

REPUBLIC OF SOUTH AFRICA



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

**DPP REF NO: 10/2/11/1-2020/140
CASE NO: SS34/2021**

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| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED YES/NO |

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DATE

In the matter of:

THE STATE

v

MZILA, MANDLA ZVENI

Accused 1

XIMBA, VELANGENKOSI CELAKULUNGE

Accused 2

JUDGMENT

STRYDOM J

- [1] The two accused in this matter are Mr Mandla Zweni Mzila (hereinafter referred to as accused 1), and Mr Velangenkosi Celakulunge Ximba (hereinafter referred to as accused 2).

[2] The preamble to the indictment only referred to eight counts but nine counts were put to the accused to which they pleaded. The court during the time preparing the judgment realized this and informed the counsel for the state and defence counsel about this. This led to an application for an amendment of the preamble as follows:

2.1 Paragraph was amended to refer to section 4(1)(f)(iv) instead of section 90. This section should apart from the sections already referred to be read with sections, 17,19, and 20. This would amount to a charge being in possession of pistols, the serial numbers or any identifying marks having been changed or removed without the written permission of the Registrar, being prohibited firearms.

2.2 By the insertion of a further paragraph 5 of being in unlawful possession of ammunition at a date and time referred to in count 1.

2.3 By renumbering the existing paragraphs 5,6,7 and 8 to read paragraphs 6,7,8 and 9 respectively.

[3] The proposed amendment was not objected to and was granted. It should be mentioned that the amendment did not altered to counts which was put to the accused but merely brought the preamble in line with the nine counts which was put to the accused.

[4] The two accused were charged with the following counts:

4.1 Murder read with section 51(1) of Act 105 of 1997 and further read with section 258 of the Criminal Procedure Act 51 of 1977 ("CPA");

- 4.2 Attempted murder;
- 4.3 Attempted murder;
- 4.4 Contravention of the provisions of section 4 read with sections 1,17,19,20, 103, 117, 120(1)(a) and section 121 read with schedule 4 and section 151 of the Firearms Control act 60 of 2000 (possession of firearms the serial numbers or any other identifying marks having been changed or removed without the written permission of the Registrar, being a prohibited firearm);
- 4.5 Contravening the provisions of section 90 read with sections 1, 103, 117, 120(a), section 121 read with schedule 4 and section 151 of the Firearms Control Act 60 of 2000 (possession of ammunition);
- 4.6 Robbery with aggravating circumstances as intended in section 1 of the CPA;
- 4.7 Kidnapping;
- 4.8 Attempted murder;
- 4.9 Contravening the provisions of section 90 read with section 1, 103, 117, 120(1)(a), section 121 read with schedule 4 and section 151 of the Firearms Control Act 60 of 2000 (possession of ammunition).

[5] The two accused pleaded not guilty to these counts and elected to remain silent and did not provide any plea explanation.

- [6] The accused were warned about the applicability of minimum sentences as envisaged in section 51 of the General Law Amendment Act 105 of 1997.
- [7] Admissions were made in terms of section 220 of the CPA. This related to the identity of the deceased mentioned in count 1, the cause of his death, the post mortem findings, the fact that the body of the deceased did not sustain any further injuries and photos that were taken of the crime scene.
- [8] A further photo album, exhibit D, was provisionally admitted subject to Warrant Officer Mokone testifying. He later testified.
- [9] An affidavit in terms of section 212 of the CPA and ballistic results compiled by Warrant Officer Thulani Elijah Sibiya, a senior forensic analyst in the services of the state at the Ballistic Section at the Forensic Science Laboratory were admitted as exhibit F.
- [10] Statements of the photographer and photographs of the identity parade, done by Warrant Officer Kutama, an official draughtsman, photographer and forensic field worker in the service of the South African Police Services was handed in as exhibit E.
- [11] The counts put to the accused related to three separate incidents.
- [12] The first incident took place on 7 April 2018 at or near Zondi. It is common cause that Richard Fanyana Nkobi (the deceased) was shot with firearms and died as a result and that the victims in counts 2 and 3 were also shot with a firearm during this incident. The question for decision pertaining to this incident is whether anyone of the accused was responsible for the shooting which took place.

- [13] The second incident took place on 22 August 2019 at or near Alexandra. It is not in dispute that Mr Onyekachi Okerafor (Mr Okerafor) was robbed of his white Toyota Quest Sedan vehicle registration DC 94 CC GP and also of two cell phones and at least R1,800 cash with the use of a firearm. The question for decision as far as this incident is concerned is whether the State proved beyond reasonable doubt that the two accused were involved in this incident.
- [14] It is not in dispute that Mr Okerafor was unlawfully deprived of his freedom of movement when he was taken from Alexandra to the N3 North where he was dropped off.
- [15] The third incident took place on 3 October 2019 and at or near Alberton where shots were fired in an attempt to kill Mr Mandlenkosi Jackson Jiyane.
- [16] It is common cause that the two accused were arrested in the vicinity where the shots were fired and two firearms and magazines containing ammunition were found in close proximity of the two accused.
- [17] The question for decision as far as this incident is concerned is whether the State has proven beyond reasonable doubt that the two accused were responsible for the shooting and possessed the firearms with ammunition found on the scene.
- [18] For purposes of this judgment, the court will first deal with the evidence led concerning the first incident and thereafter the evidence concerning the second and third incidents.

First incident

[19] Mr Jabulani Nene, Mr Bongani Mhlanga and Mr Phinda Nkobi testified that they were present at the scene on 7 April 2018 when a shooting happened. Mr Bongani Mhlanga witnessed the shooting but was not able to point out any suspects. He confirmed that the deceased was shot and died at the scene. He further confirmed that Phinda and Sizwa were shot and that they sustained gunshot wounds.

[20] Phinda Nkobi saw the three people who were shooting but was also not able to identify any one of them.

[21] Mr Justice Zakele Dube testified that on 7 April 2018 he was at his place of residence when he heard gunshots sound outside. He went outside to see what was happening. While he was approaching the gate, he saw three males and one of them was holding a firearm. He followed those males and the one who had a firearm turned and fired a shot towards him. He was not hit by the bullet and continued to follow them at some distance. They disappeared and afterwards he saw a red vehicle.

[22] W/O Malaza testified about an Identification Parade held on 10 September 2020 where Mr Dube was asked to point out the person or persons whom he described in his statement. These are the person or persons who were involved in the shooting of the deceased. This was now approximately two years after the incident. The Identification Parade Form was handed in as exhibit "H". At the parade he pointed out accused 2. Despite the fact that Mr Dube previously said in his statement made to the police that he can only identify one of the

people who came to that house, he was then asked whether he could point out another person. He then pointed out a second person who was not a suspect.

[23] In court he said that despite what was stated in his statement he was able to point out two people. Notes taken during the parade as to what Mr Dube said is to the effect that he did not see who fired shots at the scene. He saw the two guys he pointed, the one holding no 3 at the parade (it is accused 2) walking together with the one holding no 8 at the parade (not a suspect). The one holding no 8 was the person holding a firearm. Accused 2 was walking together with the person holding number 8 on the parade. In court, however, he stated that the person who took the firearm from his waist and pointed it at him and fired a shot was accused 2.

[24] What the witness thus did was to swop around in his evidence the person holding no 8 on the parade with accused 2 in court.

[25] The only evidence that linked accused 2 to this crime scene was the evidence of Mr Dube. Accused 2, during his testimony, denied that he was the person who was shooting towards people at this house in Zondi. In my view, a question mark hangs over the reliability of the evidence of Mr Dube as in court he was adamant that the person who turned around and fired a shot at him was accused 2 but at the Identification Parade he pointed out another person, who was not a suspect, and attributed this role to him.

[26] Mr Dube was a single witness and his evidence related to the identification of the person whom he saw at the scene some two years prior to the identification parade being held. In my view, the reliability of his identification is suspect. Accordingly, in my view, the state has failed to prove beyond reasonable doubt

that any one of the two accused was responsible for the shooting which killed the deceased and threatened the lives of the other two complainants.

[27] Consequently, accused 1 and accused 2 stand to be acquitted on counts 1, 2, 3 and 5.

Second incident

[28] Mr Okerafor testified that he is a taxifi driver. On 22 August 2019 he received a request on his phone to pick up a client. He drove to the client. On his arrival he found two black males and they got into his vehicle. They wanted to go to Alexandra. When he reached the destination, the man who was sitting in the front passenger seat grabbed the key from the ignition and locked the car. The man who was sitting at the back seat pointed him with a firearm from behind and demanded cash and cellular phones. These items were taken from him. The male at the front passenger seat got out of the vehicle and went to the driver's side door. He opened the driver's door and told him to move to the front passenger seat from inside the car. They drove with him to the N3 highway where they dropped him off and they drove away in his car, with registration number DC 94 CC GP.

[29] A few months later he was told his vehicle was found and was asked to identify his vehicle which he did.

[30] He testified that he could identify the person which sat in front of the vehicle with him. He identified accused 2 in court. He said he could see him well. He was driving with him for approximately 40 minutes. When they stopped he was told to swop seats and accused 2 drove further. At this change there were

street lights and he could observe him properly. The vehicle also had its lights on. The swopping of driver only took about 30 seconds but he was adamant that the driver was accused 2. He agreed that he never attended an identification parade as when it was requested that he attend such parade he was not available. A second parade was scheduled. He went to the place where the parade was going to be held but the parade never took place.

The third incident

[31] This relates to the incident that took place near the Sasol Garage in Michelle Avenue, Alberton.

[32] Constable Mxolisi Mncwango testified that he is employed by the Ekurhuleni Metropolitan Police Department. On 3 October 2019 while on duty, he received information about a shooting in Michelle Avenue near the Sasol Garage. He proceeded to the scene and upon his arrival he noticed a white Toyota Corolla parked next to the Sasol Garage on the pavement. He noticed two males lying on the ground with handcuffs on them. There was a CPS security vehicle. He approached the scene and next to the Toyota Corolla he noticed two 9mm pistols on the ground. He was informed by the CPS security officers that the two males were caught with the two pistols which were on the ground and that they were in the process of getting into the white Toyota Corolla. It is common cause that the two people who was lying on the ground next to this vehicle was the two accused before court.

[33] He further testified that the serial numbers of the two pistols were filed off. He then did a vehicle test to establish whether the white Toyota Corolla according to its registration number was stolen. The result came back negative. He then

conducted a test on the VIN number and the results were positive as per Sandringham CAS211/08/2019 for hijacking.

[34] He asked the two males who were handcuffed as to whom the driver was and accused 1 said he was and the other male was the passenger. The other male introduced himself as Velangenkosi Ximba, which is accused 2. He obtained a report from the security officers to the effect that they saw two males running towards the white Toyota Corolla with pistols in their hands and that they then called for back-up. The two males were arrested by Constable Dlongolo of the SAPS on a count of attempted murder, unlawful possession of firearms, unlawful possession of ammunition and for possession of a stolen motor vehicle.

[35] He further testified that he saw a Toyota vehicle which was shot at through its rear window into the seat. He saw the bullet holes and he also spoke to the driver of that vehicle.

[36] Sargeant Dlongolo then testified that on 3 October 2019 he was called to go to the scene. Upon his arrival he found CPS security company cars with two suspects lying on the ground. Next to them were two 9mm pistols also on the ground. It was explained to him that a shooting took place. He was shown a Toyota Corolla which was close to the suspects which, allegedly, was used by them. The registration number of the vehicle was DW 06 VC GP. In court he could not remember the registration number but after he was provided with his statement he testified what the registration number was. He also made enquiries whether this was a stolen vehicle. The registration number returned a negative result but he established that the VIN number of this vehicle was

linked to a Sandringham Police Station case CAS211/08/2019, which indicated that this was a stolen vehicle. He then arrested both suspects, accused 1 and accused 2, for attempted murder, unlawful possession of firearms, unlawful possession of ammunition and for possession of stolen motor vehicle.

[37] He was challenged under cross examination that he was not the finder of the firearms. He agreed and stated that he secured the scene and waited for the people from the Local Criminal Record Centre (LCRC) to arrive to take control over the exhibits.

[38] Mr Matthew Collen testified that he is a security officer working for CPS security. On 3 October 2019 he was on duty with his colleague, Tyron van der Merwe patrolling in the Alberton area. Whilst driving down Michelle Avenue he heard a sound that might have been that of a firearm and people started hooting. He then noticed two black males running across the road with firearms in their hands. There was a white Toyota parked in the left hand emergency lane. As he was getting out of his vehicle, the two people were getting into the Toyota, one on the driver's side and the other from the passenger side. He drew his firearm and instructed them to lay down. They threw down their firearms and laid down. After handcuffing them, he went to their vehicle to talk to the control room. A few minutes later the SAPS members arrived and he handed the scene to them.

[39] Tyron van der Merwe then testified that he is also a security officer working for CPS Security. He corroborated the evidence of his colleague, Mr Collen on all material aspects. He is the one who instructed the person who wanted to get into the driver's side of the vehicle to lift his hands. The driver then ran around

the vehicle and dropped his firearm. He instructed the driver to lay down and he handcuffed him and waited for the SAPS.

[40] The state called W/O Lehlohonolo Mokone a police officer at the Germiston LCRC. On 03 October 2019 he took photographs of the scene and lifted fingerprints from the white Toyota Corolla that was at the scene. He collected the firearms and other exhibits, including 2 cellular phones, from the scene and booked them in at the SAP13. Five fingerprints were lifted from the roof above the driver's door of the Toyota Corolla. These fingerprints lifted was compared with the fingerprints of accused 1 and found to be his.

[41] The findings concerning the fingerprints was not seriously contested. What was rather suggested is that it was possible that the fingerprints could have been placed on the roof of the Toyota Corolla during the arrest of accused 1.

[42] This witness booked in the firearms and cell phones. One of the firearms was loaded with 9 live rounds and the other one with 14 live rounds.

[43] W/O Anzuette Erasmus testified that she also dealt with the firearms and ammunition which were booked in the SAP 13 register. Her evidence was not challenged in argument before this court and nothing has to be said further in this regard. The same applies to the evidence of Sergeant Masondo who collected the exhibits.

[44] Evidence was then led in a trial-within-a-trial. The court made its ruling and the alleged statement of accused 2 was no admitted in evidence.

[45] The state then called Sergeant Bhekumuzi Dlamini the investigating officer in this matter and the person who took a statement of Mr Jackson Jiyane, the

attempted murder victim in the Alberton Case. Mr Jiyane has since died, and his death certificate has been admitted into record after the state reopened its case. Mr Jiyane's statements taken by Sergeant Dlamini and the one taken by Sergeant Dlongolo was read into record and admitted as part of the record. In the statement made to Sgt Dlongolo the complainant said that the person who was shooting at him was wearing a black jacket and Barcelona T-shirt with a blue trouser. In his statement to Sgt Dlamini he said that when he went to the place where the two suspects were lying on the ground "*..I saw that guy who was shooting me lying down and handcuffed..*"

[46] The two accused testified in their own defences. They both denied all allegations against them with reference to all three cases.

[47] As far as the third incident is concerned accused 1 testified that on 03 October 2019 he was with accused 2 at the garage where they had gone to buy airtime. He heard gunshots and people ran to different directions. They walked to their Audi vehicle which was parked in the parking bays near the garage shop. They were approached by two officers who took them to where there was a white car and arrested them. He was placed on the vehicle and he was handcuffed. He said he may have touched the vehicle when he was handcuffed but cannot be able to tell where on the vehicle he might have touched. According to him he did not enter into the vehicle. He testified that at the time when he was being handcuffed, the firearms were already on the ground.

[48] Accused 2 testified that on 03 October 2019 he was with accused 1 and they were driving in his Silver-grey Audi. After parking his vehicle, they went to the

garage shop to buy airtime. Before getting out of the shop, he heard gunshots and he saw people running. When they reached his vehicle, he saw people pointing at him with firearms. They pocked him with a firearm and pushed him to the white vehicle. He ended up on the ground and he was told to face down. He denied that he was seen by the security officers running towards the white Toyota Corolla. According to him, he was led towards the white Toyota Corolla by the security officers, and he did not reach it as he fell on the grass. He did not know why he was taken to the white Toyota Corolla.

[49] In summary the two accused denied that they were involved in any shooting near the robot in Michelle Avenue, they denied any knowledge of the Toyota Corolla, that this was the vehicle they arrived in, or was going to be used to leave the scene. They denied that the firearms and ammunition found at the scene was in any way connected to them. They were innocent bystanders arrested for nothing.

[50] A court considering whether the state has proven the guilt of the accused will consider all the evidence in totality having regard to the credibility of the witnesses and the probabilities that either point to the guilt or innocence of the accused.

[51] The state witnesses who testify as to what transpired at the place where the two accused were arrested impressed the court as witnesses. Mr Collen and Mr Van Der Merwe are two security guards who happened to be on the scene in their vehicle quite coincidentally when they heard shots and saw the two people running across the street with firearms. They decided to apprehend these people and remained in hot pursuit. The two suspect ran towards the Toyota

Corolla vehicle and wanted to get into it. Just at that moment Mr Collen drew his own firearm and ordered the suspects to lay down which they did after they threw down their own firearms. Mr Van Der Merwe is the one who instructed the driver to put his hands in the air. He corroborated the evidence of Mr Collen. Their evidence was further corroborated by the police officials who secured the scene and saw the firearms lying on the ground next to the suspects. These firearms were later collected by the LCRC police officials. The serial numbers of the firearms were filed off. The fingerprints of accused 1 was found to be present on the roof at the driver's side of the vehicle.

[52] Importantly, this Toyota Corolla, was the vehicle stolen from Mr Okerafor, the complainant in the second case. Should this court find that the two accused, more particularly accused 2, was running to this vehicle and was about to get into it, there would be corroboration for the identification of accused 2 by Mr Okerafor. This vehicle creates a link between accused 2 and the person who was responsible for robbing this vehicle.

[53] The court must consider the versions of the accused and whether their versions are reasonable possible true. The court does not even have to believe the accused when this test is applied. In my view, the versions of the accused that they were minding their own business, quite a distance away from where the Toyota Corolla was parked, when the security guards apprehended them at gun point is inherently improbable. According to the evidence of the accused they were walking towards their vehicle after they heard gunshots being fired. There were many people who started to run but the security guards arrested them. The two accused could provide no explanation why this would have

happened and where the firearms came from. In my view, accused 1 in fact went out of his way to try and to explain how it could have possibly happened that his fingerprints were found on top of the vehicle.

[54] If a court weigh this improbable evidence of the accused up against the evidence of the state witnesses who testified the court have no hesitation to find that the versions of the two accused are false beyond reasonable doubt. The court accepts that the two accused were the two persons that ran across the road with firearms in their hands towards the Toyota Corolla. They wanted to flee the scene with this vehicle but was apprehended moments before they could do so. The court finds that the two accused had this stolen vehicle in their possession.

[55] The court further finds that each one of the accused possessed an unlicensed semi-automatic pistol of which the markings were tampered with. It was not contested that the serial numbers of these firearms found were removed. Each firearm had ammunition in its respective magazines, to wit, 14 and 9 rounds. There is no need to make a finding which firearm was possessed by which accused and how many rounds was possessed by each of them. The court finds that each accused possessed an unknown amount of ammunition unlawfully.

[56] The question remain whether the two accused were responsible for firing the shots which hit the vehicle of Mr Jiyane. The two people who fired the shots acted in the furtherance of a common purpose as they were together when this shots were fired. This evidence is to be found in the two statements of Mr Jiyane admitted in evidence. The probative value of the contents of these

statements is not the same as evidence which was subjected to cross-examination but in the courts view there is no apparent reason why this evidence that the two assailants acted together should not be accepted. The dispute between the State and the accused was whether the two accused were the two people who fired the shots at Mr Jiyane and not whether the two people who fired the shots acted in concert.

[57] If the evidence is considered in totality one finds that shots were fired at the vehicle of Mr Jiyane. These shots could have killed him but did not. This amounts to an attempted murder. Shortly after the shots were fired the two accused ran across the street to a vehicle in an attempt to leave the scene. They ran with firearms in their hands. Mr Jiyane stated that two people fired shots at him. In my view the only reasonable inference which can be drawn from these facts is that the two accused were responsible, acting in the execution of a common purpose, for firing these shots. No other people was observed nearby the place where shots were fired more so with firearms in their hands.

[58] It was argued on behalf of the accused that other reasonable inferences could be drawn from the proven facts. For instance, that the shots were fired by other people not observed by the witnesses. Anything is possible, but in my view the only reasonable inference to be drawn is that the two accused were the people who fired those shots at Mr Jiyane. They ran from the scene with firearms in their hands and no other people who possibly could have fired the shots were observed.

[59] It was argued that the identity of the accused was not established by way of direct evidence implicating them as the assailants when the shots were fired. This is not correct. Mr Jiyane stated in his statement made to Sgt Dlamini that when he returned to the scene he saw “*that guy who was shooting at me lying down*”. Accordingly, the inference drawn is supported by direct evidence, albeit evidence which was accepted by way of affidavit as Mr Jiyane was killed before he could testify.

[60] In my view, the state has proven beyond reasonable doubt that the two accused is guilty of the attempted murder of Mr Jiyane.

[61] Turning now to the second incident. The court is cognisant of the fact that the identification of Mr Okerafor of accused 2 was a so called “*dock identification*”. Without corroboration for this kind of identification a court will be cautious to convict an accused. In the case of accused 2 very strong corroboration exists for the identification of accused 2. Accused 2 was found to be in the process of getting into the stolen vehicle from Mr Okerafor when he tried to flee the scene at the Sasol garage. This was about six weeks after the vehicle was robbed.

[62] This provides corroboration for Mr Okerafor’s identification of accused 2. The court finds that accused 2 was one of the assailants which robbed and kidnapped Mr Okerafor. As far as accused 1 is concerned he was going to drive the Toyota Corolla from the scene close to the Sasol garage. He was in possession of this vehicle when he was arrested. In my view there is a strong suspicion against accused 1 that he was the person in the company of accused 2 when this vehicle was robbed. His possession was relatively recent and an inference can be drawn, especially in a case where an explanation from the

accused is lacking, that he was the person with accused 2 when this vehicle was robbed. This is however, not the only reasonable inference that can be drawn. A reasonable other inference is that accused 2 was in the company of a third person which was not accused 1 when the vehicle was robbed. Accused 1 stands to be acquitted on counts 7 and 8.

[63] The State has proven the guilt of the two accused on the counts mentioned herein below. They are convicted on the following counts:

1. Accused 1 is found guilty on count 4, being unlawfully in possession of one semi-automatic pistol, a firearm the serial number of which was removed, being a prohibited firearm, as charged;
2. Accused 1 is found guilty on counts 8 and 9 as charged
3. Accused 1 is found not guilty on counts 1,2,3, 5, 6 and 7
4. Accused 2 is found guilty on count 4, being unlawfully in possession of one semi-automatic pistol, a firearm the serial number of which was removed, being a prohibited firearm, as charged;
5. Accused 2 is found guilty on counts 6, 7,8 and 9 as charged.
6. Accused 2 is found not guilty on counts 1,2,3 and 5.

RÉAN STRYDOM
JUDGE OF THE HIGH COURT

**GAUTENG LOCAL DIVISION
JOHANNESBURG**

Date of hearing: 03 May 2022
Date of judgment: 01 November 2022

Appearances:

On behalf of the State: Adv. V. Mongwane

On behalf of accused 1 and 2: Mr. L. U. Vorster