

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A110/2021

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>
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In the matter between:

SASMAN UZAIR RICARDO

Appellant

And

THE STATE

Respondent

Coram: Mabesele J; Strydom J and Strijdom AJ

J U D G M E N T

MABESELE, J:

[1] This appeal concerns the reliability of evidence of an accomplice, that the appellant was in possession of the sim card of the complainant a day after the crime of kidnapping and robbery with aggravating circumstances was committed, thus justify a conviction based on the doctrine of recent possession. The appeal is against conviction only.

[2] The court below had found that the appellant acted in furtherance of common purpose with others to kidnap the complainant at his shop and robbed him of his belongings.

[3] On 2nd July 2020, at approximately 7h50, Mr Bhojwani arrived at his business premises to commence with his daily activities. He was driving a hyundai CRV motor vehicle. Upon his arrival at the premises he went around the building to unlock the entrance door. Suddenly he was hit and fell on the ground. About two to three people picked him up, placed him inside their vehicle and covered his face and head and drove off with him. An amount of R 3 million was demanded from him. He was unable to identify his assailants.

[4] His assailants drove with him for very long time. They ultimately stopped at a certain house and placed him in a room. His cell phone, credit card,

house keys and office keys were confiscated. One of the men pressed a firearm against his head and demanded money. After 20 days he was taken to another place and left there alone. It was at that stage that he sought help from the neighbour and escaped. An amount of R 75 000 was taken from his bank account.

[5] Mr Pirirai Webster was employed by Mr Bhojwani. He was on duty on 2nd July 2020 and had witnessed the kidnapping incident. He testified that he was standing outside the business premises when Bhojwani arrived. After Bhojwani had alighted from his vehicle, a silver grey Navara vehicle stopped close to him and someone alighted and approached him. The man grabbed him and pushed him into the Navara vehicle. He noticed another man seated at the back of the vehicle and was armed with a firearm. He saw a total of four men driving off with Bhojwani. Three of them were Indians and one African. He was unable to identify them.

[6] Warrant officer Masidi is in the employ of the SAPS. He is stationed at the Johannesburg central Police Station. He was the investigating officer of the case. He received information about a certain cell phone number that had been used to demand ransom money from the family of Bhojwani. He appointed a team to trace ownership of the said cell phone number. The investigation led him and the team to Mr Andrew Mokwa who works at Crown Mines Yarona Cash and Carry. Upon arrival at Yarona he confronted Mokwa with the number. Mokwa confirmed that on 9 July 2020 he was called by the wife of the appellant from that number. Mokwa took them to the residence of

the appellant. Upon arrival, the appellant was questioned about the whereabouts of the sim card of Bhojwani. The appellant responded that he got the sim card from Mr Rhees Muhammad. The appellant took them to Muhammad's residence. Muhammed was not home. The appellant subsequently told him and the team that he lied to them to say that he gave the sim card to Rahees Muhammed and said that the sim card was given to Mr Gift Mamabolo. The appellant accompanied them to the place of residence of Mamabolo, in Alexandra. Upon their arrival, Mamabolo told them that he received the sim card from the appellant.

[7] Mr Momabolo was previously accused 3 in this case. He entered into a plea bargaining with the state in terms of Section 105 of the Criminal Procedure Act¹. He knew the appellant for about 6 years. He testified that on 3 July 2020 the appellant gave him a cell phone and a sim card and told him that they were confiscated from someone who was kidnapped by them. The appellant further told him that there were OTP (one-time pin) codes that would go through the phone and must be forwarded to him. The appellant later asked him to increase the amount of withdrawal limit on the cell phone that he gave to him. He did not know how much was ultimately withdrawn from the account but is aware of two amounts of R 15 000. He was arrested after he was identified by the appellant to the police.

[8] Appellant testified in his defence. He admitted to have given Mamabolo a cell phone on 9th July 2020 because Mambolo had taken his phone for repairs. After he had realised that he forgot a sim card inside the phone, he

¹ 51 of 1977

called Mamabolo and asked him to keep the card safe. On 13th July 2020 he spoke to Mamabolo and informed him that he wanted to do transactions for work that he had to do via the sim card that was in the phone and asked him to supply him with OTP codes as they come through on the phone. Mamabolo acceded to his request. He withdrew R 35 000 from the account. He admitted during cross-examination that his intention was to steal money from the account. He did not know who the sim card belonged to when he requested for OTP. All he knew was that the sim card belonged to Nimco Trading. He bought the sim card and the profile on a channel called Telegram. He denied that he told Mamabalo that the sim card belonged to someone who was kidnapped. He testified that the police did find the account information of Mr Bhojwani on his phone.

[9] It is common cause that the appellant gave the cell phone and sim card to Mamabolo. It later transpired that the sim card belonged to the complainant, Bhojwani. The appellant admitted to have withdrawn an amount of R 35 000 from the account of the complainant.

[10] The trial judge, having relied on the evidence of Mamabolo that he received the sim card from the appellant on 3rd July 2020 (a day after commission of the crime) convicted the appellant on the basis of the doctrine of recent possession. The trial judge rejected as reasonably possibly true, the evidence of the appellant that he gave the sim card to Mamabolo on 9th July 2020 and that the sim card belonged to Nimco Training.

[11] Mamabolo was a single witness and accomplice. In this regard, the law requires that his evidence should be treated with caution. In *R V Ncanana*² the court gave a warning that the trial judge should warn himself or herself of the danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about the innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the judge that his lies are the truth.

[12] In *Mocke V S*³ the Supreme Court of Appeal held that testimony of a single witness must be clear and satisfactory in every material respect. Where evidence is riddled with inconsistencies and lies and witness is also involved in the crime, such testimony may not be regarded as satisfactory.

[13] It is apparent from the record that Mamabolo was opportunistic and had motive to tell lies about the appellant. This is evident on page 634 of the record wherein it is recorded as follows:

‘Mr Mthembu: Let me read what is contained in your bail application, that is on page 001/72

“I was at no stage involved directly or indirectly in kidnapping, extortion and robbing of the complainant or have any knowledge in this regard”

So, today you are saying you have knowledge about the kidnapping

²_1948(4) SA 399 (AD) at 405

³_[2008] 4 A11 SA 330 (SCA)

MR MAMABOLO: There is something that I want to understand. When the bail application was done, is the time when I was told by accused 1 (appellant) not to disclose anything and they had already paid a lawyer and then the confession or the truth that I am telling before this court, I was told by my second lawyer that the truth will release me, if I can tell the court the truth I will be released. It has good results”

[14] On page 620 of the record, it is recorded as follows:

“MR MTHEMBU: But there is information you were not disclosing to court on that day

MR MAMABOLO: You can explain that to me

MR MTHEMBU: That you knew that this sim card was stolen and that the owner was kidnapped.

MR MAMABOLO: Because yes because accused 1(appellant) told me that I must not say anything, he will agree that he is the one who has done that then they will leave me to go or they will let me go”

[15] According to Mamabolo, he chose not to disclose the truth because the appellant had secured a lawyer for him and promised to admit to have

committed the crime alone so that he (Mamabolo) could be released. It is apparent that Mamabolo agreed not to speak the truth because he was benefiting from the protection he received from the appellant. On the day that he appeared in Court in the absence of the appellant, he pleaded guilty in terms of section 105 of the Criminal Procedure Act ⁴ because he was told that there will be good results that will benefit him and will be released. It is evident from his conduct that he is opportunistic, unreliable and agree to do anything that will benefit him.

[16] Mamabalo testified that he received the complainant's sim card from the appellant on 3rd July 2020. This version was disputed by the appellant who claimed to have given the sim card to Mamabolo on 9th July 2020. Since Mamabolo is considered unreliable, his version that the appellant gave him a sim card on 3rd July 2020 is not persuasive. Accordingly, a conviction of the appellant which is based on the evidence of Mamabolo that he received a sim card from the appellant on 3rd July 2020 (a day after crime was committed) cannot stand. Nevertheless, the appellant admitted that he was in possession of the sim card of the complainant and unlawfully and intentionally withdrew an amount of R35 000 from his bank account. Accordingly, the appellant should be guilty of the crime of theft, being a competent verdict for robbery with aggravating circumstances. There is no evidence that links him to kidnapping. Therefore he should be acquitted on this count.

[17] The appellant is a first offender. He is a father of three minor children; aged 3,8 and 9. He was self-employed and earned R 9000 per month.

⁴ 51 of 1977

[18] In view of the above, the following order is made:

18.1 The appeal is upheld, partially.

18.2 The conviction and sentence on the count of kidnapping are set aside.

18.3 The conviction on the count of robbery with aggravating circumstances is set aside and replaced with the following:

“The accused is guilty of theft”

18.4 The sentence of 10(ten) years imprisonment on the count of robbery with aggravating circumstances is set aside and replaced with the sentence of 6 (six) years imprisonment for theft.

18.5 The sentence of 6(six) years imprisonment is backdated to 4 May 2021.

M.M MABESELE
(Judge of the High Court Gauteng Local Division)

I agree

R. STRYDOM

(Judge of the High Court Gauteng Local Division)

I agree

J.J STRIJDOM

(Acting Judge of the High Court Gauteng Local Division)

Date of hearing : 7 November 2022

Date of Judgment :

Appearance

On behalf of Appellant : Adv Mthembu

Instructed by : Legal Aid Board South Africa

On behalf of Respondent : Adv T. Mpekana

Instructed by : Office of the Director of Public Prosecution

