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.

23/7/2014
DATE SIGNATURE

23/7/14

Case Number: A871/2011

In the matter between:

MAPHUTI ERNEST MATLOU	First Appellant
JOSAYA MOKHATSHANA MOTAUNG	Second Appellant
NKGOLONG SOLOMON MOLEKOA	Third Appellant
ADAM TIRO CHAUKE	Fourth Appellant

and

THE STATE	Respondent

JUDGMENT

POTTERILL J

[1] The appellants are applying with leave of the court *a quo* against their convictions and sentences. The four appellants were found guilty of:

Count 2: theft of cash/5 years imprisonment

Count 4: contravention of section 27(1) of Act 26 of 1956 (causing an explosion whereby life or property is endangered/4 years imprisonment

Count 5: contravention of section 28 of Act 26 of 1956 (possession of explosives)/12 years imprisonment

Count 6: attempted murder/4 years imprisonment

Count 8: theft of a firearm/4 years imprisonment

The sentences in respect of counts 2, 4, 6 and 8 were ordered to run concurrently with count 5; thus a total of 12 years imprisonment.

[2] If regard is had to the notice of appeal then the grounds of appeal are succinctly that the magistrate erred in accepting the evidence of the section 204 witness as reliable and trustworthy. It was further submitted that the magistrate erred in not rejecting the state's evidence and should have accepted the accused's versions as

reasonably possibly true. In argument further grounds were raised not set out as grounds of appeal and to which the magistrate was not afforded a right of reply.

[3] The following facts serve as background to this appeal. On 23 April 2008 an Absa bank ATM at Modimolle was blown up by the use of explosives to gain entry to the cash therein. R152 870.00 was stolen and the police recovered R126 830.00. The damage to the ATM amounted to R90 000. The stolen cash from the ATM was transported in a white Ford Ranger. The police shortly after the blast followed the Ford Ranger. The perpetrators in the vehicle shot at the police and the police opened fire on the Ford Ranger. The Ford Ranger came to a stop and the perpetrators fled from the scene. The police found 500 gram explosives and fuses in the Ford Ranger. Warrant Officer Brand found a firearm in the veldt on the escape route of the perpetrators. The police followed shoe prints that led to the arrest of the 204 witness and the first and second appellants.

[4] The 204 witness identified all four the appellants as the perpetrators. There was another person with them all the time, but this person was never arrested. This person was unknown to the 204 witness. The first appellant called the 204 witness to inform him that they must blast an ATM machine in Pietersburg. This witness agreed thereto and the first appellant picked him up in a white Ford Ranger. The

first appellant then informed him that they must go to Nylstroom. They then met up with the fourth appellant and this unknown person. The fourth appellant had a plastic bag with explosives in it. They stopped next to RDP housing in a bush. He and the fourth appellant waited there while the first appellant went to fetch appellants 2 and 3. Appellants 1 and 2 were in the front of the bakkie and the 204 witness and appellant 4 and the unknown person were in the back. They proceeded to the ATM and this witness had the task of breaking the ATM to insert the explosives and fuses. Appellant 2 was with him while performing this task. Appellants 3 and 4 were standing watch. Appellant 1 stayed in the Ford Ranger. The first attempt to ignite the explosives failed and with the second attempt they were successful and the appellant and the second appellant loaded the money in a plastic bag. As they left the scene a police vehicle came from the opposite direction, it noticed them, turned and switched on its blue lights. A pursuit followed wherein shots were exchanged. Appellants 3 and 4 were later arrested at their homes. The 204 witness and appellants 1 and 2 were arrested on foot just after they fled from the Ford Ranger.

[5] The fingerprint expert lifted appellants 1 and 4's fingerprints from the Ford Ranger. Inspector Herbst testified that he found explosives in the Ford Ranger and the same explosives were utilised to gain access to the cash in the ATM. Constable Nkuna and Brand confirmed that appellants 1 and 2 and another person were arrested

shortly after the Ford Ranger came to a standstill. Warrant Officer Brand also testified that he found a firearm in the veldt while following the footprints of the perpetrators.

[6] The cornerstone of the state's case was thus that of an accomplice who was warned in terms of section 204. The magistrate adhered to the cautionary rule applicable to accomplices although he did not expressly say so. In ***S v Hlapezula and Others*** **1965 (4) SA 439 (A)** at 440D-H:

> *"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly, even where sec. 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the*

accomplice of someone near and dear to him; see in particular R v Ncanana, 1948 (4) SA 399 (AD) at pp. 405-6; R v Gumede, 1949 (3) SA 749 (AD) at p. 758; R v Nqamtweni and Another, 1959 (1) SA 894 (AD) at pp. 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned."

In ***S v Gentle*** **2005 (1) SACR 420** on p430j-431a-b: the corroboration required is stated as being:

"It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute (cf R v W 1949(3) SA 772 (A) at 778-9) If the evidence of the complainant differs from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable. But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration."

[7] The magistrate did not err in accepting the 204 witness' evidence as reliable and truthful. The two discrepancies in his testimony vis-à-vis his statement are not material.

[8] There was corroboration of this witness' evidence in that appellants 1 and 2 were arrested shortly after the blast upon pursuit by the police. Appellant 1's fingerprints were also found on the Ford Ranger and appellant 4's fingerprint was also found on the vehicle. I am satisfied that where there is corroboration for the 204 witness' testimony his testimony pertaining to appellant 3 is truthful and reliable and must be accepted.

[9] The court *a quo* did incorrectly grant indemnity before the end of the case. In ***S v Mnyamana and Another*** **1990 (1) SACR 137 (A)** the following was said:

> *"For these reasons I am of opinion that the learned Judge's granting of a discharge to each of the accomplices when he did, was premature, and amounted to an irregularity. It does not follow from this, however, that the proceedings must necessarily be vitiated.*

Irregularities in a criminal trial fall into two categories: those which are of so gross a nature as per se to vitiate the trial and those of a less serious or fundamental nature which do not per se have that effect. In regard to the latter category the Court will, on appeal, itself assess the evidence and

> *'decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilty beyond reasonable doubt'*

per Holmes JA in S v Tuge 1966 (4) SA 565 (A) at 568B."

I can however not find that the granting of the indemnity led to a failure of justice. In ***S v Mkhize and Others*** **1988 (2) SA 868 (A)** at 872F-G:

> *"As the decisions in our law on the nature of an irregularity bear out, the enquiry in each case is whether it is of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred."*

It is thus necessary to decide whether despite the irregularity the accused's guilt was established beyond a reasonable doubt. On the totality of the evidence the court *a quo* correctly rejected the versions of the appellants. It is far-fetched to suggest that a mechanic would hitchhike 30 kilometres to fix a vehicle. Appellant 1's version was thus correctly rejected. Appellant 2's version that he was in the veldt to pray was also correctly rejected. Appellant 3's denial that he was one of the perpetrators was also correctly rejected. Appellant 4 denied that he was on the scene but the fingerprints found on the Ford Ranger tell another story. The state did prove that the appellants were guilty beyond reasonable doubt.

[10] It was argued that there is splitting of charges on counts 3 and 4. The same intents are required for both and the acts are related to the same complainant – ***S v Grobler*** **1966 (1) SA 507 (A).** This argument seems to have been premised on the fact that the charge pertained to the "leftover" explosives found in the Ford Ranger. From the charge sheet it would however seem that the charge was for the possession of all the explosives. It was further argued that section 28 of Act 26 of 1956 requires the state to prove that there is a reasonable suspicion that a person who has explosives under his control or possession intended to use such explosives for the purpose of injuring any person or damaging property. It was thus argued that where the appellant were found guilty of section 27 i.e. damaging property there were not 2 different intents and there is a duplication of convictions. I am not of the

view that there is such a close connection between the 2 acts complained of that it should be viewed as a single continuous event. The explosives were possessed to blow up ATM's. They possessed the explosives for a period and sourced the ATM they intended to blow up. They then had the intent to blow up that ATM. There is not a single intent. A person who is in possession of explosives who is not entitled to possess explosives would satisfy the requirement in section 28 that they intend to either injure a person or damage property. This intent cannot be projected on to the specific deed required in section 27. I am satisfied that there was no splitting of charges.

[11] It was also submitted that the evidence pertaining to count 6 did not justify a finding of guilty on attempted murder. It is common cause that the police vehicle was shot at with two firearms. It was shot at from an open canopy on the Ford Ranger. The front wheel of the police vehicle was damaged. The appellants executed a theft at an ATM with two firearms present, they thus did foresee that the use of firearms may arise and proceeded recklessly. When shooting at the police vehicle they must have foreseen that they could shoot a member in the vehicle or the vehicle could collide or overturn causing death. It could not be argued that shooting at a police official would in the line of their duty deter them from chasing suspects and this inference is not reasonable. The court *a quo* correctly found the appellants guilty on count 6.

[12] It was also argued that the magistrate erred in finding all the appellants guilty of possession of a firearm. Reliance was placed on ***S v Motsema*** **2012 (2) SACR 96 (GSJ)** in which the following was found:

> *"1. There is no rule of law to the effect that, when an armed robbery is committed by two or more persons with a common purpose to commit the armed robbery, joint possession of the weapons used in the robbery is to be inferred.*
>
> *2. Joint possession of the weapons can only be inferred if the facts proved leave no room for any reasonable inference other than that:*
>
> *(a) each participant in the common purpose to rob, who had physical control of a weapon, intended not merely to use it, but also to possess it, both for himself and also on behalf of one or more other participants; and*
>
> *(b) each alleged joint possessor, who did not himself have physical control of a weapon, intended that one or more of the weapons should not merely be used, but should also be possessed by another participant on his behalf."*

Although the magistrate clearly is aware of this decision I cannot find that on the evidence before us the state has proved beyond a reasonable doubt that each appellant had the intention that all of them individually possess the firearms. This conviction must be overturned.

[13] With regards to sentencing the only submission is that there is a discrepancy in sentencing four years for causing an explosion and 12 years for possession of explosives; it should logically be the other way around. Although this may be so I cannot find that the sentences are shockingly inappropriate or are not in accordance with the sanctions provided for in Act 26 of 1956 and section 51(2) of the Criminal Law Amendment Act 105 of 1997.

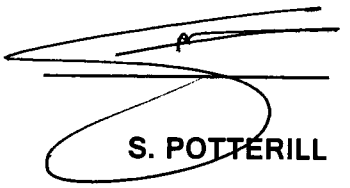
[14] I accordingly make the following order:

[14.1] The findings of guilty on counts 2, 4, 5 and 6 of all four appellants are confirmed.

[14.2] The finding of guilty of all four appellants on count 8 is set aside.

[14.3] The sentence of all four appellants on count 8 is set aside.

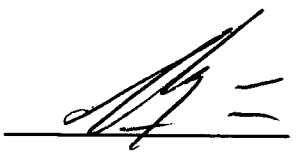
[14.4] The sentences on counts 2, 4, 5 and 6 are confirmed.



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree



N. KOLLAPEN

JUDGE OF THE HIGH COURT

CASE NO: A871/2011

HEARD ON: 21 July 2014

FOR THE APPELLANTS: ADV. A.B. BOOYSEN

INSTRUCTED BY: Du Toit Attorneys

FOR THE RESPONDENT: ADV. S.J. NTULI

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 23 July 2014