IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A144/2011

DATE: 21 OCTOBER 2011

In the matter between:

DAWID CARSTENS Appellant

and

THE STATE Respondent

JUDGMENT

BOZALEK. J:

The appellant was convicted on 15 September 2009 in the Regional Court sitting in the Strand, on one count of housebreaking with the intent to rob and robbery and one count of assault with the intent to inflict grievous bodily harm. The magistrate took the two convictions together and imposed a sentence of 18 years imprisonment on the appellant. With the leave of the magistrate, the appellant now appeals against both conviction and sentence.

The appellant was legally represented throughout the trial. His first attorney withdrew when an apparent conflict arose concerning the appellant's evidence on a certain point.

The evidence reveals that in the early hours of 7 March 2009, a man broke into residential premises at […] H[...] H[...] Street, Strand, and robbed the complainant, a Ms Strauss, of a cell phone and some R1 400,00 in cash. The intruder threatened the complainant with what appeared to be a firearm and terrorised her with threats for more than an hour, all the while helping himself to valuables and incessantly demanding that she produce the house's firearm. The complainant was trapped in her bed throughout this period until eventually her husband, who had been unaware of what had been taking place, emerged from another room and a protracted struggle between him and the intruder followed.

In the course thereof, the intruder produced a knife and inflicted several superficial wounds to Mr Strauss and bit him on the neck. The complainant rushed to her

husband's aid and succeeded in stabbing the intruder with his own knife and later hit him over the head with a *knopkierie.* The intruder was forced by them out of the room, down a passage to the front door and eventually bundled over a fence. The complainant and her husband retreated to their house and telephoned the police. Coincidentally other police patrolling the area at that time, came upon the appellant lying on a pavement near the premises, bleeding. He explained that he had been stabbed and in due course he was arrested and charged.

The appellant pleaded not guilty to the charges and offered no plea-explanation. He testified in his own defence, his version being that he had been accosted and robbed that night, in the process sustaining a stab wound. He had then made his way to the vicinity of the complainant's residence seeking help, where he had been found by the police. He denied being the intruder or robbing and assaulting the complainant and her husband. He testified, however, that he had been taken into the premises by the police for identification by the Strauss' after he was arrested as a suspect.

The state's case comprised the evidence of the complainant, Mr Strauss, the police officers who had found the appellant and who interacted with the Strauss', as well as admitted DNA evidence that blood spatters found on the walls of the passage in the house matched a sample of the appellant's blood. As the magistrate correctly noted, the primary issue in the trial was identification. He pronounced himself satisfied with the identification of the appellant in the light of the honesty and reliability of the identification by the Strauss', coupled with the DNA evidence and taking into account the unsatisfactory features of the appellant's evidence and the improbabilities therein.

On appeal it was argued on behalf of the appellant that for a number of reasons the evidence of the identification was unreliable. Before considering these specific reasons, it is as well to set out the general principles regarding identification evidence, as well as the general approach to be adopted in criminal matters to the evaluation of evidence. It is trite that evidence of the identify of an offender is treated with caution, not least for the reason that even an honest witness quite often makes a positive identification of the wrong person. See R v Masimang 1950 (2) SA 488 (A). In R v Shekelele 1953 (1) SA 636 (T) at 638G, Dowling, J stated:

> "An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identification. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification, the greatest care should be taken to test the evidence."

In S v Mthetwa 1972 (2) SA 766 (A) at 768, Holmes, JA stated:

> "Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors such as light and visibility and eyesight, the proximity of the witness, his opportunity for observation both as to time and situation, the extent of his prior knowledge of the accused, the mobility of the scene, corroboration, suggestibility, the accused's face, voice, build, gait and dress, the result of identification parades, if any, and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other in the light of the totality of the evidence and the probabilities."

As far as the evaluation of evidence is concerned, it is necessary to guard against separating the evidence into compartments. A conclusion whether to convict or not must be based on all the evidence. S v Van der Mevden 1999 (1) SACR 447 (W) at 449f-450a. It is also necessary to have regard to the inherent probabilities of the appellant's version. S v Stevens 2005 (1) ALL SA 1 (SCA) at paragraph 26.

I turn to the criticisms of the identification evidence. Firstly it is argued that the although the complainant said the intruder wore an earring, there was no evidence that appellant did so. In fact the appellant testified that he used to wear an earring on his other ear, but did not that night. The police officers were not questioned regarding this aspect. Then it is said that the complainant stated that she had ripped off the intruder's dark jacket during the struggle, whereas the police officers had testified they found him wearing a dark jacket. In a similar vein, the complainant testified that her blow with the *knopkierie* to the intruder's head had produced blood, but such wound was not noted by the two policemen.

In regard to all these criticisms, generally, it must be noted that neither police officer conducted a careful examination of the appellant. Constable Mbenyane, was not an investigating officer, but merely an officer on patrol who, it would appear, dealt relatively briefly with the appellant and the Strauss'. The incident took place at night and according to Mbenyane's evidence, he arrested the appellant, searched him, whereafter he was taken to a hospital for medical treatment. Unfortunately, I should add, no medical evidence was led. In addition the evidence was that some confusion and high emotion reigned at the Strauss' premises, even after the break-in and the arrival of the police.

Neither of the police officers appear to have recalled or recorded the precise events relating to the arrest, search or removal of the appellant in great deal and I do not

consider that much weight can be attached to minor discrepancies between their evidence. If anything, these suggest a lack of collusion between the state witnesses. It was argued that too much weight was attached to the identification by the complainant of the appellant, when she saw a blow up of his identity document photograph in the investigating officer's office. However, it is clear that this was but one of many strands in the identification evidence.

The magistrate's finding that Constable Thakoli found R1 400,00 in cash on the appellant and returned it to the complainant, was criticised on the basis that his fellow policeman had stated that he had searched the appellant and found nothing on him. Thakoli's evidence in this regard was clear and he added that Constable Mbenyane may not have seen him searching the suspect or the appellant later. As the magistrate pointed out, it was highly unlikely that Constable Thakoli would have returned this sum of cash to the complainant unless he had found it on the appellant. It was argued that it was improbable that the appellant would have told Constable Mbenyane that he was stabbed "at number […]", being a reference to the address of the complainant's premises in H[...] H[...] Street.

I disagree. It must be noted that the appellant was quite seriously injured, unable to escape and, when found by the police, was pressed by them as to how he had sustained his injuries. His explanations were vague and varied and, according to the police, made no reference to being accosted several hundred metres away by a gang of men as he ultimately testified. It was argued that a cell phone, the only item missing, was not found in his immediate vicinity. This is indeed so, but it could have easily been disposed of by him before the police arrived, by simply throwing it away or hiding it.

Finally it was argued that the magistrate erred in finding that the appellant was not taken back to the complainant's house after his arrest by the police officers. In my view the magistrate's finding on this score cannot be faulted. Both the Strauss' and the police officers were adamant that the appellant was not taken into the premises after his arrest. When one has regard to the evidence of the complainant and her husband regarding the trauma which they and their young children underwent during the break-in and the struggle with the intruder, it is highly unlikely that they would have allowed any suspect to be brought back into their house almost immediately after the ordeal.

Even more telling was the fact that the appellant's initial instructions to his first legal representative were clearly that he was never in the house at all during or after the break-in. It was only when the DNA evidence emerged later in the state's case, matching the appellant's blood sample to the blood spatters found on the wall of the passage, that the appellant appeared to change his instructions and claim that the police brought him into the house for identification purposes after he was arrested. It was evidently these clashing instructions which led to the withdrawal of his first

representative.

In my view, having regard to the evidence on this issue as a whole, it is clear that the appellant sought to tailor his version to the evidence. The reason for this is obvious. Without a version of being in the house at some stage, the evidence of the matching blood samples found in the house is damning. However, as I have indicated the evidence must not be compartmentalised. When one has regard to the evidence as a whole it is clear that a formidable case was made out against the appellant. Although there was no identification parade or post-incident identification, both the complainant and her husband identified the appellant by his face. Furthermore, the complainant unerringly identified the appellant by a copy of his identity book picture to the investigating officer shortly after the incident.

The complainant was in his presence for an hour or more, albeit most of it in a room lit only by a television set. However, for some time she was able to witness him in much better lit conditions as they struggled down the passage to the front door. Similarly, the complainant's husband was able to recognise the appellant in these better lighting conditions as he grappled with him hand to hand for some time. The complainant testified that she stabbed the intruder and the appellant was found bleeding copiously a short distance away from the complainant's premises. He furnished a false name to the police and his explanations of how he came to sustain his injury were vague and contradictory.

The final version to which he pinned his colours, was highly improbable, it involved him moving across open veld and crossing a river to find help quite a considerable distance away from where he was allegedly robbed when he could have sought assistance from houses in the immediate vicinity of where he was allegedly robbed. A large sum of cash was found upon the appellant and the complainant testified that this was among the possessions of which she was robbed.

The magistrate, who was best placed to make such findings, found that all the state witnesses were credible. In my view, looking at the evidence as a whole and having regard to the probabilities, the conclusion is inescapable that the identify of the appellant as the intruder and assailant, was proved beyond reasonable doubt and his version could safely be rejected as false.

In his argument today, Mr Buurman contended that the convictions were not sound in that the second conviction represented a splitting of charges, that is the conviction for assault with the intent to do grievous bodily harm. This matter was discussed when the charges were put to the appellant in the court below and there was no objection from the appellant's legal representative. The complaint also does not form a ground of appeal and as such cannot properly be relied upon in this court without taking further

steps.

In any event, from a substantive point of view, I am satisfied that there was no splitting of charges, in that the assault upon Mr Strauss by the appellant, was a separate offence with a separate intent which was formed after the appellant effected a break-in and a robbery. It makes no difference and it certainly does not assist the appellant that he, as was argued on his behalf, only assaulted the complainant's husband with a knife in order to try and escape from the premises, which is not a finding I make.

Sentence:
In sentencing the appellant, the magistrate found that the robbery which had been committed involved "aggravating circumstances" as defined by Act 51 of 1977, i.e. the use of a knife, thus bringing into play the minimum sentence set out in Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. This had the further result that he could only impose a lesser sentence if satisfied that" substantial and compelling circumstances" existed. The magistrate found further that the overall aggravating aspects of the offence was so serious, that a sentence heavier than the minimum sentence was justified. Therefore, although he took the two offences together for the purposes of sentencing on account of the fact that they arose out of one incident, the magistrate in effect sentenced the appellant to 18 years imprisonment on the conviction of housebreaking with the intent to rob and robbery.

It is unquestionably so that aggravating circumstances in the wider sense were present. The appellant terrorised the complainant for more than an hour with threats, including the threat to use what appeared to be a firearm and he did not hesitate to produce and use a knife when the complainant's husband came to her rescue. The entire family, including the complainant's two young children, were deeply traumatised by the events of the night and the psychological scars which they bear, will no doubt take a considerable time to heal, if they do at all.

Also counting against the appellant was his lengthy list of previous convictions, accumulated over a period of some 15 years. They include six convictions for theft, one for housebreaking and finally a conviction for robbery for which he was sentenced to three years imprisonment. It was only shortly after being released from prison, after serving part of this sentence, that the appellant committed the present offences.

On appeal it was contended that the sentence imposed was disturbingly inappropriate and induced a sense of shock. In view of the sentencing regime, the first question is then whether the magistrate correctly applied the provisions of what may be colloquially termed the minimum sentence legislation. In S v Vilakazi 2009 (1) SACR 552, paragraph 15 to 18, it was stated as follows:

> "It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo, that it is incumbent upon a court in every case, before it imposes a prescribed sentence to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence."

On behalf of the appellant it was submitted that the fact that he was an awaiting trial prisoner for 18 months, that the weapon he initially wielded was only a toy firearm and that he only used the knife when cornered by the complainant's husband amounted to substantial and compelling circumstances. I do not consider that these factors, together with the limited physical injuries inflicted upon the complainant's husband, constitute, in the circumstances of this matter, substantial and compelling circumstances. The 18 month delay, although regrettable, is not inordinate by present standards.

The further factors advanced essentially amount to the contention that the circumstances of the break-in and robbery could have been worse. Needless to say, this can be said of virtually every serious offence. In any event, the aggravating circumstances, the chief of which I have set out above, are so serious as to substantially outweigh the mitigating factors. I am, therefore, not persuaded that the magistrate misdirected himself in not finding any justification or rational basis to impose something less than the minimum sentence. Neither does that sentence, 15 years imprisonment, strike me as disturbingly inappropriate. It is, however, in itself a severe sentence and I have difficulty seeing the basis on which the magistrate saw fit to increase it by a further three years, particularly when it is clear that he subsumed the sentence on count 2 into that on count 1.

Although going beyond the minimum sentence produced only a three year difference in the sentence, such a period makes a material difference to the sentence. More importantly, an 18 year sentence for housebreaking and robbery, albeit it a very serious instance thereof, brings the sentence, in my view, into the realm of one which is disturbingly inappropriate and induces a sense of shock. For these reasons, I would dismiss the appeal against conviction, but uphold that against sentence, **REPLACING THE SENTENCE OF 18 YEARS IMPRISONMENT WITH ONE OF 15 YEARS IMPRISONMENT,** antedated in terms of section 282 of Act 51 of 1977 to the 16 September 2010.

BOZALEK, J

I agree:

SALDANHA, J

It is so ordered:

BOZALEK, J