Republic of South Africa

A144/12

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION, PRETORIA)

NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
Case No: **CC289/03**
07/02/2014 DATE
SIGNATURE

In the appeal between:

WILLY NGWENYA Appellant

and

14/2/2014

THE STATE Respondent

JUDGMENT

DESAI AJ

[1] The appellant was convicted in the above court on several diverse charges and sentenced, effectively, to life imprisonment. With the leave of the Supreme Court of Appeal, he comes on appeal to this court both against his convictions and the sentences imposed in respect thereof.

[2] Underpinning these convictions are the events which occurred in the vicinity of the Long Tom Pass on 16 and 17 November 2002. One of the victims, a Ms Julie Stevens, is a British subject who was visiting this country as a tourist.

She was accompanied by a Mr Tinus Opperman in a red Toyota Venture when they stopped at a viewing spot on the pass to enjoy the view. What happened thereafter is most unfortunate.

[3] Briefly stated, they were accosted by the appellant and his co-accused, robbed, assaulted, tied up, gagged and put on the floor between the rear seats of the vehicle,that is the red Venture. For the next fourteen hours – approximately – they were driven around, subjected to various indignities, attempts were made to draw money on their ATM cards and Ms Stevens was raped on more than one occasion. The horrific details of what exactly transpired is set out in the judgment of the trial court. I do not intend repeating same.

[4] In any event the saga came to an abrupt end when their vehicle capsized. A Mr Vasco Chambal, the brother of the deceased who was in another vehicle, saw the red Venture overturning and stopped to offer assistance. He realised something was amiss and shortly thereafter saw two of the accused at the deceased's vehicle while the deceased was still sitting behind the steering wheel. As he approached the vehicle he heard two shots being fired and he and his passengers ran into the bush. In the meantime another vehicle had removed Ms Stevens and Mr Opperman from the scene. Mr Chambal stayed hidden until the police arrived a few hours later. He then also found out that his brother had been shot in his head and killed.

[5] It was not in dispute that the four attackers were the accused. None of them testified at the trial and some of them, including the appellant, placed themselves on the scene during cross-examination. The fact that the appellant – accused 4 in the court *a quo* - was one of the attackers is not an issue before us. Instead it was argued that each of his convictions should be set aside on somewhat technical grounds.

[6] The appellant was convicted on the following charges:

1) Count 1 : Robbery with aggravating circumstances
2) Count : Kidnapping
3) Count 3 : Kidnapping
4) Count 4 : Assault with the intent to do grievous bodily harm
5) Count 10 : Murder
6) Count 11 : Possession of an unlicensed firearm
7) Count 12 : Possession of ammunition

[7] With regard to the robbery charge, appellant's counsel contended that the charge specifically relates to the complainants being robbed at gunpoint at the lookout point or viewing spot. It does not refer to the money withdrawn from Ms Stevens' bank account or the items stolen from Mr Chambal. Counsel contended that the trial court did not make a distinction for the purposes of convicting the appellant on this charge. There was simply no need for the trial court to make such a distinction. There was no count of robbery in respect of the goods taken

from Mr Chambal and the appellant was not convicted on Count 9 which dealt with the money being withdrawn from Ms Stevens' account.

[8] Counsel further contended that if the charge was restricted to what happened at the lookout point, the appellant could not be convicted on the said charge as he was not there when Ms Stevens and her companion were seized by the assailants. This argument is largely based upon the response elicited from Ms Stevens during cross-examination:

"I could not say he was at the cliff face, but he was in the car"

and her later response when it was put to her that the appellant was not involved in the original capture she responded:

"I did not see him at the cliff face"

[9] Although Ms Stevens could not say what the appellant did at the cliff face, Mr Opperman's evidence on this aspect is very clear. He implicated the appellant by stating that the appellant was the one that took his sunglasses.

[10] In the absence of any evidence from the appellant, Mr Opperman's evidence was accepted as correct. This finding cannot be faulted.

[11] Counts 2 and 3 relate to the abduction of Ms Stevens and Mr Opperman. On these counts counsel also contended that the state failed to prove beyond a reasonable doubt that the appellant participated in the initial abduction of the complainants. The evidence is overwhelming that the appellant was part of the group who attacked and abducted the complainants. The abduction lasted for a period of 14 hours and the appellant remained part of it throughout. When it was put to Ms Stevens that the appellant:

"...was trying to protect (her) through the evening at certain stages...",

She answered:

"Yes".

After the car had overturned, Mr Opperman – on Ms Stevens evidence – asked the appellant if they could go, he just said "go, go".

[12] This evidence does not suffice for an inference to be drawn that he did not have the intention to abduct the complainants. In the absence of any evidence by the appellant, the only reasonable inference is that throughout the night the appellant made common cause with the other assailants.

[13] There is no evidence that the appellant at any stage personally assaulted Mr Opperman. Ms Stevens conceded under cross-examination that the appellant tried to stop the attack. That may be so. However on the basis of common purpose it appears that the appellant was correctly convicted on this charge.

[14] With regard to the murder conviction, appellant's counsel contended that the trial court wrongly rejected the version put to the state witness that the appellant followed Accused 3 in order to prevent him from shooting anyone. The evidence of this witness, namely Ms Stevens, was simply to the effect that she could not say whether the appellant was chasing Accused 3 or the deceased. As the accused did not testify, the only evidence is that of Ms Stevens. In the light of her evidence we can safely infer that Accused 3 was still in possession of the firearm when Accused 3 and the appellant ran after the men who had approached them. Shortly thereafter shots were fired and the deceased was killed. The only other evidence of some significance is that Mr Chambal saw two persons next to the deceased's vehicle before the deceased was shot and of course, the appellant's palm print on the deceased's vehicle.

[15] As the trial court correctly pointed out, when two or more persons embark upon an armed robbery, as the appellant and his co-accused did, the act or acts of any one of them are imputed to the others if it falls within their common purpose. The appellant would be guilty of murder if he foresaw the possibility that his co-accused might shoot a person in pursuance of their goal, and if it shows that he was indifferent to such possible conduct and its consequences.

[16] The appellant ran after Accused 3 who had the firearm. They ran in the direction of the deceased. The appellant did not tell the court why he did so or what steps, if any, he took to prevent the killing. Moreover the palm print establishes that the appellant was in physical contact with the vehicle of the

deceased, perhaps in an endeavour to steal the vehicle for purposes of escaping the scene.

[17] In the peculiar circumstances of this matter it is apparent that the appellant foresaw the possibility that Accused 3 might shoot and kill anyone who interfered with their joint venture and reconciled himself with the possibility of a killing occurring.

[18] Counts 11 and 12 relate to the unlawful possession of an unlicensed firearm and ammunition. Save for the appellant, the other accused at various stages had the firearm in their possession. The appellant was convicted on the principle of joint possession in that the other accused possessed the firearm on his behalf.

[19] We have been referred to Molini v The State [2006] SCA 38(RSA). I do not think it is applicable in this instance. The firearm had been handled by three of the accused. The appellant was aware of this. The group accordingly had the intention to exercise possession of the firearm through Accused 3, the actual detentor who, in all the circumstances of this matter, intentionally held the firearm on behalf of the group (see S V Mbuhli 2003(1) SACR 97 (SCA) para 71).

[20] Sentencing in this matter must attach due weight to the seriousness of the crime. The assault upon the dignity and person of the complainants endured for up to 14 hours. Instead of assisting the complainants, ordinary people at various places where the accused stopped, gawked and jeered at them. That diminishes all of us. Ultimately, a good samaritan who came to the assistance of those injured by the overturning of their vehicle, was shot and killed.

[21] The seriousness of the crimes must weigh heavily in deciding upon appropriate sentences. The trial court was fully aware of this and largely imposed sentences of appropriate severity. The issue raised by counsel for the appellant is the following. It appears that the first reference to the minimum sentence regime was made by the trial judge at the sentencing stage. The appellant was then told that he was facing a minimum sentence of 15 years' imprisonment for the robbery and life imprisonment for the murder.

[22] Counsel for the state did not disagree with the aforementioned submission. He confirmed that the indictment did not refer to the provisions of Section 51 of Act 105 of 1997, and stated that it was not evident that the appellant had been informed thereof at the commencement of the trial. Counsel submitted that the mere fact that the appellant was not informed thereof does not mean that he did not have a fair trial.

[23] It is certainly not apparent from the record that the appellants were "fully and clearly" informed of the charges which included the minimum sentence regime. As was pointed out by Mpati JA (as he then was) in S v Ndlovu 2003(1) SACR (SCA) para 12 "...where the state intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial ...".

[24] Similar views were expressed by Lewis JA in S v Makatu 2006(2) SACR 582 (SCA) para 3&7.

[25] Counsel for the appellant accordingly asked that the sentences on counts 1 and 10 be set aside and substituted with more appropriate sentences.

[26] I intend to go along with this submission, in the light of the authorities referred to above.

[27] In arriving at appropriate penalties I cannot lose sight of the fact that this appellant was a very young man at the time of the commission of these offences. He was then only 19 years old. He was a first offender. He had already spent a year in custody awaiting the finalisation of these proceedings. He grew up in adverse conditions. Despite these factors which militate in favour of the appellant, a long term of imprisonment must inevitably follow because of the heinous nature of the crimes and the circumstances in which they were committed.

In the result the appeal succeeds partially. It is ordered:

1. The appellant's convictions on counts 1, 2, 3, 4, 10 and 11 are confirmed.

2. The appellant's sentences on counts 2, 3, 4, 11 and 12 are confirmed.

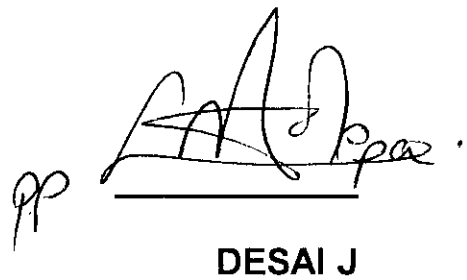
3. The appellant's sentences on counts 1 and 10 are set aside and substituted with the following:

   Count 1: 12 years' imprisonment

   Count 10: 22 years' imprisonment

4. The sentences imposed in respect of counts 1, 2, 3, 4, 11 and 12 are to run concurrently with the sentence imposed in respect of count 10.

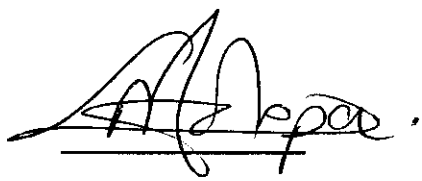
5. The sentences are antedated in terms of Section 282 of the Criminal Procedure Act 51 of 1977 to 15 December 2003, this being the date when the appellant was originally sentenced.



DESAI J

JUDGE OF THE HIGH COURT

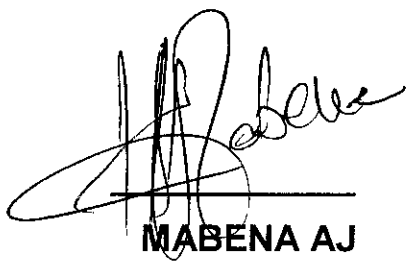
I agree



MOLOPA-SETHOSA J

JUDGE OF THE HIGH COURT

I agree.



MABENA AJ

ACTING JUDGE OF THE HIGH COURT