

Original

1

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

6/2/15

CASE NO: A434/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES /NO
(2) OF INTEREST TO OTHER JUDGES: YES /NO
(3) REVISED
DATE: 6 Feb 2015
SIGNATURE: [Signature] Jansen

In the matter between:

AARON NKOSINATHI NKOSI

Appellant

and

THE STATE

Respondent

JUDGMENT

JANSEN J

- [1] The matter came before this court on appeal from the regional magistrate of Benoni, who on 11 September 2013 convicted the appellant and a co-accused of kidnapping and murder, sentencing the appellant to five years imprisonment on the first count of kidnapping and 15 years imprisonment on the second count of murder. The magistrate ordered that the sentences imposed be served concurrently. The Appellant was also ordered in terms of section 103 of Act 60 of 2000 to remain unfit to possess a firearm.
- [2] Both the appellant and his co-accused pleaded not guilty and his co-accused was acquitted by the magistrate at the commencement of his judgment. The appellant applied for leave to appeal on the same day that he was sentenced and it was granted against both conviction and sentence by the magistrate.

Count one conviction

- [3] It was alleged that on 02 March 2012 the appellant at or near Benoni at an ABSA Bank close to a Spar Supermarket unlawfully and intentionally deprived Andrew Sithole (hereinafter referred to as “**the deceased**”) of

his freedom of movement by taking him forcefully from the ABSA Bank to Watville.

- [4] The appellant's plea explanation was to the effect that a problem had occurred at the ABSA ATM between two men named Bongani Mashaba and his brother Thulani Mashaba and the deceased. The two men were his colleagues and had driven with him and three of their co-workers on the specific day to the Spar Supermarket because accused number two had to purchase certain items at the Spar Supermarket. One of the men, namely Mr Carlos Moande, who was a mechanic for the entity for which they all worked said that in order to investigate what might or might not have happened at the ATM, in which occurrence the deceased had a role to play, that he would take the deceased to the deceased's father. The accused had driven to the Spar Supermarket with Mr Carlos Moande and were hence in the motor vehicle in which the deceased was transported by Mr Carlos Moande. Mr Carlos Moande allegedly dropped them off close to their respective homes. The appellants' version was that they did not know what happened to the deceased thereafter. They confirmed the identity of the deceased and the post-mortem report.

- [5] A Mr Pule Mabaso testified that he was in the company of the deceased on 22 March 2012 in order for the deceased to draw money at the Absa

ATM. When they arrived at the ATM there was a man, who was unknown to them, who proceeded to tell them that his ATM card had been “swallowed” by the machine. The deceased suggested that the man phone the Absa helpline which the man proceeded to do and then the deceased inserted his card into the machine and entered his pin. The machine reflected that the deceased’s salary had not yet been deposited into his account. They decided to wait until 20h00 when the deceased believed that his money might reflect in his account. He said as they stood waiting, the appellant approached the deceased and started assaulting him, accusing him of committing some form of fraud at the ATM machine and proceeded to hit the deceased with the palm of his hands. A certain Ms Rose Hannah Sibiya (whose testimony is set out below) was also standing close to the ATM and enquired why the deceased was being assaulted.

- [6] Mr Mabaso further testified that the deceased was then ordered to insert his card into the ATM machine and enter his PIN number to prove that the card indeed was his. When the deceased entered his PIN number it clearly indicated that the card belonged to him, but that there was still no money in his account. The deceased was then pulled to the parking lot by the appellant with a group of people following.

- [7] Mr Mabaso was asked if he recognised any of the people who were in the group besides the appellant and he testified that accused number two was also part of the group but testified that he was just a bystander watching the appellant assaulting the deceased. He testified that he followed the group at a distance, as he was afraid and the deceased was being pulled by the appellant. They got into a red Golf vehicle and proceeded to drive away with the deceased in the vehicle. Mr Mabaso was asked how many people were in the group in the motor vehicle and he stated that there were four people in the group excluding the appellant. He added that there was also a security guard who was trying to reprimand the group.
- [8] Mr Mabaso testified that he had reported the matter to the police but was told to come back the next day. He never saw the deceased again.
- [9] Under cross-examination Mr Mabaso confirmed that the man whose card had been swallowed by the machine was in the company of the group who left in the red Golf vehicle. He said that he did not see who the driver of the Golf was.
- [10] It was put to Mr Mabaso in cross-examination that it was the appellant's impression that the deceased had assisted the man whose card got stuck in the ATM – which Mr Mabaso denied. Mr Mabaso said that when the deceased was assaulted by the appellant the deceased said he would lay a

charge against him because the deceased said he knew that the appellant was from Watville. He also testified that the appellant was wearing a striped shirt with different colours (he remembered distinctly that two of the colours were orange and red but could not remember the rest of the colours) when confronted with the accusation that he was lying as the appellant was wearing a blue top. It was also put to Mr Mabaso that the appellant would testify that he had never assaulted the deceased, which Mr Mabaso denied.

[11] Ms Sebenzile Zulu, the appellant's partner testified that the appellant came home every evening of the first week of March 2012. She never saw the appellant after Monday the 26th of March 2013 and had heard in March that he had been arrested.

[12] The next witness, Ms Rose Hannah Sibiya confirmed that as she was walking past the ATM she heard the deceased calling her name (they were colleagues). She testified that she heard him calling for help, telling her that they were hitting him and that she must tell them that she works with him. She stated that when she went up to the deceased and asked him who is hitting him he was not being hit at that moment but then suddenly the appellant emerged and said to the deceased: "*Hey you boy, I will hit you*". She said the appellant also asked the deceased where the

card was, whereupon the deceased answered that the card that he had on him was his own card, that he was employed and that he did not steal a card.

[13] Ms Sibiya testified that the appellant then told the deceased to draw money with the card, to see if it allegedly belonged to him and the deceased entered his pin which accorded with the card, but could not draw money as there was no money in his account. She told the onlookers that the money would only reflect the following day as she was aware of this fact as she worked with the deceased. The appellant once again said “*Hey you boy I will hit you*” and proceeded to slap the deceased. She pleaded with the appellant not to slap the deceased as he was a young boy and her co-worker, but the appellant continued hitting him. The deceased told the appellant that should he continue to assault him, he knew where the appellant lived and would see to it that he would “*sleep in the police cells*”.

[14] Ms Sibiya testified that she suggested that they call the police in order to ascertain to whom the card belonged because the deceased said that it belonged to him, whereas the appellant and some people in a group with whom the appellant was (who they were was not clarified in evidence) averred that it belonged to them.

- [15] Ms Sibiya testified that accused number two, who was leaning on a trolley just outside the Spar, said “*this boy talks too much*” and after that she heard someone from the group of people say to the deceased “*you will explain not here but you will explain later*”. She thought this comment to mean that the deceased will be explaining at the police station as she sincerely thought that they were taking the deceased to the police station. The deceased was pulled by the appellant and another person who put him in the red Golf motor vehicle. She never saw the deceased again after they drove away with him in the vehicle.
- [16] The state closed its case without leading the evidence of Constable Mashabela who arrested the appellant due to all the technicalities surrounding the statement which was obtained from the appellant.
- [17] The appellant testified that on 2 March 2012 he and a few colleagues were outside the Spar Supermarket in Benoni. His colleagues who drove with him to the Spar Supermarket were Mr Thulani Mashaba, Mr Bongani Mashaba and Mr Carlos Moande and Mr David Makarina (the second accused). Mr Thulani Mashaba and the deceased, were on his version having problems with a card belonging either to Mr Thulani Mashaba or the deceased. His colleagues went to the Spar Supermarket

to purchase some items and apparently Mr Thulani Mashaba and the deceased somehow swapped cards.

[18] Mr Thulani Mashaba reported the problem to his brother Mr Bongani Mashaba.

[19] The appellant stated that he and Mr Bongani Mashaba had stayed in the motor vehicle and had not gone to the Spar Supermarket to purchase anything. The two of them, after Mr Thulani Mashaba's phone call, went to the Spar Supermarket. The relevant ATM was close to the Spar Supermarket. Mr Thulani Mashaba alleged that when he had inserted his card into the ATM, and entered his pin, it transpired to be incorrect. The appellant said he did not quarrel with the deceased but merely asked him to insert his card, which was also an Absa card, into the ATM and to enter his pin number. It corresponded with the deceased's card with the result that the deceased clearly had the correct card. He stated that there was therefore no problem and denied emphatically that the deceased was assaulted. He said that the reason why he was falsely accused of hitting the deceased was because he was earmarked as the person who had caused the whole problem. Hence he tried to identify the correct owner of the ABSA card by asking both Mr Thulani Mashaba and the deceased to insert their cards and enter their pin numbers.

[20] The appellant admitted that the deceased stated that if they were to assault him he would get them arrested. He then said that he could not even see the money that was allegedly “lost” (this is the first time that this allegation came up in the testimony) as apparently Mr Thulani Mashaba alleged that an amount of R1000.00 was withdrawn from his account. Allegedly Mr Carlos Moande, the driver of the motor vehicle, decided to take the deceased to the deceased’s mother as he knew her. Mr Carlos Moande had come to the ATM because Mr Thulani Mashaba had told him that they were not at the vehicle but at the ATM. The appellant testified that he, the second accused, Mr Carlos Moande, Mr Bongani Mashaba, and Mr Thulani Mashaba drove off with the deceased in the red Golf vehicle. The appellant said that he and the second accused wanted to take the deceased to the police station but that Mr Carlos Moande said that they had to take the deceased to the deceased’s mother first and if the stolen money was not returned, they would take him to the police station. The appellant said that he and the second accused got off close to their respective homes.

[21] When questioned why his partner Ms Zulu had testified that she did not see him after 25 March 2012 he said that they had a quarrel about a girlfriend. It was then put to the appellant that it was very strange that he had left their home on 19 March 2012 without informing his partner and

he answered that he had to attend the slaughtering of a cow for his sister. The appellant added that his partner was also not home when he left. It was then put to the appellant that on 22 March 2012, the body of the deceased was found with a decapitated head and half of his face missing.

[22] When questioned if he had any communication with Mr Carlos Moande after that weekend of the 2nd of March 2012, the appellant said that he did not see Mr Carlos Moande after that weekend and only saw him when he came to him to tell him a mutual friend of theirs had died (this reference to a friend is not a reference to the deceased).

[23] It was also put to him that after the incident on the 2nd of March 2012, he never heard from Mr Thulani Mashaba again which he confirmed, stating that Mr Thulani Mashaba and his brother Mr Bongani Mashaba were long distance truck drivers. Similarly, the appellant testified that he did not see Mr Carlos Moande again as Mr Carlos Moande's vehicle had allegedly broken down and they used taxis to get to work. Furthermore, Mr Carlo Moande had *“(d)uring that week ... left with a breakdown vehicle”*.

[24] Under cross-examination the appellant testified that he, Mr Carlos Moande and the second accused were close friends but not Mr Thulani Mashaba and Mr Bongani Mashaba because they came from Swaziland.

- [25] The appellant admitted that he went with the police to Mr Carlos Moande's residence only to find out that he had left his place of residence, that it was empty and had not seen him again.
- [26] When questioned if he had allegedly only gone to "Petrotiff" for the cow slaughtering ceremony, which ceremony was a one day ceremony, why did he not return home sooner, he answered that he first had to make arrangements with his mother to let the ancestors know that such a ceremony would take place and that he was arrested when he returned to "Petrotiff" where the cow was slaughtered.
- [27] The appellant's version under cross-examination contradicted the evidence of the state witness regarding the incident at the ATM in all material respects. The appellant said that Mr Thulani was accusing the deceased of taking his card and the appellant allegedly only tried to calm down the commotion. He admitted, however, that the deceased stayed close to him and threatened to lay a charge at the police station against him and Mr Thulani Mashaba if they sought to assault him. He also admitted to shouting. He alleged under cross-examination that the deceased walked behind him and Mr Carlos Moande to the motor vehicle. He denied assaulting the deceased. The appellant testified as

follows: *“I did not take the deceased away and I do not know how he was killed. I did not even know that he had died”*.

[28] When questioned by the court as to the reason for getting out of the car before they reached the deceased’s mother, the appellant stated that he could not speak Tsonga but that Mr Carlos Moande could. It would therefore serve no purpose as he would not have understood what they were saying.

[29] The appellant testified that he and Mr Carlos Moande continued working after the weekend until the next Friday when he left. This evidence, of course, does not tally with the evidence of Ms Sibiya and Mr Mabaso.

[30] The second accused also testified. His version was that he saw nothing. He denied that he was at the ATM and alleged that when he reached the vehicle the appellant, Mr Bongani Mashaba, Mr Thulani Mashaba and Mr Carlos Moande were in the motor vehicle. According to him, the occupants of the vehicle were talking in a normal fashion. He testified that he was dropped off at Lichville.

Analysis of the evidence:

- [31] On the charge of kidnapping it is clear that the appellant played an active role in forcing the deceased into the Golf vehicle which drove off with the deceased inside the vehicle.
- [32] Regarding the charge of murder, the evidence is circumstantial. However, the following evidence is telling: the appellant suddenly disappeared from his residence. So did Mr Carlos Moande and Mr Thulani Mashaba and Mr Bongani Mashaba. Although evidence was led that Mr Carlos Moande was nowhere to be found no evidence was furnished as to why Mr Thulani Mashaba and Mr Bongani Mashaba did not testify. According to the appellant, they would drive for long distances for their employer. No further explanation was proffered. On the witnesses' evidence, the deceased knew where the appellant lived, which fact the appellant admitted, saying that he lived close to the appellant. The state witnesses' evidence to the effect that the deceased stated that he would lay a charge against the appellant indicates a motive as to why the appellant was involved in the deceased's kidnapping. His denial that he did not assault the deceased was directly contradicted by the state witness Mr Mabaso and Ms Sibiya who saw him do it and did not deviate from their versions. Furthermore his version that he alighted from the vehicle because Mr Carlos Moande wanted to take the deceased to his mother, due to the fact that there would be language barrier, is also

wholly improbable. He is the one who was known and threatened by the deceased. It was not probable that he would then alight and not see through where the matter would end. So too, was his evidence regarding why he got involved and that his involvement was when the quarrel broke out at the ATM. Furthermore, on the appellant's own version, because the deceased's card and pin number accorded with each other, there was no reason whatsoever to take the deceased to the police station.

[33] The appellant's version is replete with inherent improbabilities and the appellant was not a credible witness.

[34] Considering the totality of the evidence, the appellant's version was false and was correctly rejected by the magistrate. The magistrate did not misdirect himself in respect of any of the evidence and correctly, in the court's opinion, held the appellant guilty of murdering the deceased after kidnapping him.

[35] The appellant admitted a previous conviction regarding theft on 11 June 2009 and a sentence of R1 800.00 or three months' imprisonment. The whole sentence was suspended for five years.

[36] Regarding sentencing, the discretion to impose a sentence is within the trial court's discretion. At the time of sentencing the appellant was single

and 30 years of age. He had three children aged four, eight and eleven. They were staying with their mother since his incarceration.

- [37] He was employed as an electrician at a company called Royal Transport and had a girlfriend who contributed together to the common household. He completed standard ten. It was emphasised that the matter was not premeditated and that the incident at the ATM was not foreseen. One thing led to another.
- [38] It was emphasised by the state that the appellant had a motive to kill the deceased who had threatened to lay a charge with the police for assault against the appellant. They took the deceased away after the threat and he had indicated that he knew the appellant.
- [39] The magistrate found no material and compelling circumstances to deviate from the minimum sentence of 15 years in respect of the conviction of murder. The magistrate held that the deceased had done nothing wrong yet was left in the veldt to rot, dying a gruesome death with his head found decapitated.
- [40] The magistrate cannot be faulted. He correctly imposed a five year sentence in respect of the first charge of kidnapping and the minimum sentence of fifteen years in respect of the murder.

[41] He also held that the appellant was unfit to possess a firearm.

[42] In the result I hereby propose the following order that: —

[42.1] the appeal against convictions and sentences is dismissed and
the convictions and sentences of the court *a quo* upheld.



JANSEN J
JUDGE OF THE HIGH COURT

I agree and it is so ordered



KHUMALO J
JUDGE OF THE HIGH COURT

For the Appellant Mr MB Kgagara
Instructed by Pretoria Justice Centre (012-401 9200/083 5144 613)

For the Respondent Advocate PN Ngcobo (076 544 0267)
Instructed by The State Attorney Pretoria (012-309 1563)