

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A108/2004

In the appeal of:

VICTOR TONY TSHABALALA

Appellant

and

THE STATE

Respondent

CORAM:

EBRAHIM, J *et* MATSEPE, AJ

HEARD ON:

17 OCTOBER 2005

JUDGMENT:

MATSEPE, AJ

DELIVERED ON:

3 NOVEMBER 2005

[1] The appellant who was 18 years at the time when he was arraigned before the magistrate's court in Sasolburg was convicted on 4 charges namely:

1. Attempted murder in that on the 1st day of March 2002 at 6344 Chris Harni, Zamdela in the district Sasolburg he unlawfully and intentionally attempted

to kill Obed Masanga by shooting him with a firearm.

2. Robbery with aggravating circumstances as prescribed in Section 1 of Act 51 of 1977 read with Section 155 (5) of Act 51 of 1977 and Section 51 of Act 105 of 1977 in that on the 1st of March 2002 at Zamdela in the district of Sasolburg within the jurisdiction of the regional court Free State, he unlawfully and intentionally robbed Jabulani Patrick Lata, a 20 year old man by assaulting him and by using force and took the following items from him:

- (i) A Siemens cellphone valued at R699,00;
- (ii) A jersey valued at R150,00;
- (iii) A hat valued at R40,00;
- (iv) Cash of R150,00.

which items were the property of Jabulani Patrick Lata and at the time the crime was committed, he or his accomplices used firearms and caused physical injury to Jabulani Patrick Lata.

3. Robbery with aggravating circumstances, as prescribed in Section 1 of Act 51 of 1977 read with Section 155 of Act 51 of 1977 as well as Section 51 of Act 105 of 1997; in that on the 1st of March 2002 at Zamdela in the district of Sasolburg within the jurisdiction of the regional court Free State, he unlawfully and intentionally assaulted and with force

took the following items from Pule Shadrack Thulo, a 20 year old male:

- i) a hat valued at R200,00;
- ii) a belt valued at R105,00;
- iii) cash valued and R30,00

which items were the property of Pule Shadrack Thulo and during which time he or his accomplices had firearms and threatened to cause physical harm to Pule Shadrack Thulo.

4. Robbery with aggravating circumstances as prescribed in Section 1 of Act 51 of 1977 read with Section 155 of Act 51 of 1977 as well as Section 51 of Act 105 of 1997. In that on the 1st of March 2002 at Zamdela in the district of Sasolburg within the jurisdiction of the regional court Free State, he unlawfully and intentionally assaulted and with force took the following items from Mvula Nzimankulu, a 17 year old male:

- i) one black trouser valued at R100,00, which item was the property of Mvula Nzimankulu

during which time he or his accomplices had firearms and threatened to cause physical harm to Mvula Nzimankulu.

[2] The accused pleaded not guilty to all charges against him.

He was convicted on the 19th of March 2003 and sentenced on the 23rd of May 2003 as follows:

- (i) Count 1 : 15 years imprisonment;
- (ii) Count 2 – 4: 11 years imprisonment on each count.

In terms of Section 280 of Act 51 of 1977 it was ordered that the sentences ought to run concurrently and that the effective sentence would be 26 years.

[2] The appellant appeals against the judgment and the sentence imposed.

[3] The appellant also applied for condonation for the late filing of his notice of appeal.

The notice of appeal is dated 9 December 2003. The letter with his notice of appeal to the clerk of the court is dated 21 December 2003. The stamp of the magistrate in the Heilbron magistrate's court is dated 20th January 2004 and the one for the Sasolburg magistrate's court is dated 6th February 2004. The appellant's affidavit in support of his application mentions that the failure to file his notice of appeal timeously was due to the commissioner in charge as well as prison authorities.

[4] The accused was still in his youth at the time of sentence. He was not having any legal representation. It does not appear from the record that at the end of his trial his rights pertaining to appeal and further legal representation were explained to him. See in this regard the provisions of section 309D of the Criminal Procedures Act No. 51 of 1977.

[5] Based on the decision in **S v N** 1991 (2) SASV 10 A which confirms that the test in deciding whether there are

reasonable prospects of success in the appeal, which would lead to the granting of condonation, is less stringent in nature. The AD in finding against the refusal of the condonation application declares as follows on page 13, paragraph A-D:

„Afgesien van die vraag al dan nie van redelike vooruitsigte van sukses was dit gemene saak tussen appellant en die staat tydens die aanhoor van die appèl dat daar aan al die vereistes vir die toestaan van kondonاسie voldoen is, onder andere is daar voldoende rede aangevoer waarom die betrokke reëls nie behoorlik nagekom is nie. Hierdie appèl wentel dus alleenlik om die vraag of redelike vooruitsigte van sukses aangetoon is – dit, synde ‘n geykte voorvereiste van die toestand van kondonاسie. Dit is ‘n mindere toets as die wat toegepas word om te besluit of ‘n appèl behoort te slaag of nie.”

[6] In this matter the first question to be answered is whether there are sufficient reasons why the relevant rules were not properly complied with.

[7] The accused’s circumstances do indicated that there are

good reasons why he was unable to comply with the relevant rules, more especially that he had no clue about the consequences of the failure to comply with the rules at the end of his trial.

[8] The question as to whether there are reasonable grounds for success on the appeal must also be answered in the positive in the light of the State's concession in not opposing the application for condonation. I come to the conclusion that justice demands that the application for condonation of the late filing of the appeal be granted and find that there is a proper appeal before the court against the conviction and sentence of the appellant.

[9] The state relied on four witnesses as far as all the counts were concerned and each one of the witnesses testimony relates to the crime perpetrated against him. The evidence indicates that the appellant does not deny having been at the scene at all relevant times when each one of the crimes were committed. The question of identity regarding his presence is thus not in dispute.

[10] His defence is that he was present and acted in collaboration with two persons, one named Jackson and the other named Snipe, who forced him by assaulting him and threatening him to join them in their spree of violence.

The counsel for the appellant correctly argues that the issue to be decided by the court is whether there was a misdirection or an error in the finding of the magistrate in the court *a quo* as to whether the appellant freely and voluntarily associated himself with the acts of the said Jackson and Snipes and whether there are grounds to find that the version of the appellant is reasonably possibly true.

- [11] In this regard the court was referred to **REX v M** 1946 AD on page 1023. In the light of the fact that the crimes were committed one after the other, the evaluation of the evidence must be weighed in its totality. However, it is necessary first to determine whether the duress or coercion relied upon by the accused in this matter, if accepted on the evidence, would entitle him to the benefit of the defence of *vis compulsiva*. The question whether the appellant can rely on necessity as a defence must now be considered. The case of **STATE v GOLIATH** 1972 (3) SA (A) page 1 is instructive on the question as far as the South African Law is concerned. As indicated, in establishing

whether the appellant acted under duress in the circumstances of this case, the evidence of each one of the complainants, relevant to the presence of compulsion or not, must be examined. I then deal with the evidence of each one of the complainants in as far as it relates to the issue of compulsion.

[12] As far as the evidence of Masango is concerned, the following observations are made:

1. He states on page 28 of the record line 3 that the appellant was in front of the other two assailants who were following him and that he had the firearm. It is the appellant who commanded him to open the entrance to his dwelling.
2. On page 30 line number 5 he states that it is the appellant that shot him.
3. On page 30, line number 21 he states that the

appellant's accomplices were standing behind him (the appellant).

This testimony was not convincingly challenged during cross-examination and he stood by it. The magistrate in the court *a quo* found no reason to reject it and thus this evidence stands proven.

[13] As far as this count is concerned therefore it is found that the appellant was not acting under duress or under compulsion. It is found that he was part of the group of people who attacked the complainant and further that he seemed to be the one who was playing the leading role as he fired the shots at the complainant in an attempt to murder him.

[14] As far as count 2 and 3 is concerned the counsel for the appellant argued that in the event that the court finds that the conviction on count 2 is correct, that in fact there should only be one conviction, relating to counts 2 and 3 in that

the charges against the appellant would amount to a duplication of convictions. In this regard he referred the court to the case of **THE STATE v GROBLER & 'N ANDERE** 1966 (1) AA on page 511 to 522.

On page 511 paragraph 8 of the said decision the learned judge Rumpff, AR states that:

;°Die probleem ontstaan in die strafreg, o.a. deurdat een handeling meerdere misdade mag skep (bv. verkragting van 'n dogter deur haar vader) en meerdere handeling, een misdaad (bv. roof).

On page 512, paragraph C-D:

“Roof is wesenlik 'n vorm van diefstal. Dit is diefstal wat met geweld gepaardgaan. Dit bestaan uit twee afsonderlike handeling, wat erge misdaad op sigself is en die staat sal ook altyd een van beide kan kies om die beskuldigde mee aan te kla. Wat vermy te staan te word is om 'n persoon twee maal aan dieselfde misdaad skuldig te bevind om hom twee maal daarvoor te straf. Indien die staat 'n beskuldigde sou aankla van roof en van diefstal of van roof en aanranding: wanneer die diefstal en aanranding die roof uitmaak, sou die

beskuldigde twee maal gestraf word vir die diefstal of vir die aanranding.”

In the present matter we are dealing with two separate acts of robbery. The first act relates to the activities of the appellant and his accomplices in relation to complainant in count 2. The second act which occurred more or less simultaneous with the one relating to count 2 is perpetrated by the appellant and his accomplices and is directed at complainant in count number 3, Mr. Thulo.

[15] The appellant as far as count 3 is concerned is directly involved with the act of robbery as will latter appear from my comments below.

[16] As far as the perpetration of the attack on the complainant in count 2 is concerned, the appellant associates himself with the act committed by his accomplices and should be found guilty, if the evidence so establishes it, of this crime, as an accomplice. The circumstances herein can clearly not compare with those as described in **STATE v**

GROBLER *supra*.

- [17] In this regard the court makes the following observation in the **GROBLER** case, *supra* on page 513 G:

„Indien dit bv., so blyk dat volgens die bewese feite 2 klagtes in die klagskrif een en dieselfde strafbare feit behels, sou die hof die beskuldigde alleen op een klag skuldig bevind.”

- [18] In the present case the facts indicate that there are two separate acts perpetrated by different individuals with the difference that they are acting as accomplices regarding each of the separate acts.

- [19] It is therefore found that there is no irregularity in the charges being dealt with separately. I thus consequently deal with the different charges separately.

As far as count 2 is concerned the evidence of the complainant was not shaken during cross-examination by the defence and the following can be noted relevant to the appellant's defence:-

- i) Page 42 he states that the assailants were walking together casually. Accused did not have the firearm as he was talking with Pule, the complainant in count 3.
- ii) On page 44 he states that the person who had the firearm was the leader of the group and that it was not the appellant.
- iii) On pages 46, line 20 he states that after the robbery the accused and his accomplices left the scene of the crime together.
- iv) On page 48, line 24 he states that the accused and his accomplices were happy (gelukkig) and they were all walking together. This evidence was also not successfully challenged in cross-examination and thus can safely be regarded as having been proven beyond reasonable doubt. The appellant, as far as this count is concerned, is found to have been acting in concert with the two other assailants.

[20] As far as count number 3 is concerned, the following may be noted about complainant's evidence:-

- (i) He, the complainant, knew the appellant before the day. Appellant took his belt and a hat.
- (ii) On page 50 of the record the complainant states that the one who had the firearm threatened to shoot him whereupon the appellant said "skiet hom". On page 52 he states that he was of the view that the group was working together because the appellant ordered the other one to shoot him and the other one was saying that they should not shoot him i.e. complainant in count 2. He further states that they were talking together and laughing together. At no stage were they fighting with each other.
- (iii) Under cross-examination by the defence he states in line 16 - 17 of the record that the group was a gang with the name

“madulammoho” meaning we leave together and that it is the gangs’ name.

The evidence as far as this count is concerned also indicates that there was no duress by any of the other accomplices, forcing him to rob the complainant, On the contrary, it established that he was part of a gang and was the most aggressive one.

[21] As far as count 4 is concerned, the following aspects needs to be highlighted regarding the presence or the absence of coercion:-

- i) Page 64 – the complainant states that the appellant pressed the firearm against his head.
- ii) Page 65 – the appellant told him that he must give money.
- iii) The appellant also followed him.

[22] There is no room for making a finding that the version of

the appellant should be accepted. It is totally improbable. In any event on his own account, he had ample opportunity to escape the other two accomplices. The fact that he failed to report the incident to the police and in fact came back to Sasolburg where he was seen selling cigarettes in the street and subsequently arrested, leads to the conclusion that his version is improbable and indeed false. The observation by the court *a quo* that his evidence be rejected as false is supported.

- [23] The court *a quo* asked for a pre-sentence report before passing sentence and having considered all the aspects that needed to be considered as far as the sentence is concerned, in particular the personal circumstances of the appellant, it states the following:-

“As ‘n mens nou verder gedagtig is aan die 13 maande wat hy reeds in die gevangenis deurgebring het en ‘n mens vat al die genade wat jy kan bymekaarkry in die betrokke geval.” Page 101.

It is clear that the court was at pains to consider each and

every aspect that needed consideration, and cannot be faulted on the sentence imposed.

[24] The appeal against the conviction and sentence is dismissed.

V. MATSEPE, AJ

I concur.

S. EBRAHIM, J

For the appellant:

Adv. N.L. Skibi
Instructed by:
Justice Centre
BLOEMFONTEIN

For the respondent:

Adv. B.G. Claassens
Instructed by:
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