THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case nr 292/94;
282/94
AND
300/94

ELIFAS SEBOLA 1st APPELLANT

PIET RALEPHATA 2nd APPELLANT

GILBERT MATLAKALA 3rd APPELLANT

AND

THE STATE RESPONDENT

CORAM: FH GROSSKOPF, HARMS et ZULMAN JJA

DATE OF HEARING: 9 MAY 1997

JUDGMENT: 12-05-97

REASONS FOR ORDER MADE IN OPEN

COURT ON 9 MAY 1997 BY FH GROSSKOPF JA, WITH WHICH HARMS AND ZULMAN JJA CONCURRED

On 9 May 1997 this court made the following order:

"1. Die appèl van appellant 1 teen sy skuldigbevinding op aanklag 13 is nie ontvanklik nie aangesien daar geen verlof om te appelleer toegestaan is nie.

2. Die appèl van appellant 2 teen sy skuldigbevinding op aanklagte 12, 13, 14, 15, en 16, en teen die vonnisse opgelê op aanklagte 12, 13, 14, en 16, word afgewys.

3. Die appèl van appellant 1, 2 en 3 teen die doodvonnis elkeen opgelê op aanklag 15 (moord) word gehandhaaf en die doodvonnis word in die geval van elkeen van hulle tersyde gestel.

4. Die sake van al drie die appellante word na die verhoof hof terugverwys vir die oplegging van vonnis op aanklag 15."

The following are the reasons for the order: The three appellants were convicted in the Circuit Court Local Division for the Northern District at Pietersburg by Els J on various counts including, armed robbery, rape, and murder. Appellant 1 seeks to appeal against his conviction and sentence on count 13 (robbery) and the death sentence imposed upon him in respect of count 15 (murder). Appellant

3 appeals only against the death

sentence imposed upon him. Appellant 2, with the leave of this Court, appeals both against his conviction and sentence.

Although as previously stated Appellant 1 seeks to appeal against his conviction and sentence on count 13, he has not received the leave of the court a quo to appeal to this Court in regard thereto nor petitioned this court in that regard. This Court accordingly has no jurisdiction to entertain such an appeal. (National Union of Metal Workers of South Africa v Jumbo Products CC 1996 (4) SA 735 (A) at 740 A - D). Appellant 2 was sentenced as follows:-

1. Count 12 (robbery) 12 years imprisonment.
2. Count 13 (robbery) 6 years imprisonment.
3. Count 14 (rape) 10 years imprisonment.
4. Count 15 (murder) death
5. Count 16 (malicious damage to property) 1 years imprisonment.

The sentence of 6 years imprisonment on count 12 was ordered to run concurrently with the sentence of 6 years imposed on count 13. The charges in respect of which appellant 2 was convicted all arise from an incident which

occurred on 12 March 1991. The deceased

in the murder count, Sergeant Maloi, and his girl friend, R. R. were sitting in a motor car at the side of the Matlala Road. The two were robbed. R. was raped. Maloi was severely assaulted and thereafter whilst still apparently alive he was placed in the boot of the car. The car was set alight. Almost nothing remained of his body.

Appellants 1 and 3 admitted guilt. Appellant 2 however, put in issue his identification as being one of the participants in the crimes in question. He gave evidence in his own defence denying any knowledge of the matter.

The state relied upon the evidence of R. who pointed out Appellant 2 at an identification parade as being one of the persons present and the person who had raped her. The state further relied upon a pointing out to a certain lieutenant De Lange and on an accompanying statement made by Appellant 2.

The court a quo disbelieved the appellant and dismissed his evidence as being false. The pointing out of the appellant at the identification parade by R. is challenged by appellant 2, not

on the basis that there was any irregularity in the holding of the parade, but upon the basis that the witness pointed out a third person at the parade who was not one of the three accused and did not point out Appellant 1 as being one of the participants in the crime. Appellants 1 and 3 of course admitted that they were present and that the witness pointing out of appellant 3 is correct.

R. in her evidence stated that she did not know appellants 2 and 3 from before. Although she pointed out three persons at the identification parade in addition to appellants 2 and 3 she was uncertain of the identity of the third person whom she pointed out. The person in regard to whom she was uncertain was Appellant 1. She stated categorically that Appellant 2 had raped her and also that Appellant 3 had said that she and Maloi were to be killed and thrown into a dam. Although she was unable to see what exactly was happening at the boot of the vehicle she nevertheless was able to hear what was going on.

The investigating officer, one Botha, gave evidence to the effect that he came across the wreck of a motor car while it was still smouldering. He found five stones in the boot of the

vehicle and

a stone with blood marks on it alongside the motor vehicle. He also gave evidence concerning the disappearance of an original document prepared by lieutenant De Lange regarding the pointing out made by the appellant. A constable Louw gave evidence to the effect that he had arrested Appellant 2. During the course of the arrest he struck Appellant 2 in the face with his fist. He did not see any injury to Appellant 2's eye. Approximately two days after the pointing out made by Appellant 2 of the scene of the crime, he was taken to a magistrate. He mentioned to the magistrate that his left eye was slightly red and that his back was sore. The magistrate noted that Appellant 2's left eye was slightly red but that there were no visible signs of injury to his back. Appellant 2 did not tell the magistrate that he had been threatened or assaulted. The redness of Appellant 2's eye was not noticeable until Appellant 2 pointed that out to the magistrate. According to Appellant 2's evidence during a trial within a trial he stated that there were other visible injuries to his body. He was, however, unable to explain why he did not show these to the magistrate. Appellant 2 admitted that he had pointed out various matters to De Lange but stated that he had been told prior to the pointing out what he was required to do. Appellant 2 objected to the admissibility of copies of the notes of the pointing

out. This aspect of the matter was however very carefully considered by the court a quo which came to the conclusion that there was no basis for excluding the copies of the notes of the pointing out which were admissible and reliable. I can find no fault with the reasoning and conclusions of the court a quo in this regard.

As regards the evidence of Romoroka the court a quo regarded her as a "baie goeie getuie" who made a very good impression on the court. The court a quo also drew attention to the fact the she had identified Appellant 2 at the identification parade without any hesitation. Again I do not believe that there is any sound reason for interfering with the court a quo's findings regarding the reliability of the evidence of R. and her identification of Appellant 2 as one of the participants of the crimes of which he was found guilty.

Appellant 2's contention that his defence of an alibi was reasonably possibly true and should be accepted is, in my view, without any substance. His evidence amounted to a bald denial of any knowledge of the matter. He was disbelieved by the court a quo for good reason. Regard being had to the totality of the evidence led

he is clearly linked to the crime. The positive identification of him by the witness R. is clearly of considerable importance.

As regards the death sentences imposed upon the three appellants these were imposed prior to the coming into effect of the Constitution of the Republic of South Africa Act 200 of 1993. Since then the Constitutional Court in S v Makwane and another 1995 (6) BCLR 665 (CC) at 724 F -1 decided that as from the date of its order in that case, the death sentence was no longer a valid sentence and that death sentences already imposed could not be carried out. The death sentences that were imposed in this case must be set aside and replaced with other sentences. In all of the circumstances of this matter I am of the opinion that an appropriate sentence in the case of all three appellants is a matter which should enjoy the attention of the trial court to whom the matter should be referred back.

RH ZULMAN