THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 450/08
No precedential significance

In the matter between:

BENZANI NXUMALO **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Nxumalo v The State* (450/2008) [2009] ZASCA 113 (23 September 2009)

Coram: Streicher, Brand JJA and Griesel AJA

Heard: 15 September 2009

Delivered: 23 September 2009

Summary: Evidence – whether circumstantial evidence was sufficient to justify conviction of the appellant. Test regarding such evidence applied to the facts.

ORDER

On appeal from: The Free State High Court (Circuit Court at Kroonstad) (Hancke J and assessors).

Order:

1. The appeal is partially upheld to the extent that the convictions and sentences imposed in respect of counts 21 and 22 are set aside.

2. Save as aforesaid, the appeal is dismissed.

JUDGMENT

GRIESEL AJA (Streicher, Brand JJA concurring):

[1] The appellant, as accused no 14, appeared with 14 co-accused before Hancke J and two assessors, sitting in the Kroonstad circuit court. They were charged with a total of 54 counts, including robbery with aggravating circumstances, kidnapping and contraventions of the Prevention of Organised Crime Act 121 of 1998 (POCA).

[2] After a protracted trial, the appellant – together with some of his co-accused – was convicted on a total of ten counts, namely four counts of robbery with aggravating circumstances (counts 19, 21, 23 and 25); five of kidnapping (counts 20, 22, 24, 26 and 27) as well as contravention of s 9(1)(a) of POCA (count 53). He was thereupon sentenced to a total period of 77 years imprisonment, which was ordered to be served concurrently in such a way as to amount to an effective term of 25 years imprisonment. Leave to appeal against the convictions and sentences was refused by the trial court. Subsequently, however, this court, on petition, granted leave to appeal against the convictions on counts 19–22. Regarding sentence, the parties

were directed to address the question as to how the setting aside of the conviction in respect of these counts (or some of them) should affect the composite sentence imposed in respect of these and the other counts of which the appellant was convicted.

Factual background

[3] The appellant and some of his co-accused were found to have been members of a criminal syndicate specialising in the hijacking of heavy trucks and other motor vehicles and the export of such vehicles, primarily to Mozambique. The indictment covered more than twenty separate hijacking incidents over a period of some five-and-a-half years, between 1999 and 2005. The *modus operandi* utilised by members of the syndicate involved not only the use of firearms to rob the victims of their vehicles and personal possessions, but also the extensive use of cell phones to keep in touch with each other prior to, during and after operations. Evidence linking various cell phone numbers to the individual members of the syndicate thus formed a vital link in the evidential chain in the case against the accused.

[4] The trial court found that the cell phone numbers ending in 8640, 7346 and 8852 could positively be linked to the appellant. In his evidence at the trial, the appellant denied that he had ever used cell phones with the numbers ending in either 7346 or 8852. The trial court, however, rejected his version as false and furnished cogent reasons for its conclusion. It has not been contended on appeal that the trial court erred or misdirected itself in this regard. I can accordingly find no grounds for disturbing these factual findings.

Counts 19 & 20

[5] Turning now to the first of two separate incidents in respect of which leave to appeal has been granted, the evidence adduced at the trial established that on 16 July 2004 the complainant, Mr Ernst Rasepedi Moepi, was *en route* along the road between Reitz and Frankfort with his employer's

8 ton Isuzu truck with registration number LKX 314 GP. Shortly after 14h00 near Frankfort he was robbed at gunpoint of his truck, cell phone and personal possessions after his vehicle had been forced off the road by the robbers. In the process, he was also kidnapped and was held captive until 18h00 that day. These events form the subject matter of counts 19 and 20, in respect of which accused nos 1, 2, 3, 4, 5, 6, 10, 11 and the appellant were convicted.

[6] There was no direct evidence linking the appellant to the commission of these offences. According to the judgment, the trial court convicted the appellant on the basis of the following circumstantial evidence:

- The appellant's cell phone with the number ending in 7346 was proved to have been in the vicinity of Frankfort at 14h22 on the day in question.

- The same cell phone was in contact with accused no 11 at 16h25 that same afternoon from the Randvaal area.

[7] In granting leave to appeal to this court, the parties were directed to deal specifically with the question whether there is any evidence linking the applicant to the commission of these offences other than the circumstantial evidence referred to above. If there is such evidence, the parties were requested to state the nature of the evidence and to deal with the question whether such evidence is sufficient to sustain the convictions on these counts.

[8] In response, counsel for both sides pointed out that, according to the cell phone records, the same cell phone was not only used in the vicinity of Frankfort at 14h22 on the day in question, but also at 14h26 on the same day. Moreover, between these two calls, the appellant's cell phone records reflect two further calls from the 'Leeukop' area at 14h24 and 14h25 respectively. From the fact that four calls were made from the same cell phone within five

minutes of each other it is safe to assume that Leeukop is also in the vicinity of Frankfort.

[9] Counsel for the appellant further pointed out that, contrary to the finding of the trial court, the cell phone records of the appellant (with the number ending in 7346) do not show that he was in contact with accused no 11 at 16h25 on that day. Instead, it shows contact at 16h29 from the Randvaal area between the cell phone of the appellant and the cell phone (with a number ending in 1911) of an unidentified person, who was proved to have been involved in various of the offences. In addition, the records show contact between the appellant and the same 'guilty' cell phone at 21h16 and 21h19 the night before the commission of the offences, namely 15 July 2004.

[10] The correct approach to circumstantial evidence has been stated on many occasions by this court and does not require reiteration.[1] Considering the cumulative effect of the circumstantial evidence in this case, the picture that emerges is as follows:

- The cell phone with number ending in 7346, which has been positively linked to the appellant, was used four times within a short space of time at or near the scene of the crimes shortly after those crimes were committed.

- The scene of the crimes, near Frankfort in the north-eastern Free State, is some distance away from Gauteng, where the appellant lives. His route took him along the same route – from Reitz to Frankfort – as the route followed by the victim of these crimes. In the absence of a reasonable explanation from the appellant, it is difficult to conceive of an innocent explanation for his presence in that area at that time.

[1] *R v De Villiers* 1944 AD 493 at 508–509; *S v Reddy & others* 1996 (2) SACR 1 (A) at 8*c–h*.

- The appellant has been proved to have been in cell phone contact with the 'guilty' cell phone with number ending in 1911 on two occasions on the night before the crimes in question as well as the afternoon after the crimes were committed.

- The appellant falsely denied any involvement in the commission of the offences and falsely denied any connection with the cell phone number ending in 7346. In the light of the incriminating nature of the evidence relating to that cell phone, the trial court was justified, in my view, in drawing an adverse inference from the appellant's false denials.[2]

[11] On the evidence as a whole, I am satisfied that the trial court was entitled to infer that the appellant was indeed at or near the scene of the crime outside Frankfort at the relevant time. I am satisfied, moreover, that the inference of guilt is the only reasonable inference to be drawn from the evidence. It follows, in my view, that the appeal in respect of counts 19 and 20 cannot succeed.

Counts 21 & 22

[12] In another incident, on 27 July 2004 at approximately 9h30 and between Memel and Senekal, the complainant, Mr Thomas Leoma, was hijacked and robbed of his employer's Nissan diesel truck, registration number CNR 169 FS, as well as certain personal belongings. He was also kidnapped and was held captive until approximately 13h00 the same day. These events form the subject matter of counts 21 and 22.

[13] The trial court found that the state had proved the guilt of the appellant as well as accused numbers 1, 2, 6, 11 and 15 beyond reasonable doubt. In its summary of the evidence, however, no mention is made of any direct or circumstantial evidence linking the appellant to the commission of these offences, save for evidence that there was cell phone contact between

[2] *S v Rama* 1966 (2) SA 395 (A) at 400G–H; *S v Steynberg* 1983 (3) 140 (A) at 147A.

the appellant and the 'guilty' cell phone (with number ending in 1911) on the afternoon *before* the crimes were committed. In the light of this evidence this court, in granting leave to appeal, directed the parties to deal specifically with the question whether there is any evidence linking the applicant to the robbery on the day in question other than the evidence of the cell phone contact mentioned above. If there is such evidence, the parties were requested to state the nature of the evidence and to deal with the question whether such evidence is sufficient to sustain the convictions on these counts.

[14] Counsel for the state was unable to refer us to any further evidence linking the appellant to the crimes in question, save for relying on the general pattern or *modus operandi* of the syndicate disclosed by the totality of the evidence. Counsel fairly conceded, however, that he could not seriously resist the appeal with regard to these two counts. In my view, this concession was properly made – especially in view of the further evidence emerging from the appellant's cell phone records, showing that the appellant's cell phone was used more or less at the time of the commission of the offences, at 8h58 on 27 July 2005, at Booysens in Gauteng, some considerable distance removed from the scene of these crimes.

[15] Where the state is unable to prove actual physical presence at the scene of a crime – let alone participation in the crime by an accused – it can only succeed in obtaining a conviction if it can prove a pre-existing conspiracy or common purpose with which the accused had associated himself to commit the crime in question. With regard to counts 21 and 22, the state has failed, in my view, to discharge that onus.

[16] In the circumstances, it appears that the trial court erred in convicting the appellant of these offences. It follows that the appeal in respect of counts 21 and 22 must be upheld.

Sentence

[17] Counsel for the appellant and the state were agreed that success on appeal in respect of only one set of charges would have 'little or no effect' on the composite sentence imposed by the trial court. I agree with this approach. After all, 'the court must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'.[3] Applying that yardstick to the remaining offences of which the applicant has been convicted, I can find no reason to interfere with the composite sentence of 25 years imprisonment imposed by the trial court.

[18] The following order is issued:

1. The appeal is partially upheld to the extent that the convictions and sentences imposed in respect of counts 21 and 22 are set aside.

2. Save as aforesaid, the appeal is dismissed.

B M GRIESEL
Acting Judge of Appeal

[3] Thomas *Principles of Sentencing* 2ed (1979) p 56, quoted with approval in *Johaar v The State* (652/2008) [2008] 46 ZASCA (21/5/09) para 14.

APPEARANCES:

FOR APPELLANT:	R C Krause (attorney) Instructed by BDK Attorneys (David H Botha, Du Plessis & Kruger) Johannesburg Symington & De Kok Bloemfontein
FOR RESPONDENT:	C F Steyn Instructed by The Director of Public Prosecutions Bloemfontein