

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Case No: CA&R 76 /2012

Heard: 28/10/2013

Judgment: 08 /11/2013

In the matter between:

LUZUKO GEBUZA

APPELLANT

and

THE STATE

RESPONDENT

Coram: Williams J et Olivier J

JUDGMENT

Olivier J:

[1]. The appellant was convicted of robbery with aggravating circumstances and sentenced to 15 years imprisonment. With leave of the trial court he appeals against both his conviction and sentence.

[2]. The appellant pleaded not guilty and his plea explanation was that he “*was nowhere on the scene of the crime*”, that “*he had nothing to do with the crime*” and that “*he was in Port Nolloth¹ at the time*”.

[3]. The complainant’s evidence was that the appellant and two other men attacked him at his business premises in the early hours of the

¹ Which is according to the evidence approximately 150km from the town of Springbok, where the robbery allegedly took place.

morning of 1 January 2006, after he had opened the door for the appellant. He was blinded by some sort of powder, assaulted and then tied up. Money and other goods were taken. The complainant was instructed to get into the appellant's vehicle and he was told that they were going to kill him. A taxi then arrived and the complainant managed to untie himself and to get out of the vehicle. The appellant's accomplices ran away and the appellant then drove off in his vehicle. The complainant was taken to hospital, where his wounds were cleaned, and some of them were sutured, and he was given an injection.

- [4]. Apart from the complainant two other witnesses, who were among the passengers in the taxi, identified both the appellant and his vehicle as having being on the scene of the crime.
- [5]. It was common cause that the complainant had known the appellant and had seen him on a number of occasions before the incident. The complainant knew that the appellant was a labour inspector, but denied a statement that there had been trouble between him and the appellant because of his labour practises.
- [6]. Both Mr Bezuidenhout and Mr Kleinbooi, the witnesses in the taxi, testified that they had known the appellant before the incident. Bezuidenhout's evidence was that he had seen the appellant in the shop where he (Bezuidenhout) worked and Kleinbooi's evidence was that he had seen and conversed with the appellant before.

They both also testified that they were familiar with the appellant's vehicle. According to Kleinbooi he was about two meters from the appellant, after having alighted from the taxi, when he witnessed the appellant speeding off.

- [7]. There was a contradiction in the evidence of the complainant and that of Bezuidenhout and Kleinbooi about whether the complainant was inside or outside the appellant's vehicle when the taxi arrived on the scene. This is not relevant for purposes of the real issue, namely the identity of the appellant as one of the attackers. Bezuidenhout and Kleinbooi had in any event been seated among other passengers in the taxi before they alighted and gave chase when the other two attackers ran away. Bezuidenhout explained that he could not see properly from where he had been seated in the taxi.
- [8]. The complainant's identification of the appellant as one of the robbers was therefore substantially corroborated by the evidence of Bezuidenhout and Kleinbooi. The appellant later testified that after the incident a certain Francois played a leading role in a drive and in a memorandum to terminate the appellant's employment and that he suspected Bezuidenhout and Kleinbooi of being part of a "*plot*" against him.
- [9]. This was never put to either Bezuidenhout or Kleinbooi. It is in any event in my view far-fetched and not reasonably possible. The appellant was arrested on the second day after the incident. For the

appellants' theory to be possible, the plot would therefore have had to be hatched in a mere two days.

- [10]. Bezuidenhout and Kleinbooie arrived on the scene in the taxi as customers to purchase liquor at the complainant's business. There was no suggestion of any closer relationship between them and the complainant. There was also no suggestion of bad blood between Bezuidenhout and Kleinbooie and the appellant, of any association between them and Francois or of any reason whatsoever why they would have wanted the appellant's employment terminated.
- [11]. In cross-examination the appellant testified that the people who had according to him conspired to have his employment terminated where *"not people from the community. It is certain business people from Springbok"*. There is no evidence that Bezuidenhout and Kleinbooie were business people, let alone people who would have any interest at all in the appellant's employment as an inspector.
- [12]. Mr Mzamo, the attorney who appeared before us on behalf of the appellant, suggested that the appellant may have injured himself for the purposes of the plot. This is blatant speculation and completely far-fetched.
- [13]. It is in any event equally far-fetched that Bezuidenhout and Kleinbooie would, in order to achieve this, have falsely implicated the appellant in such a serious crime.

- [14]. There can be no doubt that the complainant was attacked, assaulted and injured as described by him. His evidence in this regard was never seriously challenged and it was never disputed that he had been taken to hospital for treatment. The evidence of Bezuidenhout and Kleinbooie that they found the complainant injured, bloodied and in an emotional state was not seriously challenged.
- [15]. A medical report (J88) was admitted into evidence by agreement. It reflected multiple injuries to the complainant. On behalf of the appellant much was made of the fact that the report was dated 6 January 2013, and therefore a number of days after the incident. It is unsatisfactory that it was never in evidence cleared up whether this meant that the particular medical practitioner only examined the complainant on 6 January 2013 or whether the report reflected injuries observed by the medical practitioner when the complainant was treated at the hospital immediately after the incident. In the paragraph headed "*Clinical findings*" it was, however, clearly recorded that the assault had taken place "*on Sunday*". Furthermore the complainant's evidence that the report correctly reflected the injuries sustained by him, was left unchallenged.
- [16]. That the complainant had therefore been attacked and injured in the early hours on 1 January 2006 is a fact and it is in my view not reasonably possible that seemingly unrelated role players like the complainant, Francois, Bezuidenhout and Kleinbooie would all have

seized this opportunity to frame the appellant, let alone in less than two days.

- [17]. The appellant's evidence was far from satisfactory. In cross-examination of the complainant it was for the first time disclosed that the appellant's version was not only that he had been in Port Nolloth, but also that his girlfriend had been with him. This alibi was never disclosed to the police.
- [18]. The appellant's explanation for this in his evidence-in-chief was that *"the Police were very nasty to me and wanted me to say anything that they wanted me to say"*. He did not say that he attempted to tell them about his alibi, or what it was that the police had allegedly wanted him to say.
- [19]. In cross-examination his explanation for not disclosing his alibi to the police was: *"Sir because of the delay of this case, I did not want to have anything to do with the Police, any of the Police, I just wanted the case to come before Court, so that we can come and talk about this before Court..... and unfortunately it happened that I lost my girlfriend"*². This makes no sense. An affidavit by his girlfriend may have resulted in him not being prosecuted.
- [20]. It was also only when the complainant testified that it was suggested to him in cross-examination that the appellant's vehicle could have been on the scene after having being used by someone

²The appellants' evidence was that his girlfriend had in the mean time passed away.

else *“toe hy gekuier het of toe hy geslaap het”*. This too had never been raised in the plea explanation.

- [21]. The appellant's version in this regard in his evidence-in-chief was that he went to bed in Port Nolloth at about 04:00 to 05:00 on 1 January 2006, in other words shortly before the incident took place in Springbok, and that he only woke up at 12:00, when his brother wanted to use his vehicle. His evidence was that his brother then told him that he had earlier that morning *“around 07:00 to 08:00”* attempted unsuccessfully to wake the appellant up in an attempt to locate the keys of the appellant's vehicle, *“but they could not get the car keys”*.
- [22]. At a later stage in his evidence-in-chief the appellant testified that his brother *“informed me that he came earlier on before 08:00 to try and wake me up so that he can get the car, but he could not wake me up.....”*.
- [23]. This would clearly imply that, on what the appellant was according to him told by his brother, his brother would not have been able to use the appellant's vehicle around the time of the incident, because he had been unable to find the keys.
- [24]. This raises the question why the possibility that the vehicle had been driven from Port Nolloth by someone else was put to the complainant in cross-examination.

[25]. The regional magistrate found that a “*blood analysis report*” which had been admitted as evidence by consent “*stated that the seat cover ³ had the complainant’s blood*”. This finding was wrong, because the prosecution had failed to present evidence that a sample of the seat cover or of the complainants’ blood had been taken, let alone the so-called chain evidence to prove that such samples had reached the laboratory without having been tampered with and correctly marked.

[26]. I mention in passing that certain statements on behalf of the appellant in cross-examination and other evidence could arguably have been implied admissions that the complainant’s blood had been found in the appellant’s vehicle.

26.1 It was put to the complainant that “*dit is moontlik dat miskien enigiemand het sy motor geneem toe hy gekuier het of toe hy geslaap het en dit gebruik en dit is hoekom u bloed daarop gekom het*”.

(My emphasis).

26.2 Before handing in the report the prosecutor put the following on record:

“It seems from the cross-examination from the questions it will not be in dispute that the blood was indeed found there and the Defence has previous indicated to the State that they have no objection to the State handing up the report”.

³ Of the appellant’s vehicle.

The attorney who represented the appellant at the trial did not indicate that the prosecutor's impression was wrong, but responded merely by stating that there was no objection to the admission of the blood report into evidence.

26.3 When the appellant was cross-examined and asked to explain *"how it happened that the blood of the Complainant was found inside the car"* he answered:

*"I cannot really tell how **the blood of the Complainant was found in my car**, but I can just tell that it is a strange thing".*

(My emphasis)

This was shortly before the appellant reiterated that there was a plot against him.

[27] Even without the evidence of the blood report and without any such implied admission, however, there would be clear evidence that the appellant's vehicle had been on the scene of the robbery.

[28] It may at first blush seem unlikely that the appellant would, while being aware that the complainant knew him and would be able to identify him, in broad daylight have taken part in the robbery. The complainant's evidence that his attackers were going to take him somewhere else to kill him must, however, not be lost sight of.

[29]. In his heads of argument Mr Mzamo made reference to the evidence that the taxi stopped behind the appellant's vehicle and to the evidence that the appellant reversed his vehicle before speeding off. There is, however, no evidence that the taxi stopped so close to the appellant's vehicle or in such a position that it would not have been possible to reverse the appellant's vehicle, and this issue was never in cross-examination taken up with the complainant, Bezuidenhout or Kleinbooi.

[30]. It is trite that a court of appeal will not easily interfere with the factual and credibility findings of a trial court and in this case there is in my view no basis for such interference.

[31]. In argument Mr Mzamo made reference to the fact that the prosecutor who had initially been involved in the case had previously consulted with the appellant as his attorney. Mr Mzamo wisely did not argue that the conviction should be set aside because of this. The problem was discovered during the evidence-in-chief of the complainant and there is no suggestion that it could in any way have prejudiced the appellant.

[32]. As regards the sentence I have no doubt that the finding of aggravating circumstances was justified. Even if the complainant's injuries could be argued not to have constituted grievous bodily

harm there was a clear threat of such harm when he was told that he was going to be killed⁴.

[33]. The question is whether there were substantial and compelling circumstances to justify a lesser sentence than the prescribed minimum of 15 years imprisonment⁵.

[34]. In this regard the first fact to be considered is that the appellant's legal representative had apparently advised him that the prescribed minimum sentence was 10 years imprisonment⁶. This would in itself be an important consideration⁷.

[35]. At the age of 37 years the appellant had no previous convictions at all.

[36]. A further factor to be considered in the appellant's favour is the delay in his prosecution⁸. He was initially arrested on 3 January 2006. The date of the appellant's first appearance was 25 October 2010 and the trial was finalised on 7 June 2011.

[37]. The complainant did not sustain very serious injuries and there is no evidence of permanent physical damage caused by the assault on him. Although this and the fact that no fire-arm, knife or other

⁴ Section 1(1)(b) of the Criminal Procedure Act, 51 of 1977.

⁵ See Section 51(2), read with Part II of Schedule 2 to the Criminal Law Amendment Act, 105 of 1997.

⁶ Record, page 14, line 8

⁷ Compare **S v Ndlovu** 2003 (1) SACR 331 (SCA) para [14]; **S v BF** 2012 (1) SACR 298 (SCA) para [7]

⁸ Compare **Michele and another v S** [2010] 1 All SA 446 (SCA); **Hendricks v S** [2010] 4 All SA 184 (SCA) para [50]; **S v Roberts** 200 (2) SACR 522 (SCA) para [22]

dangerous weapon was used could be attributed to the arrival of the taxi and the frustration of the plan to move the complainant to another location, it should still to an extent be considered in the appellant's favour too.

[38]. The same applies to the fact that the stolen property was recovered.

[39]. The appellant had been in permanent and stable employment at the time of the robbery. He lost that position as a result of a charge against him. He then started a tuck shop business and he financially supported his three dependent children, one of whom a student at university and the other two 11 and 7 year old scholars, as well as his widowed mother. At the time of sentence the appellant had been in a stable relationship with a women (apparently not the mother of any of his children) for five years. These are favourable personal circumstances and should have served as a strong indication that the appellant could be rehabilitated.

[40]. While there are certain aggravating factors such as the fact that the robbery had clearly been planned and that the intention had clearly been at least also to abduct the complainant I am of the opinion that, cumulatively viewed, at least the wrong advice regarding the minimum sentence, the long delay in the prosecution, the appellant's favourable personal circumstances and the fact the appellant is a first offender constituted compelling and substantial circumstances.

[41.] Bearing in mind the benchmark of 15 years a sentence of 10 years imprisonment would in my view have been an appropriate sentence.

[44]. In the circumstances the following orders are made:

- 1. The appeal against the conviction is dismissed and the conviction is confirmed.**
- 2. The appeal against sentence is upheld. The sentence is set aside and substituted with a sentence of 10 years imprisonment, which is antedated to 7 June 2011.**

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

I agree.

**C C WILLIAMS
JUDGE
NORTHERN CAPE DIVISION**

For appellant: Mr B L Mzamo, Mzamo Attorneys, Johannesburg.

For respondent: Adv K M Kgatwe, Office of the Director of Public Prosecutions, Kimberley.