

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

A674/2001

DATE:

8 MARCH 2002

5 In the matter of:

THUMEKILE KLAAS1ST AppellantPHILLIMON BHONO2ND AppellantLUSINDISO NQHELE3RD AppellantMONWABISI PHONGOMILE4TH Appellant

10

J U D G M E N T

VAN HEERDEN, J:

15 [1] The four appellants were charged at the Regional Court
held at Malmesbury with the following four offences:

1. Armed robbery
2. Kidnapping
3. Possession of unlicensed firearms
- 20 4. Illegal possession of ammunition

For the sake of convenience I will refer to the appellants
as the accused.

[2] The accused, all of whom were represented by the same
25 legal representative during the entire trial, pleaded not

/SP

guilty and no plea explanation was tendered on their behalf. On 12 April 2001, all four accused were convicted on the counts of armed robbery and were acquitted on the other two counts. Each was sentenced to a period of 15 years' imprisonment on count 1 and a period of five years' imprisonment on count 2, which latter sentence was to run concurrently with the sentence on count 1. The accused now appeal against both the convictions and the sentences imposed upon them by the Regional Court.

[3] Very briefly, the complainant Mr M J van Zyl, testified that on 21 May 1999 he was approached by three men all armed with firearms, demanding money. These three men were accused 2, 3 and 4. At that time he was busy inspecting certain houses on a building site with one of his employees, a certain Amanda Theron. The complainant was forced at gunpoint to walk in the direction of and then to get into his vehicle but on the way to the vehicle he was assaulted by the armed men and fell to the ground. The three armed men also got into the bakkie, accused 2 into the driver's seat and accused 4 into the front passenger, while accused 3 sat in the back next to the complainant, pressing the firearm

into his side. The second accused then drove off to a gravel road.

5 [4] As they were on their way the complainant noticed that the accused were glancing behind them and he assumed that there could well be a vehicle following them. Accused 2 stopped the vehicle on the gravel road in the middle of nowhere and all the accused climbed out of the bakkie. At this stage he noticed that another bakkie had stopped behind them. In the process of being forced into 10 his own bakkie and driven off to the gravel road, the complainant was robbed of his wallet and cash which he had in his bakkie to pay the wages of the employees to the amount of R7 500, as well as of his cellphone.

15

[5] The accused instructed the complainant to leave the scene in his bakkie, which he did, while the accused drove away in the other bakkie. Shortly thereafter the accused's vehicle was stopped by a police vehicle and 20 the accused, including now accused 1 who was in the bakkie following the complainant's bakkie, were ultimately apprehended and the stolen items recovered.

[6] The version of the accused was that on the day in 25 question they had gone to the building site to get money

/SP

which the complainant owed to them. Apparently
accused number 1, one of the complainant's contractors
who had in turn employed accused 2, 3 and 4, had
contacted the complainant telephonically in advance to
make the appointment. The accused were driven to the
building site by another person in his vehicle, this other
person having been requested to do so by accused 1.
Upon their arrival at the building site, accused 2, 3 and 4
had approached the complainant, called out to him and
informed him that they had come to fetch their money.
Accused number 1 was not with them at the time because
he had stopped on his way to the complainant to talk to
other workers who were known to him. Accused 2, 3 and
4 then walked with the complainant to his bakkie where
the money apparently was and where he was going to
give it to them.

[7] The complainant, however, told the accused to get into
the bakkie, whereupon he, the complainant, drove off.
Some of the accused assumed that he was going to the
bank, the others did not know where he was going. The
complainant landed up on a gravel road where he
stopped the vehicle and handed the bank package full of
money to the accused. The accused thought that this

money was simply the money owed to them by the complainant.

[8] In the interim, accused number 1 had seen the complainant's vehicle leaving the building site and had followed it in his friend's vehicle with the friend driving. At a later stage he came upon the three accused standing alongside the gravel road and they told him what had happened. Thereafter, a police vehicle arrived on the scene and the accused were all arrested.

[9] As pointed out by Ms Mabandlela, who appeared for the respondent in this matter, the complainant's evidence was corroborated in all material respects by that of Amanda Theron, as also by that of another employee one Alan Simons, who was present at the building site when the incidents occurred. Although Mr Simon, who appeared for the accused before this Court, pointed out differences between the evidence of the State witnesses, I agree with the regional magistrate who in her judgment indicated that none of these difference was at all material.

[10] However, having perused the record in its entirety, I am quite satisfied that all the four accused were correctly

convicted of armed robbery and kidnapping, accused number 1 by correct application of the doctrine of common purpose.

5 [11] As regards the sentences imposed on the accused, the regional magistrate correctly pointed out that in respect of both the relevant offences, the Criminal Law Amendment Act 105 of 1997 applies. Armed robbery is one of the offences listed in Part II of Schedule 2 to the Act, while kidnapping in this case fell under Part IV of Schedule 2. As all four accused were first offenders, the regional magistrate, acting in terms of section 51(2)(a)(i) and section 51(2)(c)(i) of Act 105 of 1997, had to impose a period of imprisonment of not less than 15 years on the robbery charge and of not less than five years on the kidnapping charge unless she was satisfied that there were substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed sentences (see section 51(3)(a).)

20

[12] In her judgment on sentence the regional magistrate indicated that she had taken the accuseds' personal circumstances into account, including the important fact that they were all first offenders. However, pointing out that the Criminal Law Amendment Act 105 of 1997

prescribed these sentences for first offenders and taking into account the seriousness of the offences and the interests of the community, she came to the conclusion that there were no substantial and compelling circumstances justifying a departure from the prescribed sentences. She did, however, order that the sentence of five years' imprisonment imposed in respect of the kidnapping, run concurrently with the sentence of 15 years imposed in respect of the armed robbery. There would appear to be nothing in the relevant provisions of Act 105 of 1997 and in particular section 51 thereof that would prevent this order from being made.

[13] Although Mr Simon argued that the regional magistrate had left the personal circumstances of the accused out of consideration in imposing sentence and that there were substantial and compelling circumstances justifying a departure from the minimum prescribed sentences, he did not provide us with any further information in this regard. With reference to the principles laid down by the Supreme Court of Appeal in S v Malgas 2001(1) SACR 469 at para 25, as also in S v Fatyi 2001(1) SACR 485 at para 5, I am of the view that there is no reason whatsoever to interfere with the sentences imposed by the regional magistrate.

[14] In the circumstances I would recommend that the appeal of each of the appellants against both conviction and sentence be dismissed and that the convictions and sentences be confirmed.

Dismissed

10

Pr. VAN HEERDEN, J

CONRADIE, J: I agree. The appeal against the convictions and sentences is dismissed.

15

CONRADIE, J