IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE:~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/**NO**
(3) REVISED

DATE: **4 March 2024**

SIGNATURE:.....

Case No. A97/2023

In the matter between:

MHLABA, MUZI BONGINKOSI **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Basson & Millar JJ *et* Rangata AJ

Heard on: 12 February 2024

Delivered: 04 March 2024 - This judgment was handed down electronically by

circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 04 March 2024.

Summary: Criminal Law – appeal against conviction and sentence – extra-curial statement by co-accused inadmissible against appellant – sufficient other direct evidence to establish appellant on scene – common purpose – active association and participation by appellant in murder and robbery – conviction sound – no substantial and compelling factors found to justify deviation from minimum sentence of 15 years imprisonment in respect of robbery – sentence of 18 years imprisonment imposed for murder not shockingly inappropriate – appeal against sentence dismissed.

ORDER

It is Ordered:

[1] The appeal is dismissed.

JUDGMENT

MILLAR J, (BASSON J *et* RANGATA AJ CONCURRING)

[1] During the early hours of the morning on 1 October 2011, at Mzinti Trust, three men broke into the home of Mr. James Ngomane and his wife Ms. Anita Manyisa. They entered the bedroom where the couple were sleeping and when a startled Mr. Ngomane sat up, he was shot and killed. Ms. Manyisa was dragged from the bed and robbed of not only cash but also the keys to a vehicle.

[2] In consequence of these events, the appellant and three other men were arrested. They were arraigned for hearing in the High Court on 10 April 2013 on four charges:

[2.1] Murder read with the provisions of section 51 of Act 105 of 1997[1];

[2.2] Housebreaking with intent to commit robbery and robbery with aggravating circumstances read with section 51(2)[2] of Act 105 of 1997.

[2.3] Unlawful possession of a firearm.

[2.4] Unlawful possession of ammunition.

[3] All four of the accused pleaded not guilty to the charges put to them. The High Court at the conclusion of the trial convicted the appellant and one other accused and discharged the other two. The appellant was convicted of both murder and housebreaking with intent to commit robbery and was sentenced to imprisonment for each of these for eighteen years and 15 years respectively. It was ordered that the sentences would run concurrently and so the effective sentence was one of 18 years imprisonment.

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1 The Criminal Law Amendment Act in terms of which minimum sentences were prescribed for certain serious offences. In the case of murder, section 51(1) prescribes a minimum sentence of life imprisonment in circumstances where the murder was planned or premeditated.

2 A minimum sentence, for a first offender, of 15 years imprisonment.

[4] Leave to appeal against both conviction and sentence was granted to this court by the court *a quo.*

[5] When the appeal was heard, counsel for the appellant, although having addressed both convictions and sentences in her heads of argument did not persist with argument in respect of the conviction for robbery. She confined her address to arguing that the conviction for murder ought to be set aside.

[6] The crux of the argument was that the State had failed to demonstrate on the evidence led by it that there had been any common purpose to commit murder. Since the appellant had elected not to testify or call any witnesses in his defence, the determination of the appeal is to be decided on an evaluation of whether the State discharged the onus upon it to demonstrate the guilt of the appellant beyond a reasonable doubt.

[7] The evidence of two witnesses called by the State is relevant to the determination of this appeal, Ms. Manyisa and Mr. Vusi Ceko (Mr. Ceko). There were other witnesses called but these related to the prosecution and defence of the other accused and save in respect of the admissibility of extra-curial admissions made by one of the other accused persons which is dealt with hereunder, not relevant to the present appeal.

[8] Ms. Manyisa's evidence was uncontroverted. She testified that during the early hours of the morning on 1 October 2011 she and her husband had been asleep. They were awoken by a loud noise but thought nothing of it and went back to sleep. A short while later they realized that the lights in their home had been turned on and then the door to their bedroom was kicked open.

[9] Three fairly young men who she had never seen before entered the bedroom where the couple were sleeping. When her husband sat up, one of the men pointed a handgun at him and shot him. He was fatally wounded. Ms. Manyisa was dragged from the bed and robbed of cash. The keys to her husband's vehicle were also taken although the vehicle was not. She was unable to identify any of the perpetrators.

[10] The second is Mr. Ceko[3]. He testified that on the evening of 30 September 2011 he was at a tavern and had received a telephone call between 19H00 to 20H00 from one of the accused, Mr. Khoza. He was asked to meet him in Mzinti as there was a car that he wanted him to drive for him. He was unable to arrange transport when he received the call, and it was only some hours later that he made his way to the area by hitch hiking. When he left the tavern, he was with another accused, Mr. Magagula who he asked to accompany him.

[11] When they arrived in the Mzinti area he had called Mr. Khoza to tell him he was there, and he had given him directions to a church where they were to meet. Upon arrival at the church, he had found Mr. Khoza with three other men, one of whom was the appellant. Besides the four accused and himself there was a fifth man, Mr. Manzini. There were six of them there altogether. He testified that although he did not know the appellant personally, he knew him by sight having seen him previously at the tavern when he had gone drinking with Mr. Khoza.

[12] When they entered the church, it was dark. The only light was that cast by the cellphone of Mr. Khoza which he was shining onto the persons there so that they could see each other. Mr. Khoza then said that since he was now present, they should all go to where the car that he wanted him to drive was to be found.

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[3] He was called in terms of section 204 of the Criminal Procedure Act 51 of 1977. The reason is apparent from the content of his evidence in that it incriminated him in the offences in respect of which he testified.

[13] On the way they walked in two groups, three in the front and two behind. In his group he walked with Mr. Khoza and Mr. Magagula. He testified that Mr. Khoza told him that *"when we arrive at the house, they will grab the owner of the house and take the keys, give the keys to me and I will go and start the car and we get into the car and we drive off.*"

[14] When they arrived at the house, Mr. Ceko informed them that he was not prepared to enter the house as the owner knew him. It was then agreed that he would go and stand some distance away. Mr. Manzini also refused to enter and so the two of them remained outside.

[15] The other four men then entered the premises. From outside he heard a sound which sounded like a door being broken and a short while thereafter a gunshot. He also heard the sound of crying coming from inside the house.

[16] When they came out of the premises Mr. Khoza had the car keys. Mr. Ceko refused to take them or drive the car because of the gunshot he had heard. It was at this point that the appellant said that they must not take the car and should just leave it. They then moved to the other side of the road.

[17] All six men were now standing together. The appellant took out money and gave Mr. Ceko and Mr. Manzini each R700.00. Money was also given by him to Mr. Magagula although Mr. Ceko did not see how much.

[18] The appellant then told Mr. Ceko that he was being given the money so that he would keep quiet about what had happened and not tell anyone. Mr. Khoza then told them to part ways and that since Mr. Ceko had come with Mr. Magagula

they should go together. They left and were joined by the appellant. They went to a tavern in Ntunda to "*enjoy ourselves*".

[19] It was argued for the appellant that his identity and involvement in the commission of the offences had not been established beyond a reasonable doubt. This argument was predicated on the finding by the court *a quo* that Mr. Ceko *"..would not have been able to recognize the people he met on the night in question as the light was poor. One must however remember that accused 1 called him and was known to him and that accused 3 went with him. So only the identification of accused 2 and 4 could be suspect.*" The court a quo however went on to state that "*It must however also be taken into consideration that he testified that he saw accused 2 prior to the incident at a tavern and that he was known to him."*

[20] Mr. Ceko's identification of the appellant is however not limited only to his sight of him when he saw him by the light of the cellphone or having seen him previously at a tavern. His unchallenged evidence was that he had specifically interacted with him when he had given him the R700.00 and had thereafter gone off with him to a tavern after the group had parted ways.

[21] Mr. Khoza had implicated the appellant in statements made by him during a pointing out. He also admitted to possessing the firearm and to using it to shoot Mr. Ngomane. It was argued that the court *a quo* had "*mainly*" relied on this statement in identifying and convicting him. I am not persuaded that there is merit to this argument.

[22] The court a quo relied in the first instance on the direct and uncontradicted evidence of Mr. Ceko that the appellant who he had seen before had been

present on the scene. Neither this evidence nor the evidence that they had gone to a tavern afterwards was challenged or disturbed.[4]

[23] While the court *a quo* considered the extra-curial statement of Mr. Khoza as adding weight to the direct evidence of Mr. Ceko it relied on *S v Ndhlovu*[5], and subsequent to the conviction of the appellant, the law was clarified by the Supreme Court of Appeal in *S v Litako*[6]. Apposite to the facts in the present matter the court said "*Co-accused, more often than not, disavow extra curial statements made by them and often choose not to testify. They cannot be compelled to testify, and in the event that an extra-curial statement made by one co-accused and implicating the others is ruled admissible and he or she chooses not to testify, the right of the others to challenge the truthfulness of the incriminating parts of such a statement is effectively nullified."*[7]

[24] In my view, disregarding the extra-curial statement of Mr. Khoza in its entirety does not in any way detract from the weight to be attached to the evidence of Mr. Ceko.

[25] The presence of the appellant on the scene and entering the premises is not the end of the matter. It was argued that in consequence of the fact that on the evidence of Mr. Ceko there had been no discussion of the use of violence nor had a firearm been shown to anyone at the church,that this was indicative of the fact that it was neither planned nor foreseeable that anyone would be killed when they went to get the vehicle. On the basis of this it was argued for the

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4 *S v Texeira* 1980 (3) SA 755 (A). In the present matter the only other witnesses who could testify about the events of the evening in question, besides Ms. Manyisa and Mr. Ceko were the accused persons and they all elected to exercise their right to silence.

5 2002 (2) SACR 325 (SCA).

6 2014 (2) SACR 431 (SCA). When the application for leave to appeal was argued, this judgment had in the meantime been handed down and was one of the reasons the court *a quo* granted leave to appeal to this court.

7 *Ibid* at para [65].

appellant that the State had failed to prove any common purpose on the part of the appellant.

[26] In *S v Thebus*[8] the Constitutional Court in defining common purpose held that:

> *"The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind."*[9]

[27] In the present matter, the evidence establishes a common purpose in the first category, to break into the home of Mr. Ngomane and to steal his vehicle. However, it also establishes this in the second category. The appellant left Mr. Ceko and Mr. Manzini and together with Mr. Khoza went and broke into the premises. He was present when the door to the bedroom was broken in. He was present when Mr. Khoza, brandishing the firearm shot Mr. Ngomane and thereafter assisted with robbing Ms. Manyisa. There can be no doubt that at the very least from the moment that the firearm was brandished, the appellants failure to give any indication or to take any steps to disassociate[10] himself from its use and the consequences place him squarely within the ambit of being actively associated and participating.

[28] The evidence before the court a quo established beyond a reasonable doubt that the appellant was both present when the offences with which he was charged were committed and that he actively associated and participated in

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8 2003 (2) SACR 319 (CC).

9 *Ibid* par [19].

10 *S v Musingadi and Others* 2005 (1) SACR 395 (SCA).

their commission. For these reasons the appeal against the convictions must fail.

[29] In regard to sentence, both the counts of the indictment in respect of which the appellant was convicted and sentenced carry minimum sentences. In sentencing the appellant, the court *a quo* correctly found that insofar as the murder was concerned, it was on the part of the appellant neither planned nor premeditated and for that reason did not impose the minimum sentence of life imprisonment. No substantial and compelling circumstances were found to justify not imposing the minimum sentence of 15 years imprisonment for the robbery with aggravating circumstances.

[30] Additionally, the sentences were ordered to run concurrently which has the effect of reducing the term of imprisonment to which the appellant was sentenced to an effective 18 years. The sentence is neither inappropriate nor was there any misdirection in its imposition.[11] There is in the circumstances no basis to interfere with the sentence imposed.

[31] In the circumstances I propose the following order:

[32.1] The appeal is dismissed.

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A MILLAR

JUDGE OF THE HIGH COURT

[11] *S v Rabie* 1975 (4) SA 855 (A) at 855C-D.

GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED _____

A BASSON

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE __

B RANGATA

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	12 FEBRUARY 2024
JUDGMENT DELIVERED ON:	04 MARCH 2024
COUNSEL FOR THE APPELLANT:	ADV. L AUGUSTYN
INSTRUCTED BY:	PRETORIA JUSTICE CENTRE

COUNSEL FOR THE RESPONDENT:	ADV. M SHIVURI
INSTRUCTED BY:	THE DIRECTOR OF PUBLIC PROSECUTIONS