IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A 99/2018
Date of hearing: 26 March 2024
Date delivered: 10 April 2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED
10/4/24
DATE [redacted] SIGNATURE

In the matter between:

SEEMA MOSA MMOTLA	**First Appellant**
MICHAEL MATHE	**Second Appellant**
ZAKHELE MASUKU	**Third Appellant**
MZANE WAYNE MARANELE	**Fourth Appellant**

and

THE STATE	**Respondent**

JUDGMENT

SWANEPOEL J: (Leso AJ and Kok AJ concurring)

INTRODUCTION

[1] If ever a law school needed to use a criminal case as a case study to illustrate to students how not to prosecute a matter, this case would be ideal. The case is riddled with prosecutorial missteps, starting with a badly drafted charge sheet. Then, having charged the appellants with theft of a motor vehicle, the prosecutor led no evidence that the vehicle was in fact stolen. The appellants were also charged with murder, without the cause of death (or the chain of custody in respect of the bodies of the deceased) being proven, and on the charge of possession of firearms, no ballistic evidence was led regarding the allegedly recovered firearms, and there is also no chain of custody of the alleged firearms. To add insult to injury, the prosecutor, when faced with an application for the discharge of the appellants in terms of section 174 of the Criminal Procedure Act, 51 of 1977 ("CPA"), enthusiastically argued for their discharge, when the basis for the application was obviously flawed.

[2] The saga started in early 2011 when the first appellant approached his cousin, Mr. Jan Sithole ("Sithole") with a proposal. The first appellant was then a serving police officer, and Sithole was employed as the driver of a cash-in-transit van. The first appellant proposed a plan whereby he would rob Sithole's van at an agreed place and time. Sithole's assistant, Mr. William Makola ("Makola") was also drawn into the plan.

[3] Sithole and Makola disclosed the plan to their employer, and he, in turn, enlisted the assistance of the police. The latter approached the Director of Public Prosecutions who authorized the use of a trap in terms of section 252 A of the CPA.

[4] After two fruitless dry runs by the robbers on 7 February and 14 February 2011, Makola told the first appellant that unless the robbers carried out the plan on 22 February 2011, he would not participate.

[5] On the morning of 22 February 2011 the cash-in-transit van, driven by Sithole, approached the Unifees Primary School where it was scheduled to pick up money. A green/blue Condor vehicle had stopped at a nearby river, and had allegedly transferred three robbers to the back of a white Nissan one-ton LDV. It is common cause that the Condor was driven by the second appellant. The Nissan then travelled towards the school with the three men on the back of the vehicle, and one passenger sitting in the front with the driver. Unbeknown to the robbers, the police had set a trap and were waiting at the school to apprehend them.

[6] When the cash-in-transit van arrived at the school it was approached by the Nissan vehicle, driven by the fourth appellant The robbers alighted from the vehicle and started shooting at the cash-in-transit van. One of the robbers tried to chop open the window of the van, and another robber poured petrol over the van. Sithole and Makole tried to escape by driving off and a shootout ensued between the robbers and the police officers. The Nissan came to a standstill a short distance away

from the school. When the shootout ended, three robbers were dead. The third appellant was apprehended next to the Nissan, having sustained a gunshot wound. The fourth appellant, the driver of the vehicle, was also apprehended. Three firearms were recovered at the scene.

[7] Some distance away, the first appellant was found observing the scene from a white Volkswagen Polo. The second appellant was apprehended at the green Condor, approximately three kilometers from the school.

[8] The appellants were charged as follows:

[8.1] Attempted murder, for having shot at the police in an attempt to kill them (count 1);

[8.2] One shot had penetrated a school class window where there were allegedly children in class, and consequently the appellants were charged with attempted murder on the children (count 2);

[8.3] The appellants were charged with three charges of murder in respect of their three dead co-conspirators (counts 3 to 5);

[8.4] Conspiracy to commit a robbery, read with the minimum sentence provisions in section 51 (2) of the Criminal Law Amendment Act, 105 of 1977 ("the Act") (count 6);

[8.5] Robbery with aggravating circumstances, for having allegedly robbed the van of an unspecified amount of money, read with the provisions of section 51 (2) of the Act (count 7);

[8.6] Unlawful possession of a firearm, to wit a 9 mm pistol (count 8);

[8.7] Unlawful possession of a 9 mm Vector pistol (count 9);

[8.8] Unlawful possession of a .38 Taurus Special firearm (count 10);

[8.9] Theft of a Nissan LDV (count 11);

[8.10] Unlawful possession of 17 rounds of ammunition (count 12).

[9] The appellants were convicted on all counts.

COMMON PURPOSE

[10] Of much significance is the prosecution's failure to allege in the charge sheet that the State relied on the doctrine of common purpose. Generally, a perpetrator is only liable for his/her own acts or omissions. The doctrine of common purpose is applied by the courts to hold a person, who acts in concert with others to commit a crime, liable for the acts of all of the persons who carry out the common purpose. In *S v Safatsa*[1] a large group of people had attacked a person in his home, ultimately killing him.

[1] 1988 (1) SA 868 (A)

Eight persons from the group were charged with murder. The defence argued that it was not possible to causally connect the actions of any one of the accused to the death of the deceased. The Court held that each of the accused had actively associated themselves with the common purpose and were thus liable for the acts of all, even it had not been proven that the conduct of any individual amongst the accused had causally contributed to the death of the deceased. If the doctrine were to be applied in this case, each of the appellants would be liable for the actions of all of their co-conspirators.

[11] In *Msimango v The State*[2] the Supreme Court of Appeal held:[3]

> "[14] It is common cause that in convicting the appellant on count 3, the regional magistrate relied upon the doctrine of common purpose even though it was never averred in either the charge sheet or proven in evidence. It was impermissible for the regional magistrate to have invoked the principle of common purpose as a legal basis to convict the appellant on count 3 as this never formed part of the state's case.
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> [15] Undoubtedly, the approach adopted by the regional magistrate of relying on common purpose which was mentioned at the end of the trial is inimical to the spirit and purport of s 35 (3) (a) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) under the heading 'Arrested, detained and accused persons'. In fact it is

[2] 2018 (1) SACR 276 (SCA)
[3] At [14] to [15]

subversive of the notion of a fair trial which is contained in s 35 (3) (a) of the Constitution which provides in clear terms that:

'(3) Every person has the right to a fair trial, which right includes the right –

(a) to be informed of the charge with sufficient details to answer it.'"

[12] Neither the presiding officer nor the prosecutor even mentioned the doctrine of common purpose during the trial, but it is clear that it is upon the application of this doctrine that the appellants were ultimately convicted. Instead of considering the causal connection between the acts of each of the appellants and the offence, the court accepted (without saying so), that they had acted in furtherance of a common purpose, and they were each convicted as if they had individually committed each of the charged acts. In doing so, the court erred, and it is necessary for this Court to consider the acts of each appellant individually to determine their guilt or innocence.

SECTION 252 A OF THE CPA

[13] Before the Court considers the actions of each appellant in relation to the offences, it is necessary to deal with the contention of the first appellant that the police's conduct in setting up the trap was such as to go beyond merely providing the appellants with the opportunity to commit the robbery. Section 252 A (1) of the CPA reads as follows:

(1) Any law enforcement officer, official of the State or any other person authorized thereto for such purpose (hereinafter referred to in this section as an official or his or her agent) may make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, and the evidence so obtained shall be admissible if that conduct does not go beyond providing an opportunity to commit an offence: Provided that where the conduct goes beyond providing an opportunity to commit an offence a court may admit evidence so obtained subject to subsection (3)." (my emphasis)

[14] The evidence is that the first appellant initiated the scheme. He called Sithole to discuss the plan. Sithole initially told the first appellant that he was no longer employed as a cash-in-transit driver, but later he approached the first appellant and told him that he was again so employed. The first appellant argued that by doing so Sithole enticed the first appellant to commit the offence, thus going further than merely providing the opportunity to commit the offence.

[15] I disagree. Sithole's actions amounted to no more than advising the first appellant that if her were to continue with his plan, Sithole would remain involved. That is per definition what is meant by "providing an opportunity" to commit the offence.

[16] The first appellant also argued that Makola enticed the robbers by insisting on 21 February 2011 that if they did not commit the robbery on

22 February 2011 he would no longer participate. I disagree with this contention as well. Makola did not tell the first appellant to commit the offence; he told him that if he did not do so by 22 February 2011 he would not remain involved.

[17] In *S v Matsabu*[4] the complainant was tasked by the police with trapping corrupt traffic officials who solicited bribes from the public. When the complainant was faced with a possible fine for speeding, she repeatedly suggested by inuendo that the traffic official should consider an alternative to a fine, resulting in her then paying a bribe of R 300.00. Her conduct went further than simply remaining supine and waiting for the traffic official to ask for a bribe. The Court said[5]:

> "As the section contemplates, a trap may usefully be employed to set up a situation of which a corruptly-inclined official may take advantage. The provision of an attractive opportunity is the essence of a successful trap and the legislature recognizes that fact in **s 252A.** It draws the line however at conduct which literally or figuratively lays a bait for the unsuspecting official by encouraging the commission of a crime. But the complainant's behaviour was essentially neutral. She did not tempt, entice or suggest any unlawful line of conduct."

[18] The Court held that the evidence regarding the trap was admissible. In my view the conduct of the complainant in *Matsabu* went much further in encouraging or enticing the traffic official to commit the offence than anything that either Sithole or Makola did in this case. In *S v Wana*[6] a trap was held to be in accordance with section 252 A where the

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[4] 2009 (1) SACR 513 (SCA)
[5] At para 16
[6] Unreported ECP CC 16/213 (dated 20 March 2015)

conspiracy to commit the offence and the terms of the conspiracy had been agreed at an early stage, and what followed was merely the planning of the robbery. In my view, this matter is on all fours with *Wana*. The first appellant conceived of the plan to rob the cash-in-transit van. He approached Sithole. Neither Sithole nor Makole were involved in the planning of the robbery. Once the first appellant had initiated the plan, he had some two weeks to reconsider whether to proceed or not. The robbers conducted two dry runs, and even though they were put off by the presence of the police on one occasion, they decided, nevertheless, to carry out the robbery on 22 February. At no stage did either Sithole or Makole encourage the first appellant to proceed with the robbery.

[19] The argument that there was somehow something underhanded about the fact that neither Sithole nor Makole knew that they were so-called "agents" of the police is without foundation. There is no reason for the police to explain the technicalities of the section 252 A trap to its agents. There is no magic in the term "agent", and whether Sithole and Makola knew that they were agents or not does not detract from the fact that all that they did was to provide the robbers with an opportunity to commit the robbery. It follows, therefore, that the evidence relating to the trap is admissible.

THE CHARGES

[20] As far as the robbery charge is concerned, the evidence is that no money was stolen, and I am unable to understand how the appellants

could have been charged with robbery in the first place. At best for the State the appellants committed attempted robbery. The appeal against the conviction on count 7, robbery, must succeed.

[21] Counsel for the appellants argued that the appellants had never envisaged that the situation would become out of control, and that a shootout would ensue. It was never their intention to rob the van, but only to steal the money with the co-operation of the crew of the van. Therefore, the appellants say, they can only be convicted of attempted theft of money.

[22] I disagree. Firstly, there is no evidence to support this contention as none of the appellants testified about their intentions. The actions of the robbers on the scene also belies this argument. Immediately after alighting from the Nissan the robbers started shooting at the van, attempting to chop open its window. They poured petrol over the van, obviously to force the crew to open the doors. If it had been agreed that the crew would meekly surrender the money, none of these actions would have been necessary, and they would not have had to carry firearms. There is no merit in this argument, and I find that the robbers' intention was clearly to commit a robbery.

[23] The murder charges require the State to prove, in the absence of the application of the common purpose doctrine, that the actions of each of the appellants were causally connected to the death of the deceased. There is no such evidence. Not only is it common cause that the first and

second appellants were not at the scene of the shooting, and no firearms were found in their possession, there is no evidence that either the third or fourth appellants fired any shots. All of the appellants must therefore be acquitted on the murder charges.

[24] As far as the possession of the firearms charges are concerned, the same applies. There is no evidence that any of the appellants possessed any of the firearms found on the scene. The evidence relating to the scene, and what and whom was found at which point was confusing, to say the least. One would have expected the prosecution to provide a detailed drawing of the scene, depicting where each firearm was found and where each robber was found. Perhaps then one could have come to a finding on the circumstantial evidence as to which robber possessed which firearm, if any. Furthermore, had the prosecution alleged common purpose in the charge sheet, the appellants could possibly have been convicted as active associates in the possession of the firearms, albeit that the firearms may have been in the possession of the other robbers. In the absence of the application of the common purpose doctrine, the appellants must be acquitted.

[25] Unfortunately, the attempted murder charges are hit with the same problem. There is no evidence that the third or fourth appellants fired any of the shots that hit the school, nor that either third or fourth appellant fired at the police. In fact, the evidence is that the first and second appellants never fired a shot. The actions of the appellant's co-conspirators cannot, in these circumstances, be attributed to the appellants.

[26] In respect of the charge of theft of a motor vehicle, the Nissan, there is no evidence that the vehicle was stolen. The best evidence for the State is that of Warrant Officer Loock, the investigating officer, who testified that the Nissan was tested by "some of the members on the scene" and was found to have been stolen at Phukeng. That evidence is obviously hearsay, and has no evidentiary value.

THE EVIDENCE AGAINST THE APPELLANTS

[27] It now falls to me to consider the acts of each of the appellants in relation to the charges of conspiracy to commit aggravated robbery, and the attempted robbery itself.

[28] There is no doubt the first appellant was the initiator of the plan to rob the van. Not only did he propose to Sithole and to Makole that they should commit the offence, he continued to liaise with them as the plan unfolded.

[29] Early on the morning of the robbery, the first appellant spoke by telephone with the fourth appellant. He spoke to Judas Mabasa, one of the deceased robbers, four times between 4h36 and 9h27 on 22 February, and also to Peter Mosekogomo, another deceased robber, four times between 5h26 and 9h32. The first appellant also spoke to the fourth appellant at 23h43 on the evening before the robbery. The first appellant received a call from Sithole at 9h29, whereafter he called Mosekogomo again at 9h32. At 9h19, shortly before the robbery, he received another call from Sithole. At that stage the first appellant was in the vicinity of the

robbery. The inescapable conclusion is that the first appellant was coordinating the robbery. He was present at the scene of the robbery, albeit some distance away from the school and from the point where the Nissan was eventually brought to a halt. It is highly likely that he was acting as a lookout. The first appellant did not testify, nor was the evidence of Sithole and Makole, to the effect that he was the initiator of the scheme, ever disputed. The first appellant is therefore guilty of conspiracy to commit aggravated robbery.

[30] The obvious question is then whether the acts perpetrated by the first appellant also constitute attempted aggravated robbery. In *S v Nooroodien*[7] the Court held that where an accused is part of the conspiracy to commit a murder, and the conspiracy is then carried out, that accused is liable to be convicted as a co-perpetrator, and it is not necessary to rely on the principles of the common purpose doctrine. That approach is applicable to this case, in my view. The first appellant not only conspired to rob the van, he was involved in the execution of the plan.

[31] The second appellant poses a different problem. He was seen some three kilometers from the scene of the robbery by Mr. Gert De Klerk, a police officer of unknown rank. De Klerk says that he observed the Condor driving off the main road towards the river. He observed the driver and three occupants in the vehicle. He was able to describe the clothing

[7] 1998 (2) SACR 510 (NC); See also: Gqirana v The State (unreported Eastern Cape Bisho case no. CA&R/2008); S v Sauls and Others 1981 (3) SA 172 (A) at 182 D

and appearance of some of the occupants. After approximately five minutes the Nissan appeared. The three occupants climbed onto the back of the Nissan. He then heard shots fired at approximately 9h50. De Klerk's evidence is the only evidence that implicated the second appellant in the offence.

[32] Initially, the second appellant did not testify. However, after he appointed a different legal representative, he sought leave to reopen his case, which was granted. He testified that he had travelled from Mabopane on his way to a scrap yard near Onderstepoort to look for spare parts. The Condor belonged to him, although it was not registered in his name. He saw a large number of vehicles displaying flashing lights, some of them driving on his side of the road. There were passengers in those vehicles who were standing out of the sun roofs. The second appellant said that he had to move out of the way of these other vehicles, so he turned to the right onto a side road, trying make a u-turn. He drove some 25 meters onto the side road at which point he stopped his vehicle.

[33] A police officer came running towards the Condor. He told the second appellant to move away because the police were busy at the scene. The second appellant then heard gunshots, and as he was about to leave, a second police officer came to speak to the first officer. The second officer was evidently De Klerk. He knew De Klerk from a previous incident when De Klerk had arrested him. He said that De Klerk arrested him because had a score to settle with the second appellant because the

first arrest had resulted in a civil judgment against the state. The second appellant denied De Klerk's version of events entirely.

[34] It is not in dispute that De Klerk and the second appellant knew one another from before this incident, and that De Klerk had previously arrested him. The only evidence linking the second appellant with the offence is that of De Klerk. The second appellant is also the only accused who testified. His version under oath is consonant with the version put by his erstwhile legal representative, and with his affidavit in support of a bail application which was brought shortly after his arrest.

EVALUATION

[35] A court of appeal may not lightly interfere with credibility findings of the trial court.[8] The reason for that principle is clear: a trial court hears the evidence, observes the witnesses, and is in the best position to evaluate the quality of the evidence and the veracity of the witnesses. In this case the presiding officer made no finding on the credibility of either the second appellant nor of De Klerk. He seems to have simply accepted that because the second appellant was arrested on the scene (albeit 3 kilometers from the school), he must have been involved.

[8] S v Francis 1991 (1) SACR 198 (A) at 198 J – 199 A; S v Monyane and Others 2008 (1) SACR 543 (SCA) at para 15

[36] In *S v Van der Meyden*[9] the court (per Nugent J), in emphasizing that one cannot merely consider the one side of the coin, but must weigh both the evidence of the state and the evidence of the accused said:

> "These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.
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> In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

[37] The presiding officer accepted that De Klerk's evidence was credible, without considering the exculpatory evidence of the second appellant. In doing so the court *a quo* erred. In these circumstances this Court is entitled to come to its own conclusion on the credibility of the two witnesses. It is also not necessary for the Court to subjectively believe the second appellant. The question is whether his evidence is reasonably possibly true. Even if his version is improbable, the second appellant is entitled to the benefit of doubt. His version has to be held to be false beyond a reasonable doubt for it to be rejected.

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[9] 1999 (1) SACR 447 (W) at 448 F - I

[38] The cell phone records reveal that there was no communication between the first and second appellants. The second appellant was allegedly providing transport to three of the five robbers who carried out the robbery. The absence of any communication between first and second appellants before the robbery leaves some question marks as to the second appellant's involvement in the robbery. In my view, one cannot say that the second appellant's version is false beyond a reasonable doubt. For these reasons the second appellant's appeal against conviction must succeed.

[39] As far as the third and fourth appellants are concerned, they were part of the group of robbers who attacked the cash-in-transit van. They were both wearing gloves when they were arrested, obviously to prevent any forensic evidence from being left behind. By their presence on the back of the Nissan, they were actively associating themselves with the offence, and whether they fired any shots or not, they are co-perpetrators in the robbery.

[40] The final issue to consider is whether the conviction on count 6, conspiracy to commit aggravated robbery, and count 7, aggravated robbery, constitutes a duplication of convictions. It has been an entrenched principle in our law over a span of more than 150 years that it is impermissible to convict an accused on two offences, when in reality only one offence has been committed. Particularly, courts have held that where a conspiracy to commit an offence precedes the completion of the

offence, a conviction on both the conspiracy and the completed offence is impermissible.[10]

[41] Consequently, if the first, third and fourth appellants' appeal against the conviction on aggravated robbery is unsuccessful, the appeal against the conviction on count 6 must succeed.

SENTENCE

[42] The sole conviction that will therefore stand is the conviction of the first, third and fourth appellants on attempted robbery (count 7). There is no minimum sentence applicable to attempted robbery, as the provisions of Part II of Schedule 2 to the Criminal Law Amendment Act, 107 of 1997 relate to the completed offence of aggravated robbery.

[43] This Court must, given the aggravating and mitigating evidence which is already on record, impose a sentence which is appropriate in the circumstances. The Court must consider the personal circumstances of the appellants, the seriousness of the offence, and the interests of the community. The first, third and fourth appellants have been in custody since their arrest on 22 February 2011. They were sentenced more than six years later, on 31 August 2017. In imposing sentence, the court *a quo* did not take their pre-sentence incarceration into account. The appellants' personal circumstances are unremarkable and do not justify any great degree of mitigation. On the other hand, cash-in-transit robberies are

[10] S v Basson 2001 (1) SACR 1 (T); S v Agliotti 2011 (2) SACR 437 (GSJ)

extremely prevalent in Gauteng. As in this case, cash-in-transit robbers do not hesitate to use deadly force, and often innocent lives are lost. The community requires the courts to impose appropriate sentences in such cases in order to deter other persons from committing such offences.

[44] Although the first, third and fourth appellants' conviction on the murders, the possession of the firearms and ammunition, and the attempted murders is to be set aside, it is only so because of a simple error on the part of the prosecution. Had the prosecutor paid attention to the charge sheet by inserting an allegation that the State alleged that the robbers were acting with common purpose, the appellants would likely have been convicted of murder, which, in this case, carries a minimum sentence of life imprisonment, and on the attempted murder and unlawful possession of firearms charges. I do not believe that it is inappropriate to take into account that three lives were lost in this incident, and that there was an attempt to kill other persons.

[45] In the circumstances I make the following order:

[45.1] The appeal against the appellants' conviction on counts 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 is upheld and the order of the court a quo is amended to read:

"Accused 1 to 4 are acquitted on counts 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12"

[45.2] The second appellant's appeal against the conviction on count 7 is upheld and the order of the court a quo is amended to read:.

"Accused no. 2 is acquitted on count 7."

[45.3] The first, third and fourth appellants' appeal against conviction on count 7 is upheld to the extent that the court *a quo's* order is amended to read:

"Accused nos. 1, 3 and 4 are found guilty of attempted robbery."

[45.4] The first, second and third appellants' appeal on sentence in respect of count 7 is upheld, and the order of the court a quo is amended to read:

"On count 7 the first, second and third accused are sentenced to 15 (fifteen) years' imprisonment, which shall be calculated from 22 February 2011.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

[redacted]

LESO AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

[redacted]

KOK AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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COUNSEL FOR THE STATE:	Adv S Lalane
DATE HEARD:	26 March 2024
DATE OF JUDGMENT:	10 April 2024