REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEAL CASE NO: A283/2020

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

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DATE
SIGNATURE

In the matter between:

PAULOS NYEMBE APPELLANT

And

THE STATE RESPONDENT

NEUTRAL CITATION:

KUMALO ET FRANCIS-SUBBIAH JJ

J U D G M E N T

KUMALO J

[1] This is an appeal against both conviction and sentence on counts one and two.

[1] The appellant was charged in the Regional Court for the Regional Division of Gauteng, Benoni, with three counts namely: count 1 – Robbery with aggravating circumstances, count 2 – Theft of a motor vehicle and count 3 – Contravention of section 49(1)(a) of the Immigration Amendment Act No.13 of 2002 read with sections 25, 34(1) and 26.

[2] He pleaded not guilty to counts 1 and 2 but pleaded guilty to count 3. The regional magistrate found him guilty as charged after he had satisfied himself that appellant admitted freely all the elements of the offence.

[3] He was also convicted of counts 1 and 2 and sentenced to a 15-year period of imprisonment for both counts. He was sentenced to a period of 12 months for the offence in count 3. The sentences were ordered to run concurrently and was declared unfit to possess a firearm in terms of section 103 of Act 60 of 2000.

[4] Leave to appeal for both conviction and sentence on count 1 and 2 was granted by the regional magistrate.

[5] The state's allegations were that on or about 15 November 2018, the appellant and his co-perpetrators did unlawfully and intentionally acting in common purpose, assaulted the complainant Ms Poppy Linah Kekana, and robbed her an amount of R1200, a Nokia cellphone, identity document and house keys. A firearm was used during the commission of the offence.

[6] Ms Kekana testified that on the day in question she received a call from the appellant using a cell phone number that she did not know and requested to use her husband's truck to ferry some load of scrap metals. Her husband was in Malawi on the day in question. The appellant arrived at her home in the company of another person by the name of Andrew.

[7] She called her husband to confirm if they can use the truck. She then left with them to where the truck was parked after her husband confirmed that they can use it. The truck was parked in Alberton, Telekom premises.

[8] She had gone to these premises in the company of another boy who was supposed to go with the accused. On arrival at the premises the boy decided that he was no longer going because he did not tell his mother. She then had to go with them because her husband had told

her that he does not trust the appellant and needed somebody to be with them all the time.

[9] She then drove back home with the appellant and his friend to change her clothing.

[10] She testified that they headed towards Carnival City. On the way the appellant told her that the truck does not engage gears properly. She called her husband over the phone and the husband spoke to the appellant in Sitawa, a language which she did not understand.

[11] The appellant told her that he was going to use his mechanic to fix the truck. After a while a mechanic arrived driving a Nissan 1400. She was asked to alight from the truck as they wanted to tilt its head for the mechanic to assess what needs to be fixed.

[12] It was getting late at the time and there was not enough light where they were. The appellant told her that they needed to move the truck to a place with sufficient light so that the mechanic can be able to fix it.

[13] Whilst they were moving with the truck, she saw a petrol filling station and requested that they park in it because there was sufficient light for the mechanic to work. The appellant refused. She was then at some stage transferred to the Nissan 1400 and the truck started moving and took a different direction from theirs.

[14] She inquired from the driver of the Nissan 1400 as to where they were going as she was supposed to go with the truck wherever it was going.

The driver told her that he was told to take her where he was asked to take her, and she must not make any noise.

[15] She was taken into a Bush and another Nissan 1400 joined and followed them and parked in front of them. Four boys alighted from that Nissan and opened the doors of the vehicle she was in and one of them was in possession of a firearm. She was pulled out of the vehicle and her cellphone, house keys and spectacles were taken from her.

[16] They took her further into the bushes, put her on the ground and took off her shoes. She was then taken back to the other Nissan 1400 bakkie and later into another private car which drove around with her. She asked the driver of the vehicle to call the police, but he refused.

[17] They drove around until she saw a filling station and requested that she be allowed to relieveherself at the filling station. Her request was granted. She alighted from this vehicle and ran into the filling station. She asked the person who gave her the keys to the toilets to accompany her into the toilet. She related her ordeal to this person.

[18] When they came out, they found the driver of the private vehicle waiting outside for her. He called her, and she refused. The car left. The people at the garage called the police.

[19] A case of robbery and theft was finally opened on 8 November 2018. The appellant had disappeared with the truck and was finally traced at Lindelani, near Daveyton. He was arrested on 8 January 2019.

[20] He was then charged and convicted of the counts referred to above in paragraph 2. I have already indicated that he pleaded guilty to count 3 and the learned magistrate accepted his plea in that regard.

[21] Although the evidence of the witnesses indicate that he was not present during the commission of the offense in count 1, the magistrate convicted him relying on the doctrine of common purpose.

[22] The main attack against the judgment of the trial court is that it erred in convicting the appellant oh the robbery with aggravating circumstances based on common purpose.

[23] The question then is whether the trial court correctly concluded that the evidence implicating the appellant was sufficient to conclude that he acted in common purpose with the robbers justifying his conviction.

[24] In *S v Mgedezi*, The Supreme Court of Appeals stated the following:

"In the absence of proof of prior agreement, accused #6 who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be liable for those events, on the basis of the decision in S v Sefatsa and Others 1988 (1) SA 868 (A), Only if certain a requisites are satisfied in the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of

the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite mens rea so, In respect of the killing of the deceased, he must have intended them to be killed or he must have foreseen that the possibility of them being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

[25] Further, in *S v Le Roux*, the Supreme Court of Appeals stated:

"In Sv Mgedezi and Others, this court dealt with a situation where there was no prior plan to commit the offense of public violence. It was stated there that agent oral and all-embracing approach regarding all those charged is not permissible. It was stated failure that's the conduct of the individual accused should be individually considered, with a view to determining whether there is a sufficient basis for holding that a particular accused person is liable on the ground of active participation in the achievement of a common purpose that developed at the scene. In that case the following was stated:

a view after the totality of the defence cases cannot legitimately be used as a brush with which to tower each accused individually, nor as a means of rejecting the defense version en masse."

And further:

the trial court was obliged to consider, in relation to each individual accused whose evidence could properly be rejected as false, the facts found proved by the state's evidence against that accused, in order to

assess whether there was a sufficient basis for holding that accused liable on the ground of active participation in the achievement of a common purpose. The trial court's failure to undertake this task again constituted a serious misdirection."

[26] In *S v Thebus* the constitutional court reiterated the applicability of the doctrine as follows:

"If the prosecution relies on common purpose it must prove beyond a reasonable doubt that each accused had the requisite mens rea concerning the unlawful outcome at the time the offence was committed. It means that he or she must have intended that criminal results or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue."

[27] It is clear from the findings of the court *a quo* that the appellant was convicted of count 1 based on common purpose. What facts were relied upon to reach that conclusion is not quite clear. The court *a quo* relied upon the fact that the assailants were known to the appellant and he was present when the crime was committed.

[28] However, the evidence led does not support those conclusions. Ms. Kekana was taken to a bush where she was robbed. A gun was used in the process. It is clear from her evidence that the appellant was not there. There is no evidence that he actively participated or associated

himself with the crime of robbery apart from the fact that he knew the assailants. His participation can at best be regarded as evidence that he had some knowledge of the robbery but he certainly was not present at the scene when it was carried out.

[29] A conviction of robbery on this set of facts does not withstand the ordinary principles of criminal liability and as articulated by the SCA in *Beenesh Dewnath v S* (269/13) [2014] ZASCA 57 (17 April 2014), in our law, the guilt of an accused falls to be decided with reference to his own acts and his own state of mind.

[30] There is no basis to conclude that the appellant committed the crime on count 1. The State must prove its case beyond reasonable doubt and the accused does not bear any onus to prove his innocence. In so far as count 1 is concerned, the State has failed to prove its case beyond reasonable doubt and counsel for the State conceded as much and correctly so in my view, that common purpose is not applicable in the set of facts of this case.

[31] The appeal on count 1 must succeed.

[32] I do not intend to delve much into the merits of the appeal on the second count. Counsel for the appellant conceded in not so many words that the State had proven its case beyond reasonable doubt in so far as it is concerned. From the evidence led, the appellant was involved in the theft of the vehicle and as a matter of fact, he was the

mastermind behind it. Therefore, the appeal on this count cannot succeed.

[33] The difficulty in the current matter is that the learned magistrate, when sentencing the appellant, did not prescribe a sentence for each offence but gave a globular sentence for the count of robbery with aggravating circumstances and the count of theft.

[34] Like Bosielo JA in *Karabo Rantlai v The State* (1178/2016) [2017] ZASCA 106 (13 September 2017), this court finds itself in a difficult situation to unscramble a scrambled egg. I find his remarks useful in this regard when he said the following:

"I find it opposite to reiterate the warning expressed in Young, Kruger, Nkosi and Philips that although there is no bar to imposing a globular sentence it is imperative for judicial officers to consider the desirability of such a sentence carefully before imposing it, bearing in mind the kind of serious if not intractable problems which will occur on appeal where some counts are set aside and there is a need to alter the globular sentence imposed. We also are now faced in this appeal with a difficult task of having to unscramble a scrambled egg. Although useful at times such a sentence must be imposed in exceptional circumstances only."

[35] Counsel for the appellant submitted that this court has all the facts and can impose the sentence it deems fit. This court however, is inclined to

accept the submission of the State that the matter be remitted back to the court *a quo* for its consideration of sentence.

[36] In the result, the following order is made:

1. The appeal against conviction on count 1 is upheld.
2. The appeal on count 2 is dismissed.
3. The matter is remitted back to the court *a quo* for its consideration of sentence on count 2.

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M.P. KUMALO J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

I Agree

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R FRANCIS-SUBBIAH J

Judge of the High Court

Counsel for the Applicant: Adv MG Botha

Instructed by: Legal Aid Board, Pretoria Justice Centre

Counsel for the Respondent: Adv V Tshabalala

Instructed by: Office of the Director of Public Prosecutions

Date of hearing: 18 July 2023

Date of Judgment: 25 August 2023