

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

10/3/15
Case No: A597/14

In the matter between:

HANS JOSEPH KGARIA

Appellant

and

THE STATE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : YES/NO

(2) OF INTEREST TO OTHER JUDGES : YES/NO

(3) REVISED

DATE

10/3/15

SIGNATURE

Respondent

JUDGMENT

D S FOURIE, J:

[1] The appellant was convicted in the Regional Court on two counts of housebreaking with the intent to commit robbery with aggravating circumstances and robbery with aggravating circumstances as contemplated in section 1 of Act 51 of 1977. The appellant was sentenced as follows: On count 1 – with regard to housebreaking with the intent to commit robbery with aggravating circumstances 3 (three) years imprisonment and with regard to robbery with aggravating circumstances 10 (ten) years imprisonment; on count 2 – with regard to housebreaking with the intent to commit robbery with aggravating circumstances 3 (three) years imprisonment and with regard to the robbery with aggravating circumstances 10 (ten) years imprisonment.

[2] It was ordered that the 3 (three) years imprisonment on each of the two counts are to run concurrently with the two sentences of 10 (ten) years imprisonment. The effective sentence is therefore 20 years imprisonment. The Magistrate granted leave to appeal against conviction only.

The two counts relate to two different incidents. The one took place during December 2011 and the other during August 2012. The main issue on appeal is whether the identification of the appellant as one of the perpetrators was proved beyond reasonable doubt.

THE EVIDENCE

[3] According to the evidence of the complainant on the first count she and her husband had entertained guests on the night in question. After they had left, her husband, who was a member of the Community Policing Forum, went out on patrol. A bottle of beer was left on the table. Later during the night she realised that there were people in her house. The burglar door was broken and also removed. She saw one of the perpetrators whom she identified as the Appellant. According to her he was pointing a firearm at her. She later realised her purse and cell phone had been stolen. The next morning she found an empty beer bottle in her backyard which she handed over to the police. It is common cause that a fingerprint of the appellant was found on this bottle.

[4] As far as count 2 is concerned, the complainant testified that on the day in question she was alone at home. She later went to her bedroom and locked the door. Shortly thereafter she heard footsteps in her house and people whispering. The door to her room was then kicked open and she tried to escape. She was stopped outside her home by a man with a firearm who took her back to her room. Whilst she was lying down, he kicked her on the eye and in her stomach. She then begged the robbers not to injure her, as she was pregnant. She could identify one of the robbers in the light of her television screen. Several items were robbed, including a Nokia 1100 cell phone. She later attended an identity parade and pointed the appellant out as the robber who kicked her on her eye. The appellant was later arrested and a Nokia 1100 cell phone was found in his possession. The complainant identified this cell phone as her property by referring to a certain number on it.

[5] The appellant testified and he also called his brother to testify on his behalf. He denied that he was involved in any of the two incidents. He conceded that his fingerprint was found on the beer bottle. However, according to him he was at his brother's home selling liquor on the day when the first incident took place. This, according to him, should explain how his fingerprint could possibly have come onto this bottle. However, when his brother testified he denied that the appellant sold liquor on the day in question as he did not need the assistance of his brother on that day. The appellant also admitted that the cell phone was found in his possession, but according to him it had been sold to him by another person.

DISCUSSION

[6] It was submitted on behalf of the appellant that the appeal against the conviction should be upheld, as the State failed to prove that the appellant was one of the robbers. It was also contended that a reasonable possibility exists that his evidence may be true. It is indeed correct that if a reasonable possibility exists that the evidence of an accused may be true, a Court is bound to acquit him. However, it is also important to bear in mind that a decision to acquit or to convict should take into account all the evidence.

[7] Furthermore, bearing in mind the advantages which a trial Court has of seeing, hearing and appraising a witness, the powers of a Court of Appeal to interfere with the findings of fact of a trial Court are limited (S v Francis 1991 (1) SACR 198 (A) at 204 c-e). In the absence of any misdirection the trial Court's conclusions, including its acceptance or rejection of a witness' evidence, are presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of Appeal on adequate grounds that the trial Court was wrong in either accepting or rejecting the witness' evidence (S v Latha & Another 1994 (1) SACR 447 (A) at 453 e-f).

[8] According to the Magistrate's judgment it is clear that he considered all the evidence properly. The onus and test to be applied in criminal matters are both correctly formulated. The Court also took into account that the identification of the appellant with regard to both counts is founded on the evidence of a single witness. However, that was corroborated by strong evidence, i.e. the fingerprint of the appellant found on the beer bottle and the cell phone of the other complainant found in his possession. The evidence for the State was therefore accepted and that of the appellant rejected.

[9] Having regard to all the evidence, I am unable to find that the trial Court misdirected itself in any manner. It should be emphasised that although there is a possibility that the explanation given by the appellant with regard to both incidents may be true, this is not the test to be applied in criminal matters. He is entitled to be acquitted if there exists a *reasonable* possibility that his evidence may be true. Having regard to the facts and circumstances of both incidents, I am not convinced that there is a reasonable possibility that his evidence may be true.

[10] It should therefore follow that in the absence of any misdirection the trial Court's findings and conclusions are presumed to be correct. The appellant was unable to convince this Court on adequate grounds that the trial Court was wrong in either accepting or rejecting a witness' evidence and therefore the appeal, as far as conviction is concerned, falls to be dismissed.

[11] The last issue to be considered relates to a contention put forward with regard to sentence. Counsel for the appellant submitted that the trial Court misdirected itself by sentencing the appellant twice on each of the two counts, i.e. three years imprisonment for housebreaking with the intent to commit robbery with aggravating circumstances and ten years imprisonment for robbery with aggravating circumstances as contemplated in section 1 of Act 51 of 1977. The argument goes further to suggest that this amounts to an irregularity in the proceedings and therefore this Court should exercise its powers of review to come to the assistance of the appellant by setting aside the sentence *in toto*. The matter should then be referred back to the Court *a quo* to consider sentencing afresh.

[12] I do not agree with these submissions. First, I should take into account that leave to appeal on sentence was refused by the Magistrate. That order still stands. Put differently, not every appeal is an open invitation to raise any issue that suits the appellant. Second, both counts clearly refer to two different offences, i.e. the crime of housebreaking with intent to commit robbery with aggravating circumstances and robbery with aggravating circumstances as contemplated in Sec. 1 of Act 51 of 1997. I am aware of the fact that in practice, although two crimes have been committed, they are treated as one crime for the purposes of sentence (cf S v Cetwayo 2002 (2) SACR 319 (ECD) at 321 d-e). However, a deviation from this practice does not necessarily amount to an irregularity. Third, even if this would amount to an irregularity, then in terms of section 309(3) of the Criminal Procedure Act a

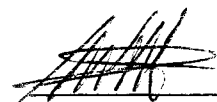
conviction or sentence shall not be reversed or altered by reason of "any irregularity or defect in the record or proceedings", unless it appears to the court that a failure of justice has resulted from such irregularity or defect. Having regard to the fact that the appellant was correctly found guilty as charged and on each count both sentences are to run concurrently, I am unable to find that any failure of justice has occurred. I therefore conclude that there is no merit in any of the arguments relating to sentence.

ORDER:

In the result I make the following order: the appeal is dismissed.


D S FOURIE
 JUDGE OF THE HIGH COURT
PRETORIA

I agree,


N V KHUMALO
 JUDGE OF THE HIGH COURT
PRETORIA

Date: 10/3/15 February 2015