



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: A854/2013 ^{30/01/2015}

In the matter between:

Sydney Chanduke

Applicant

And

State

First Respondent

JUDGMENT

Maumela J.

1. This is an appeal with leave of the court *a quo*, against both conviction and sentence. Before the Regional Court for the Division of Gauteng, sitting in Klerksdorp, the appellant, who was legally represented, throughout the proceedings, was charged with two counts of Robbery with Aggravating Circumstances. He pleaded Not Guilty to both counts.
2. The original record of proceedings before the court *a quo* is not available due to the fact that the relevant tapes got damaged. Instead of re-constructing the record the court *a quo* re-called witnesses who had already testified. The appellant pleaded Not Guilty to both counts. The state led evidence. The appellant was convicted on count 1. On count

- 2, he was found Not Guilty and discharged.
3. The allegations in count 1 were that upon or about 15th of February 2010 and at or near the N12 road in Klerksdorp in the Regional Division of Gauteng, the accused did unlawfully and intentionally assault Antony Mbewe, and did then and with force take the following items from him to wit an Agosy Truck with 33 tons of lime worth R 1 3 60 000-00, Molera worth R 800 000, R120 -00 in cash and a cell phone; his property or property in his lawful possession; the aggravating circumstances being that a fire arm was used.
 4. The state led evidence. Antoni Mbewe was the first witness to be called by the state. He told court under oath that before the incident in issue in this case, he did not know the accused. He works as a Truck driver for a company called Rubica Carriers. On the 15th of February 2011, at around 22h00 in the night, he was driving a truck with two trailers. He was with his assistant, Morgan Changa Changa. He was driving along the N12 from Danielskuil; heading towards Johannesburg, through Olifantsfontein. Upon stopping at a robot, he noticed a person standing near the truck. This person pointed a firearm at him. He saw three other people approaching. The one standing near the truck opened the driver's door, which was not locked. That person shoved him leftwards, away from the driver's seat. He then took over the driver' seat. As he strove to respond, he was hit on the head with the butt of the firearm.
 5. Owing to the darkness, he could not see his attacker properly. The person who took over the driver`s seat took out some cable tiers out of a small bag, which were used to tie his hands behind his back. His legs were also tied. His and

his assistant's faces were covered with pieces of cloth. For two hours, their assailants strove in vain to establish the location of the tracking device of the truck.

6. At threat of death the attackers demanded of him to show them where the tracking device of the truck is fitted. He told them that he is newly employed and does not know where the tracking device is fitted. He negotiated successfully and the robbers gave him back his passport. They then took him and his assistant into the bush where they were made to lie on the ground, on a blanket. They were covered with another blanket. After a while they heard the engine of the truck start and drive off. He managed to uncover and loosen himself. He and his colleague found out that they were at a distance of about 10 kilometres outside Potchefstroom. After an effort, the two of them found their way to the police station in town.
7. A person sent by his boss eventually picked them up at the police station. Due to considerations of jurisdictional delimitations, the place where the crime happened dictated that the case be reported at Krugersdorp Police Station. They heeded advice to do so. His boss triggered the applicable tracking company into action. Later at around 06h00 of the same morning the truck was recovered and he saw it.
8. He said that the truck had been transporting lime. He does not know the value of the lime he was transporting. His assistant has since returned to Zambia. It was admitted on behalf of the accused that he was found driving the truck in issue on the 16th of February 2010, at 5h00 in the morning. It was also admitted that the truck was recovered in the area of Johannesburg and Pretoria and that it was stopped

somewhere near Midrand, just before the Centurion off-ramp. An affidavit by Morgan Changa Changa, the witness's assistant on the day of the incident, was admitted and marked as "**Exhibit 82**".

9. The defence admitted the contents of the affidavit. The state then closed its case. The appellant testified under oath in his own defence. He told court that on the 15th of February 2010 at about 8h00 in the morning, he received a call from one Gilbert, who told him that he obtained his cell number from a Zambian lady known as Catherine. Gilbert said that he is in need of a truck driver because he is not satisfied with the performance of the one he had. Besides; the same driver was reported to be sick. Gilbert offered him a temporary job to transport a truck load to Polokwane.
10. He later met Gilbert at the Shoprite-Checkers parking area. Gilbert verified his driver's licence and assessed his experience in driving. He was to be remunerated at an amount of R15 000-00 for the temporary job as a driver. Gilbert phoned the driver repeatedly. He said that the latter was already driving towards Johannesburg and he would meet him, (the driver), at 17h00.
11. It was arranged for Gilbert to pick him up from his home once the truck would have arrived within the vicinity of Johannesburg. He was picked up from home as arranged. He and Gilbert met up with the truck along the N12, at a place called Randjiesfontein, between 4h00 and 5h00 in the morning of the 16th February 2010. Gilbert gave him a brief, as he handed the truck over to him. He also alerted him to aspects that warranted his attention. He, (Gilbert), gave him about R2 500-00 for toll gates and fuel. He was told to drive

towards a Total Garage where he would be given more money for diesel. He was also to be given instructions concerning offloading.

12. Gilbert, who was driving behind him later, disappeared. Somewhere near Centurion, two vehicles sandwiched his. He was then signalled to a stop with hazards. He initially mistook the people stopping him for Gilbert, but he eventually realised that it is some gun-wielding police. The police literally hurled him off the truck asking him what he was doing in a hijacked truck. By then Gilbert was nowhere to be seen anymore, much as he has never seen him again. He heard rumours that Gilbert might be in Rustenburg.
13. The witness said that on the day of the incident he had no idea whatsoever that the truck was stolen. He met the people who gave the truck to him between 3h00 to 4h00 in the morning. He drove along the N12. He used the money Gilbert had given him to pay for his legal representation. He said that he became gullible because Gilbert sounded very convincing. He told the police about Catherine. The appellant stated that the police stopped him at 6h00 in the morning. The police on the other hand said that they stopped him at 5h30.
14. It was submitted on behalf of the appellant that the trial court erred in finding him guilty. It was submitted that the state did not prove its case beyond a reasonable doubt. That the appellant was convicted on the mere basis that he was found driving a stolen truck while no evidence placed him at the scene of the hijack. It was argued that the appellant was therefore wrongfully convicted on the basis of circumstantial

evidence.

15. In the case of *R v Blom*¹, the court set down criteria on the basis of which circumstantial evidence can constitute conclusive proof of the fact sought to be proven. In that regard where reliance is sought to be placed on circumstantial evidence, the following two criteria apply, namely:
 - (a). The inference sought to be drawn must be consistent with all the facts, secondly;
 - (b). The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.
16. On behalf of the appellant, it was submitted that the inference that the court drew finding the appellant guilty does not exclude the possibility that things could have happened in line with the appellant's version. In the case of *S v Shocked*², the court stated the following: [*"the accused's version can only be rejected on the basis of inherent improbabilities; not because it was merely improbable, but because it was so improbable that it could not be reasonably possibility true"*]. It was submitted on behalf of the appellant that in this case, there are no tangible grounds on the basis of which to reject his, (the appellant's) version.
17. It is not in dispute that the appellant was found driving a stolen truck. It is not in dispute that the complainant and his assistant were robbed of a truck with 33 tons of lime on board, money and cell a phone. What is in dispute is whether or not the appellant participated in the robbery and whether

¹ . 1939 AD 188.

² . 2001 (4) SA 1 (SCA).

he drove the truck knowing that it was hijacked, in which case the accused would be either a perpetrator; an accomplice or an accessory after the fact.

18. The version of the appellant and that of the state are in contradiction to each other. In the case of *S v Chabalala*³, the court stated that in instances of this sort, where the court has to deal with mutually destructive versions, then the court has to look at the totality of the evidence and should avoid the temptation to rely on to one obvious aspect without assessing the entire picture painted by the available evidence.
19. The victim in the incident, Mr Mbewe, told the trial court that the incident happened in the dark of night. He said he was not able to make out the identity of his attackers. For that reason, the appellant was arrested on the mere basis of the fact that he was found driving the truck that was hijacked. The appellant states that he was found driving the truck merely because through a contact called Catherine, he was hired on a temporary basis to drive the said truck to Polokwane to deliver a load. He has a permanent job from which he often takes leave in order to augment his monthly income by taking on temporary jobs as a truck driver.
20. He had worked with Catherine before and he had no reason to disbelieve Gilbert. Upon learning that Catherine is the one who referred Gilbert to him he let his guard down only to find that he inadvertently involved himself in a criminal act. He had no idea that the truck he had to drive could be stolen because he was presented with all documents pertaining to

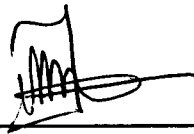
³. 2003 (1) SACR 134 (SCA), at page 140 a to b.

it. Whoever hijacked the truck ensured that all necessary documents are at hand.

21. In my view, the inference that the court drew in convicting the appellant, is not the only reasonable inference that could be drawn from the available facts. In particular, the inference that the court drew does not exclude the version of the Appellant. In the result, I view that the appeal against conviction and sentence stands to succeed. The following order is made:

ORDER.

1. The appeal is upheld.
2. The conviction and sentence are set aside.



T. A Maumela
Judge of the High Court of South Africa.

I agree.



V.V. Thlapi
Judge of the High Court of South Africa.