occupants. The Magistrate was, in the end, convinced that the appellant was part of the group of persons that robbed the complainant.

[23] The conclusion by the Magistrate that the simulated motor vehicle collision, in which the complainant's vehicle was purportedly involved in, was merely a ploy to bring her vehicle to a halt cannot be faulted. What should be added is that the robbers must have known her, knew about the exquisite and expensive ring she wore, observed her movements, followed her to the place where she would be relatively isolated, simulated the accident and robbed her.

[24] Our law did not require that a Court had to act only upon absolute certainty, but merely upon justifiable and reasonable convictions. See *S v Ntsele* 1998 (2) SACR 178 (SCA). The appeal must fail.

[25] In the result I make the following order:

ORDER:

- 1. The appeal against conviction is dismissed.**

MV PHATSHOANE J

I agree

SL ERASMUS AJ

On behalf of the appellant: Mr HMA Bence (instructed by Fletcher's Attorneys)

On behalf of the respondent: Adv M Makgaga (Instructed by the NDPP)