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/MC

Case nr 605/87

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between

MINSTON BALOYI

Appellant

and

THE STATE

Respondent

CORAM:

VAH HEERDEN, HEFER et VIVIER JJA.

HEARD:

22 November 1988

DELIVERED:

29 November 1988

J U D G M E N T

VIVIER  
JA/.....

VIVIER JA:

During the night of 16 December 1985 P.N. and his wife A. were asleep in their house at 800, D...V..., near Johannesburg when a group of about twelve young men broke into the house. The youths assaulted P. by kicking and hitting him. They demanded from him the keys of his Kombi which was parked outside. P. and his wife fled, but she was dragged back into the house and raped by one of the youths. The keys to the Kombi were found by one of the intruders and removed, together with R220-00 in cash. A great deal of damage was done to the Ntibaness' possessions: 16 windows of the house, a kable, doors, chairs, a hi-fi set and the back window of the Kombi were broken and a front door of the Kombi and the fence in front of the house damaged.

Following upon these events the appellant ("accused no 1") and four others, to whom I shall refer as accused nos 2, 3, 4 and 5 respectively, were charged in the Regional

at Johannesburg on five counts: housebreaking with intent to commit an offence unknown to the State (count 1); rape (count 2) ; assault with intent to do grievous bodily harm (count 3); theft (count 4) and malicious injury to property (count 5).

The charges against accused no 3 were withdrawn when he failed to appear at the trial and accused no 4 was found not guilty on all the charges. The other accused were convicted as follows: on count 1 accused nos 1, 2 and 5 were found guilty of housebreaking with intent to commit robbery; on count 2 only accused no 2 was found guilty and on count 3 only accused no 5 was found guilty; on count 4 all the accused were found not guilty and on count 5 only accused no 1 was found guilty. On count 1 accused nos 1, 2 and 5 each received a sentence of 6 years' imprisonment. On count 5 accused no 1 was sentenced to one year's imprisonment. On count 2 accused no 2 was sentenced to 5 years' imprisonment

and on count 3 accused no 5 was sentenced to one year's imprisonment.

Accused nos 1, 2 and 5 appealed to the Witwatersrand Local Division against their convictions and sentences. The appeals were dismissed, save that in the case of accused no 2, two years of his sentence on count 2 was ordered to run concurrently with his sentence on count 1. With the leave of the Court a quo accused no 1 now appeals to this Court against his convictions and sentences.

The main issue before us was whether accused no 1 was correctly identified as one of the men who entered the complainants' house on the evening in question. Miss Borchers, who appeared on behalf of accused no 1, submitted, firstly, that the evidence of the State witnesses P. and A.N., who both identified accused no 1 as one of the intruders, was unsatisfactory and unreliable in a number of respects, and secondly, that the evidence of accused no 1

that he was not inside the house, should not have been rejected by the trial court.

P.N.'s evidence was that he awoke when the kitchen door, which had been locked, was knocked from its frame and fell in. He went into the kitchen and saw a number of youths, led by accused nos 1 and 5, entering the kitchen. The intruders demanded from him the keys of his Kombi which was parked outside. He returned to his bedroom, followed by the youths. One of them switched on the lights in the house. From outside others were throwing stones at the house. He tried to get hold of his stick in order to defend himself but he was kicked on the forehead by accused no 5. P. said that he fought with the intruders who assaulted him. One of the youths took the keys of the Kombi from his jacket pocket together with R220-00 in cash. P. said that he and his wife eventually managed to escape, but that she was dragged back into the house. He went to the neighbours for help and

upon his return saw the police van parked in front of his house. He saw the police arriving with accused no 1 whom he identified to the police as one of the intruders.

A.N.'s evidence differed in a number of respects from that of her husband. She said that when they awoke the intruders were already in their bedroom. She switched on the bedroom light. All four accused were there, led by accused no 5 who was the one nearest their bed. He was the one who first demanded the Kombi's keys and he started hitting P. with a kierie. According to A. a general fight then ensued in which they were assaulted by all the accused and they also fought back. During the course of the fight they moved to the kitchen and eventually to the outside of the house. P. managed to escape but she was dragged back into the house by accused no 2. It was at this stage that she saw accused no 1 in the dining room breaking the window with a brick which he had in his hand. She was

forced into the children's room and raped by accused no 2. After he had finished with her he joined the other youths who were at that stage ransacking the house and breaking the windows and furniture. It was then that the keys of the Kombi and money were found and taken by the intruders. A. managed to flee to the neighbours where she came across her husband. Later that evening she saw accused no 1 in the police van and identified him to the police as one of the intruders.

The evidence of accused no 1 was that, although he was among the group of youths who went to the complainants' house on the night in question, he at no stage entered the house but remained outside. He said that he had met the group earlier that evening in Meadowlands. The members of the group were armed with an assortment of weapons, including a knife, sticks and horsewhips. The leader of the group ordered him not to do or say anything but to join them and he

obeyed because he was afraid that they might hurt him. He thought that the group intended fetching school children from places where liquor was sold. After about half an hour's walk they came to the complainants' house. He heard that they intended taking the Kombi even before some members of the group entered the house. He and some others remained in the street. He did not see the members of the group entering the house. He heard shouting from inside the house and then saw P. running to the house next door. He neither saw nor heard anything being broken in the house. He saw people running to and fro and although he now had an opportunity to escape he was too drunk to do so. He said that the leader of the group must have noticed his condition, yet he threw the keys of the Kombi at him and told him to drive the Kombi. Although he protested and said that he could not drive, the leader of the group insisted that he drive the Kombi. He got into the Kombi which was parked

inside the grounds of the house and started the engine. When he was questioned by the magistrate at the commencement of the trial after his plea of not guilty, accused no 1 said that he could not start the Kombi and that some of the youths then pulled him from the Kombi. In his evidence he said that after starting the Kombi he saw the rest of the group running towards the Kombi and that he then ran away. He ran to the third or fourth house which was about fifty metres away and because he was so drunk he lay down in the grounds and fell asleep. Shortly afterwards he was apprehended by the police, who took him back to the Ntibaness' house, where he was seen by both complainants. They also saw him later that same night at the charge office.

The magistrate found that both P. and A. were honest and reliable witnesses, despite the differences between their evidence. He rejected the evidence of accused no 1. The magistrate held that accused no 1 was part of the

group who broke into the house with the common purpose of robbing P. of the keys of the Kombi so that they could take the Kombi. The magistrate also found, wrongly in my view, that it had not been proved that the men who entered the house had a common purpose to damage the Ntibanes' property. Consequently only accused no 1 who, according to A., had smashed a window with a brick, was convicted of malicious injury to property.

Miss Borchers's main criticism of the reliability of the identification of her client by the two State witnesses, P. and A., was based on the fact that both saw accused no 1 on two occasions while he was in police custody and before an identification parade was held. The first occasion was outside the Ntibanes' house after the arrest of accused no 1 and the second occasion was later that same night at the charge office. It is quite clear, however, that the magistrate attached little, if any, weight to the

identification of accused no 1 by P. and A. at the identification parade.

P. did make a mistake when he claimed in his evidence in chief that he had identified all the accused at the identification parade. In cross-examination by accused no 4 he conceded that he had not identified him at the parade. There are, in my view, other unsatisfactory aspects in his evidence. One gets the impression that he was badly shaken by the events and that this affected the reliability of his observations. It would be safe therefore, in my view, to disregard his evidence concerning identification. A. appears to have been a far more impressive and convincing witness. The only points of criticism levelled by Miss Borchers against her identification of accused no 1, apart from the fact that she saw him before the identification parade, which I have dealt with, was that she had little opportunity for a reliable identification due to the nature

of the attack on her and her husband. I do not agree. She saw accused no 1 in her bedroom and later in the dining room and she gave a clear account of his movements on the latter occasion. In my view there is no reason to disurb the magistrate's acceptance of A. as a reliable witness.

Any doubt remaining after A.' s evidence is dispelled by accused no 1's own evidence. He admitted that he had been in possession of the Kombi's keys and that he had succeeded in starting the Kombi's engine. his explanation for how he obtained the keys is so unlikely, however, that it can safely be rejected as false. I simply cannot accept that the leader of the group would have given the keys ot the vehicle to a drunken stranger who had informed him that he could not drive a car. Once his explanation for his possession of the keys is rejected the only inference left is,that he was one of the men inside the house. It follows that he was correctly convicted.

That leaves the appeal against the sentence. Miss Borchers, quite correctly in my view, made no submissions before us in regard to sentence. The magistrate did not misdirect himself and, considering the very serious nature of the crimes, the sentences are certainly not so severe that they justify interference on appeal. The appeal is dismissed.

W. VIVIER JA.

VAN HEERDEN JA)

Concur.

HEFER JA)