

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A320/2012

In the appeal between:

MOJALEFA MOKHESENG

Appellant

and

THE STATE

Respondent

CORAM:

DAFFUE, J *et* LEKALE, J

JUDGMENT:

DAFFUE, J

HEARD ON:

16 SEPTEMBER 2013

DELIVERED ON:

26 SEPTEMBER 2013

INTRODUCTION

- [1] On 28 July 2011 appellant and his co-accused, to whom I shall refer herein as accused one, were convicted in the Regional Court, Bloemfontein of one count of housebreaking with the intention to steal and theft. On 16 January 2012 they were sentenced to five years' imprisonment. The appellant's application for leave to appeal against his conviction and sentence was dismissed by the court *a quo*,

but on 9 May 2012 the High Court granted leave to appeal on petition.

GROUND OF APPEAL

- [2] The conviction is attacked, mainly on the basis that the court *a quo* erred in finding that the only reasonable inference to be drawn from the proven facts was that the appellant took part in the crime, the reasons being that evidence tendered on behalf of the State and accused one indicated that appellant was under the influence of alcohol and that another reasonable inference to be drawn was that he was fast asleep or so intoxicated that he could not act at all at the stage when the offence was committed. It should be mentioned at this stage already that appellant elected not to testify.
- [3] Regarding sentence the court *a quo* is blamed for not considering other sentencing options and that five years' imprisonment is shockingly excessive. Reliance was placed on the appellant's clean record, the fact that he was in the employ of the South African National Defence Force, already nine years at the time the trial was concluded, that his wife and their five year old child were fully dependent upon him, that he was seriously intoxicated during the commission of the offence and that these aspects were not duly taken into consideration.

THE FACTUAL MATRIX

- [4] Mr Bantjes, who appeared for appellant, accepted the court *quo's* factual findings and did not criticise its acceptance of the evidence tendered on behalf of the State, in particular where same was allegedly corroborated by accused one. The following facts were common cause:

- 4.1 On Saturday afternoon, 6 December 2008, Mr Koupis, the owner of Delta Bottle Store in Westdene, Bloemfontein, locked his premises. Early Sunday morning, the 7th of December 2008 and when it was still dark, he was informed by his security company, Bloemsec Security, that the alarm in his business premises had been activated. When he arrived at the scene he noticed that the glass of the glass door was broken and that several boxes of expensive whiskeys which were on display close to the door, were missing.
- 4.2 A close circuit security system was installed within the premises and although Mr Koupis watched the recording at a later stage, none of the offenders could be identified. This recording vanished inexplicably and could not be presented as evidence. Some of the stolen goods were retrieved and returned to him.
- 4.3 Mr Olivier, an employee of Bloemsec Security, who worked nightshift on this particular night, attended to the alarm when activated at the Delta Bottle Store. As he approached the premises, he noticed a white Mazda 323 motor vehicle leaving it. He passed the

vehicle and upon discovery that a break-in had been effected, he made a U-turn and followed the vehicle, simultaneously alerting his colleagues in other vehicles per radio.

4.4 The Mazda increased speed and at times travelled at 130 – 140 km/h, ignoring red robots and even entering a one-way street from the wrong side. Personnel of Chubb Security were also called upon to help with the chase and eventually the white Mazda was pushed off the road in Moshoeshoe Road in Batho suburb.

4.5 During the chase by Mr Olivier, Mr Fourie, a reaction officer and co-employee of Bloemsec Security, attended a different scene. When his assistance was requested over the radio, he went to the junction of East Burger- and Alexander Streets where he parked his vehicle in the junction in order to block any oncoming traffic. A white Mazda, followed by a Bloemsec vehicle, speeded towards him and he had to remove his vehicle in order to prevent the Mazda from colliding with him. He also followed the Mazda and confirmed the high speeds and other traffic offences referred to by Mr Olivier. Just before he pushed the Mazda off the road in Moshoeshoe Road, the passenger sitting in the left rear seat threw a box containing whiskey bottles out of the vehicle. He managed to avoid the objects and thereafter pushed the vehicle off the road. During the chase Mr Fourie at

a stage put his vehicle's lights on bright and ascertained that toilet paper was used to camouflage the registration number plate of the Mazda to an extent that the letters were clearly legible, but the numbers were not easy to make out.

- 4.6 There were five people in the Mazda. When it stopped, the person sitting in the front passenger seat fired two shots with his firearm towards Mr Fourie and nearly struck his colleague. Mr Fourie returned fire and fired shots in the direction of the Mazda, but aiming to ground level.
- 4.7 Four of the five people in the Mazda got out of the vehicle and ran away. The person sitting in the middle of the rear seat did not get out of the vehicle. Messrs Fourie and Olivier approached the vehicle with their firearms ready and pointed at the person as they were uncertain whether he was armed or not. This person, who was identified as appellant, was pulled out of the vehicle and left on the ground until he was later on when the police arrived thrown into the police van.
- 4.8 According to Mr Fourie the appellant was not drunk, although there was white froth coming from his mouth. On the other hand, Mr Olivier was of the view that appellant was under the influence of alcohol and he detected the smell of liquor.

- 4.9 Mr Piater, a co-employee at Bloemsec, arrived later and he and Mr Olivier apprehended accused one who was hiding in an outside room approximately fifty metres from the scene. On accused one's own version he ran away and jumped over two fences in order to escape.
- 4.10 It is apparent from photographs taken at the scene that the Mazda vehicle contained several boxes of whiskey of different brands. There were two boxes at the passenger's side in the front of the vehicle, one on the seat and one on the floor and another two boxes in the rear, one on the seat and the other on the floor.
- 4.11 Accused one testified in his defence. He not only contradicted statements made by himself to the witnesses, but also the plea explanation of appellant. According to him he was at the Zanzibar Tavern which is near the Batho police station. Between 02h00 and 03h00 Sunday morning he requested appellant – the two of them were not drinking together at the tavern – whether he could go and sleep in his vehicle as he was drunk. This was arranged and although he was aware, at a later stage, of people inside the vehicle, he was so drunk that he did not identify these people and was totally unaware of housebreaking and the chase at high speed through the streets of Bloemfontein. He was awakened only by the speed humps in Moshoeshoe Street just prior the vehicle coming to a standstill. He

was also aware of firearm shots being fired at their vehicle and this was the reason why he fled from the scene as he was afraid of being shot. A statement to the one state witness pertaining to his degree of intoxication was met with a reply of disbelief. The witness indicated that it would be improbable not to have woken up, bearing in mind the very loud noise made by the alarm at Delta Bottle Store, the high speed the car was travelling at and the corners that had to be executed at high speed in order to try and get away from the chasing vehicles. He also mentioned that the boxes containing whiskey bottles were probably put on the laps of the persons in the vehicle and others at their feet.

4.12 According to accused one appellant was fast asleep and lying down on the rear seat at all relevant times prior to and during the chase. According to him he was hopelessly intoxicated. Contrary to the version of the state witnesses, accused one testified that he was sitting on the passenger seat in the front of the vehicle.

4.13 The appellant elected not to testify. He made a plea explanation and several statements to the state witnesses, which obviously cannot be regarded as evidence at all. However it is deemed apposite to quote the plea explanation:

“Op Sondagoggend 7 Desember 2008 was beskuldigde 1 in Zanzibar Klub, naby Batho Polisiestatie, in die teenwoordigheid van sy twee swaers. Hulle het baie gedrink. Beskuldigde 1 en ‘n onbekende persoon vra ‘n rygeleentheid van beskuldigde 2 vanaf die klub. Nadat beskuldigde 2 sy twee swaers in die woonbuurt afgelaai het, voel hy nie lekker nie (was te dronk) en vra beskuldigde 1 sy vriend om beskuldigde 2 se motor te bestuur. Beskuldigde 2 laat dit toe, want hy sou in dieselfde straat gaan slaap as waar beskuldigde 1 woon. Beskuldigde 2 raak agter in die motorvoertuig aan die slaap. Hy word wakker toe die motor teen ‘n hoë spoed oor hobbels ry en teen iets bots. Beskuldigde 2 dra nie kennis van enige inbraak of diefstal nie en was nie betrokke by enige inbraak of diefstal nie.”

According to statements made to Mr Fourie appellant was so intoxicated that he did not even hear the shots fired by the firearms.

EVALUATION OF THE COURT A QUO'S JUDGMENT IN RESPECT OF CONVICTION

- [5] In considering the appeal I accept that the court *a quo* was in a more favourable position than this court to form a judgment, because it was able to observe the witnesses during the questioning and was absorbed in the trial from start to finish. A court of appeal assumes that the court *a quo*'s findings are correct and will accept these findings, unless there is some indication that a mistake has been made. Also, the trial court enjoys a particular advantage when the demeanour of a witness or witnesses is of importance and when inferences from proven facts are in

issue. It can be in a more favourable position than the court of appeal, because it is better able to judge what is probable or improbable in the light of its observations of persons who have appeared before it. However it is accepted that sometimes a court of appeal may be in as good a position as a trial court to draw inferences where they are either drawn from admitted facts or from facts as found by the trial court.

See: **R v Dhlumayo and Another** 1948 (2) SA 677 (AD) at 705 and 706.

- [6] In order to interfere with the court *a quo*'s judgment it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory, or where the records shows them to be such. There may also be misdirections, though the reasons were satisfactory, if it has been shown to have overlooked other facts or probabilities.
- [7] Having considered the reasoning of the court *a quo* and the evidence presented to it, I am satisfied that the court *a quo* committed no misdirections. I have reconsidered and revaluated the evidence and bearing in mind that courts of appeal are slow to disturb findings of credibility, I am satisfied that even if it could be said that this court had the benefit of an overall conspectus of the full record and is in a better position to draw inferences, the court *a quo* cannot be faulted. Having perused the full record and the reasons of the court *a quo* the following *dictum* of the Supreme Court of Appeal is apposite *in casu*:

“This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the 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 (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e - f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204e).”

See: **S v Monyane and Others** 2008 (1) SACR 543 (SCA) at par [15].

- [8] In adjudicating the evidence in its totality the court *a quo* correctly considered the inherent probabilities and improbabilities.

- [9] In **R v De Villiers** 1944 AD 493 at 508 and 509 the Appeal Court referred to the well-known *dictum* in **R v Blom** 1939 AD at 202 pertaining to the test to be applied when reliance is placed on circumstantial evidence and pointed out that it is not each proved fact that must exclude all other inferences, but the facts as a whole must do so, and continued as follows:

“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”

See also **S v Ntsele** 1998 (2) SACR 178 (SCA) at 182b – f cited with approval in **S v Boesak** 2000 (1) SACR 633 (SCA) at par [13] p 638f.

- [10] It is clear from the evidence that accused one tried his best to exculpate his friend, the appellant. Notwithstanding appellant’s plea explanation and his statements to the State witnesses, which is no evidence at all, and the version of accused one which was rightly rejected by the court *a quo*, there was absolutely no evidence placed before the court *a quo* that appellant was so drunk that his muscular movements were involuntary or that he was unconscious at all relevant times or so fast asleep as a result of his intoxication that he could not act and/or form an intent to commit the act of housebreaking with intent to steal and theft together with his co-perpetrators. Such an inference cannot reasonably be drawn from the proved facts and consequently the trial court correctly convicted appellant as charged.

[11] Over and above the court *a quo*'s findings the following improbabilities appear from the evidence:

11.1 It is improbable that appellant would just hand over his vehicle to strangers at a stage when he was in the vicinity of his brothers in law's residence.

11.2 There was no reason for the strangers to camouflage the registration number plate of the white Mazda vehicle which did not belong to them, but to appellant, if appellant was not part of the gang that planned to commit the offence of housebreaking at Delta Bottle Store.

11.3 It is improbable that the gang members who have come in possession of a valuable tool such as a motor vehicle, would keep appellant and accused one in the vehicle in circumstances where they were not part of the gang and could not make any contribution in support of the criminal activities and would in any event just be in the way and taking up space which could have been utilised to load extra liquor.

11.4 On all probabilities the gang members should have considered that the two innocent intoxicated people might wake up at any stage during the trip and cause alarm, or they might identify them and later give incriminatory testimony against them in a court of law.

[12] It is necessary to consider a final aspect. Mr Bantjes argued that it was not necessary for appellant to testify as he was not called upon to prove the State's case for it. He also relied on appellant's constitutional right to remain silent. However, appellant's constitutional right is not at stake *in casu*. He had the right to remain silent and not to testify, but being so, he must be prepared to suffer the consequences of relying on such constitutional right. Mr Bantjes admitted that the State has made a *prima facie* case against the appellant, but that it was not enough *in casu*. I accept that *prima facie* inference does not necessarily mean that if no rebuttal is forthcoming, the *onus* will have been satisfied. The Supreme Court of Appeal dealt with this issue as follows in **S v Boesak** *supra* at paras [47] and [48] p 646f – i:

“But one of the main and acknowledged instances where it can be said that a *prima facie* case becomes conclusive in the absence of rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation. In the present case the only person who could have come forward to deny the *prima facie* evidence that he had authorised, written or signed the letter, is the appellant. His failure to do so can legitimately be taken into account.”

It was for the appellant to testify and to indicate, for example how much he drank, that he was at all relevant times so intoxicated that he could not act and/or form an intention to commit the criminal offence of which he was accused and that he knew nothing of the housebreaking, including events

prior thereto and immediately thereafter. Such failure could legitimately be taken into account. As indicated the conviction is in order.

THE SENTENCE

[13] It is trite that a court of appeal will not interfere with the sentence imposed by the court *a quo* unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. *In casu* the court *a quo* has been accused by appellant's legal representative of not taking into consideration all the mitigating factors referred to above.

[14] I agree with the court *a quo* that the seriousness of the offence did not warrant a non-custodial sentence. The following *dicta* of Ponnann JA in **S v Kekana** 2013 (1) SACR 101 (SCA) at 105d – i are apposite:

“It is true that the appellant has an unblemished record and that he was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out a clear message that behaviour of the kind encountered in this case cannot be countenanced. The natural indignation that the community would feel at conduct of this kind warrants recognition in the determination of an appropriate sentence...Moreover, as the version of the appellant

was found by the trial court to be false and in effect contrived, it is difficult to conclude in his favour that he has demonstrated any remorse or contrition. In all of the circumstances of the case, therefore, the moral reprehensibility of the appellant's conduct remains undiminished."

There is no reason to interfere with the imposed sentence.

[15] Consequently the following order is issued:

The appeal is dismissed and the conviction and sentence are confirmed.

J.P. DAFFUE, J

I concur.

L.J. LEKALE, J

On behalf of appellant: Adv B.L. Bantjes
Instructed by:
Kramer, Weihmann & Joubert
BLOEMFONTEIN

On behalf of respondent: Adv A. Bester
Instructed by:
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