THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
Case No: 666/96

In the matter between

LESEGO KGENGWE Appellant

and

THE STATE Respondent

CORAM: HOEXTER, PLEWMAN JJA et MELUNSKY AJA

DATE HEARD: 3 November 1998

DATE DELIVERED: Judgment delivered orally in open court on 3 November 1998

JUDGMENT

MELUNSKY AJA

Melunsky AJA

The appellant and a certain Captain Sono stood trial before Comrie J and assessors in the Bophuthatswana Provincial Division of the Supreme Court, as it was then called, on three counts - murder, robbery and attempted murder. Despite their pleas of not guilty they were convicted on all counts. The appellant was sentenced to life imprisonment on the murder charge and to ten and twelve years imprisonment respectively on the robbery and attempted murder counts. He appeals to this Court against the convictions and sentences with leave of this Court.

Before dealing with the merits of the appeal it is necessary to say something about the deplorable state of the record. Apart from numerous spelling mistakes and other errors, various pages of the record were invariably duplicated where the transcriber reached the end of a tape. What is more, the documentary exhibits, including a plan and photographs, were entirely

omitted. All of this was disconcerting if not confusing and made the task of

reading the record far more difficult than it should have been.

There is a duty on an appellant's attorney to ensure that the record is properly prepared for the appeal. Occasional errors in transcription may be overlooked but in this case the persistent duplication of pages coupled with the omission of the exhibits were of such a nature that we gave serious consideration to striking the appeal from the roll. It is only because we have a firm and clear view of what the outcome of the appeal should be and that it is in the interests of justice to dispose of this matter that we are prepared to concern ourselves with the merits.

The events that gave rise to the conviction of the appellant and his co-accused took place at the Mafikeng Jewellers in Main Street Mafikeng, a business owned by Mr and Mrs Maree. During the afternoon of 25 June 1993 a man entered the shop and went to the workshop area at the back of the

building where Mr and Mrs Maree, their granddaughter and a Mr Snyman were present. He seized Mr Maree by the collar of his shirt and shot him in the face with a pistol which he held in his other hand. Mr Maree died instantly.

Mrs Maree and her granddaughter took cover but Snyman, who had been discussing insurance business with the deceased, tried to intervene. The assailant shot at Snyman and wounded him in the hand. He then fired more shots, including one into the shop which shattered a glass display cabinet.

While the shooting was taking place a Mr Mokise was in the front part of the shop. He saw the shooting and testified that a second person, whom he was unable to identify, grabbed hold of him and threw him onto the street.

Mokise was able to observe the person who had shot the deceased leave the shop and go down the street. Mrs Maree later ascertained that a tray of silver bracelets had been removed from the display cabinet which was shattered by the bullets fired by the assailant.

5 The charges against the appellant and Sono arise out of the death of Mr Maree, the theft of the bracelets and the shooting of Snyman.

The appellant was identified as the person who had fired the shots by Mrs Maree, Snyman and Mokise. Mrs Swanepoel, the manageress of a shop next door to the jewellery store, heard the shots and went to the front door of her shop. A man whom she identified as the appellant hurried past her. He held a pistol in one hand and attempted to conceal something under his jacket with the other. Mr and Mrs da Silva were on the pavement on the opposite side of the street. They testified that the appellant went along the street carrying a box in one hand and holding a pistol in the other. He then entered a white van, referred to as a bakkie in evidence, which was parked in the street. The vehicle drove off.

There was also evidence from two policemen, Sergeants Khoela and Pieterse who were manning a road block near to Sannieshof, some 120

kilometres from Mafikeng. They told the trial court that they stopped a white bakkie driven by Sono in the late afternoon or early evening of the day in question. The appellant was the only passenger in the vehicle. There was a fresh wound on his left arm. He told them that he had sustained the injury from the fan belt of a harvester. A search of the bakkie revealed a 9 mm parabellum pistol in the cubby-hole and a bracelet under the seat. The appellant told Khoela that the pistol belonged to Sono. Mrs Maree, Snyman, Mrs Swanepoel and the da Silvas identified the pistol as being similar to the one which they had seen in the assailant's possession earlier that day; and it was indeed common cause that spent cartridges found in the Marees' jewellery shop had been fired from this hand gun. Moreover, Mrs Maree was able to identify the bracelet as one that had come from her shop.

The appellant's evidence, in brief, was to the effect that he had accompanied Sono and two other people, known only as Zachs and Ticky, to

Main Street Mafikeng in the said bakkie; that Zachs and Ticky, especially the former, had compelled him to accompany them to Mafikeng Jewellers; and that he had gone with them under duress. The appellant said that it was his task to help the other two carry jewellery out of the shop. He denied that he had a pistol in his possession. He claimed that the shots were fired by Zachs who had gone into the shop first and that after the shooting he had tried to take some jewellery from a display cabinet but had been unable to do so because he had cut his hand on the glass. He also denied that he himself had entered the workshop at the back of the shop. He testified that after the shooting he, Zachs and Ticky had run back to the bakkie which proceeded to a place known an Danville. There Zachs told Sono to take the pistol and added that he would get it from Sono at a later stage. He also allegedly instructed them to drive to Wolmaranstad where the bakkie was to be sold. Sono also gave evidence which, to some extent, corroborated the appellant's version but it is not

necessary to say anything more about his testimony.

About a week after the incident the appellant appeared at various identification parades at the local police station. He was there identified by Mrs Maree, Snyman and Mokise as the person who had fired the shots and by Mrs Swanepoel and the da Silvas as the person who had hurried along the street, holding a pistol in one of his hands. In identifying the appellant the witnesses relied - to a greater or lesser extent - on a prominent scar or mark around the outer aspect of the appellant's left eye. The trial court placed no reliance on the da Silvas' identification of the appellant on the grounds that they would not have been able to see the scar because of the distance which separated them from the appellant. Moreover, Mrs da Silva in court at first identified a court orderly as the person whom she had seen running in the street. The court, however, accepted that Mr da Silva had seen a man with a pistol get into the passenger side of the bakkie and it is significant that

appellant testified that he did enter the passenger's side of the vehicle after the shooting.

Mrs Maree told the trial court that on her way to the identification parade she was told by a Major Brand to watch for a mark or scar on the face of one of the suspects. Her son had also mentioned this to her. Moreover she saw the appellant being taken out of a police van on her arrival at the police station where the parade was to take place. Mrs Maree said that before she was taken to the identification parade there was a discussion between her and the other witnesses, apart from Snyman who was in another room, about the fact that one of the suspects was the man with a scar on his face. The other witnesses, however, denied that such a discussion had taken place. In the light of Mrs Maree's disclosures, the trial court, quite correctly in my view, was not able to place reliance on her identification of the appellant. Although the Court a quo described Mrs Swanepoel as a woman of considerable resource

and self assurance it considered it to be unwise to rely on her identification of the appellant because she had little time to observe him as he hurried past her.

Moreover there was the possibility that Mrs Swanepoel might have been present during the discussion about the scar on the suspect's face.

Snyman, however, was not present during the said discussion.

The Court a quo considered that he was a satisfactory witness and that he had had an adequate opportunity to observe the appellant, despite the terrifying circumstances under which he had seen him. Mokise, who was described as an honest witness, also had sufficient time to see the appellant's face, according to the trial court. The court considered it to be doubtful whether Mokise had heard any discussion about the scar before the identification parades were held. In the result the court did not have regard to the evidence of identification of Mrs Maree, Mrs Swanepoel or the da Silvas. For the purposes of identification it placed reliance on the evidence of Snyman and,

to a lesser extent, on that of Mokise. Counsel for the appellant correctly conceded that both Snyman and Mokise were honest witnesses. He submitted however, that the circumstances under which they saw the suspect were not ideal for identification purposes. This is true but the circumstances under which the witnesses identified the appellant were carefully considered by the trial court and its approach in this regard cannot be faulted. Furthermore the evidence of da Silva and Mrs Swanepoel provides strong corroboration for the finding that it was the appellant who went to the bakkie, holding a pistol in his hand. The police evidence, moreover, shows quite clearly that the appellant and Sono were in possession of the murder weapon and some of the stolen property a short while after the shooting. The false explanation given by the appellant to the police did nothing to advance his case.

Finally it is necessary to emphasise that the evidence given by the appellant was so improbable that it cannot reasonably be true. A fundamental

feature in this case is that it was common cause that the appellant was in the jewellery shop when the shots were fired but his explanation for his presence there was far-fetched and not credible. The trial court gave detailed reasons for rejecting his evidence but it is not necessary to repeat what is contained in the judgment. It follows, therefore, that the appeal against the convictions must fail.

As far as sentence is concerned, it was submitted on the appellant's behalf that the sentences were too severe and that the judge overemphasised the nature of the offences and overlooked the personal circumstances of the appellant.

The appellant is a young man with no previous convictions. He is reasonably well-educated and comes from a stable family background. His counsel submitted in particular that the appellant should be given an opportunity to rehabilitate himself, particularly because of his youth. While

there is considerable force in counsel's submission, the personal circumstances of the appellant must be weighed against the nature of the crimes. The appellant's behaviour was callous in the extreme. He resorted to robbery for personal gain and was quite prepared to kill to achieve his object. The courts of this country are obliged to act with firmness when confronted with crimes of this kind. While the sentences imposed on the appellant are severe they are certainly not unreasonable or disproportionate to the sentences that are warranted in this case. The trial judge exercised a proper discretion and committed no misdirection. There is therefore no substance in the appeal against the sentences and it should be dismissed, subject to what follows.

The judge ordered the sentence on Count 3 to run concurrently with that of life imprisonment on Count 1. He made no similar order in respect of the sentence on Count 2. This was obviously an oversight on his part and in any event it is clear from s 32(2) (a) of the Correctional Services Act 8 of

4 1959 that the sentence on Count 2 must also run concurrently with the sentence of life imprisonment on Count 1. It is so ordered and, save for this, the appeal is dismissed.

MELUNSKY AJA

Hoexter JA)
Concur
Plewman JA)

ORDER

The sentence on Count 2 will run concurrently with the sentence of life imprisonment imposed on Count 1. Save for this the appeal is dismissed.

Melunsky AJA