REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES:
~~YES~~ / NO
[3] REVISED
DATE 16/8/16 SIGNATURE

18/8/2016

CASE NO: A81/2016

In the matter between:

BONGANI JOSEPH MABENA Appellant

and

THE STATE Respondent

JUDGMENT

J W LOUW, J

[1] The appellant and his co-accused, Edward Marula Kgareng, were convicted of the following charges by C J Claassen J on the basis of common purpose:

- Count 1: Robbery with aggravating circumstances.
- Count 2: Murder.
- Count 3: Possession of two unlicensed firearms.
- Count 4: Possession of unlicensed ammunition.

[2] The appellant and Kgareng were each sentenced as follows:

- Count 1: Fifteen years imprisonment.
- Count 2: Life imprisonment.
- Count 3: Three years imprisonment.
- Count 4: One year imprisonment.

The court ordered that the sentences on counts 3 and 4 run concurrently with the sentence on count 1.

[3] The appellant was granted leave to appeal against his conviction and sentence by Ledwaba DJP, Claassen J having in the meantime retired. In regard to the appellant's conviction, the only issue on appeal is whether the court *a quo* correctly found that the appellant and Kgareng had acted in common purpose. The murder victim was a police officer, Bapelang Johannes Sedimo, who was shot while on duty.

[4] The State called an independent eye-witness, Mr. Enos Boitemelo Sehwapa, who was present when the incident occurred at around 04h00

on New Year's Day 2005. He testified that he had been drinking at a tavern in a Thabazimbi township since the previous evening. He and many others stood drinking in the street outside the tavern. It was still dark. He saw a police vehicle approaching and stop in front of the tavern. He wanted to go and show the police officer that someone had injured him in a fight. Before he could reach the police vehicle, the police officer got out of the vehicle and spoke to a young man, asking him why he was drinking in the street. The young man then grabbed the policeman by his clothes in front of his chest. Sehwapa then heard the sound of a firearm and saw the police officer and the young man who had grabbed him fall to the ground. When they were on the ground, he heard two further gun shots. Sehwapa then saw another young man approach the policeman and the young man who were lying on the ground. He saw the other young man search the police officer and concluded that he had removed something from the police officer while he was on the ground. The young man who was lying on the ground then got up and the two young men both ran away.

[5] Sehwapa was not able to identify either of the two young men. He could also not say which of the two had fired the shots, but presumed ("vermoed") that it was the one who had grabbed the police officer by his clothes.

[6] It was common cause that Kgareng was arrested at the appellant's parental home the following night where he was sleeping with his girlfriend. The arresting officer, Capt. Charles Cornelius Smith, testified that a Z88 firearm with fifteen rounds of ammunition was found under his pillow. The serial number of the firearm had been filed off, but the forensic evidence confirmed that the firearm was the official firearm which had been issued to officer Sedimo. Capt. Smith testified that Kgareng informed the police that the appellant might be in hospital as he had been injured. After searching various hospitals, the appellant was found at the Ga-Rankua hospital where he was booked in under a false name. His left arm was injured. He was arrested and when asked about the second firearm, he told the police that he had given it to Kgareng. Kgareng then accompanied the police to his parental home, where the firearm, a 7.65 mm pistol, was found hidden behind some books. When asked about ammunition for this firearm, Kgareng indicated that it was at the appellant's parental home where a bottle containing ammunition was then found. The serial number of this firearm had also been removed. Forensic evidence however confirmed that the bullet which had been removed from the body of the deceased had been fired from this firearm.

[7] The appellant and Kgareng both testified and both placed themselves on the scene of the murder and the armed robbery. They both denied killing the deceased and robbing him of his firearm, each blaming the other.

[8] The evidence of the appellant was that he and Kgareng and other people were standing in the street outside the tavern when the police vehicle arrived and stopped where they were standing. There was a female police officer with officer Sedimo in the vehicle. Officer Sedimo told Kgareng not to drink liquor in the street. He then drove away in the vehicle. The appellant then went inside the tavern and bought more liquor. The police vehicle returned after a few minutes, at which time a fight had started between some of the revellers. This time officer Sedimo was alone in the vehicle. After speaking to the group of people involved in the fighting, Sedimo drove the vehicle to where the appellant and Kgareng were standing and said to Kgareng that he had told him not to drink in the street. Kgareng then asked Sedimo whether he was the only one amongst everyone else who was drinking in the street and told Sedimo to leave him alone and to concentrate on his work. Officer Sedimo then threatened to lock Kgareng up in the police cells because he wouldn't listen. He opened the back of the police vehicle and tried to catch Kgareng. Kgareng retreated and took out a firearm. Sedimo then took out his firearm and tried to hide behind the appellant. The appellant tried to move backwards. It was then that Kgareng fired a shot. The appellant pushed Sedimo and they both fell to the ground. Kgareng then shot Sedimo while he was lying on the ground. The appellant couldn't say how many shots were fired. He stood up, but Sedimo was not able to. Kgareng then went to Sedimo and took his firearm. He then left the

scene and the appellant followed him. When the appellant caught up with him, he realised that his hand was bleeding. Kgareng gave him the firearm that he had used to shoot officer Sedimo and told him to hold it. Kgareng then realised that the appellant had been injured and he took the firearm back. The appellant asked Kgareng whether he could see that he had injured him. Kgareng's reply was that the appellant was a man and that he should not be afraid of pain.

[9] The appellant further testified that they did not have enough money left to get to Ellisras where they had originally planned on going. Kgareng had only R50, which was not even enough to get back to Pretoria from where they had come. Kgareng suggested that they go and wake his brother-in-law. There Kgareng asked the brother-in-law for a plastic bag and money in the amount of R40. The brother-in-law gave them a plastic bag but only had R20 to give to Kgareng. Kgareng put the two firearms inside the plastic bag. The appellant took off his skipper which covered his injured hand and his trousers which had blood on it because Kgareng told him he would be arrested if he did not change his trousers. Kgareng provided him with Bermuda shorts which he kept at his brother-in-law's place. They then proceeded to hitch-hike in the direction of Pretoria. At that stage, the appellant was holding the plastic bag with the two firearms and the clothing. A truck gave them a lift, and the appellant gave the plastic bag with its contents back to Kgareng once they were seated inside the truck. They alighted from the truck at Brits from where

Kgareng went home and the appellant somehow managed to get himself to the Ga-Rankuwa hospital where he was arrested the next morning.

[10] The evidence of Kgareng was that he and the appellant, with whom he had been friends for ten years, were travelling together to Ellisras. They arrived at Thabazimbi at about 17h00 on 31 December 2005. They then went to the house of a person whom he knew where they drank beer. At about 20h00, he and the appellant went to the tavern in question where they remained and drank liquor until the shooting incident took place. He denied that he shot officer Sedimo and said that Sedimo was shot by the appellant. He did not see clearly how it all happened, but saw that Sedimo and the appellant were pulling each other and that thereafter a gun shot went off. People ran in different directions and the appellant and Sedimo were lying on the ground. He saw the appellant standing up. He then walked across the street and found that the appellant was busy searching Sedimo and saw that there was blood on Sedimo's shirt. He then asked the appellant whether he realised that he had killed the policeman. The appellant then took one firearm and placed it in his pocket and cocked the other firearm and said that the people of Thabazimbi were fools and that he was not going to buy their story. He told the appellant that he would be putting him, Kgareng, in trouble because they had gone there together. The appellant said that he was a clever person and knew his story. He hadn't been aware that the appellant was in possession of a firearm. When the shooting took place,

he wasn't sure whether it was the policeman who was shooting the appellant or whether the appellant was shooting the policeman. He said that when this happened, he was inside the yard of the tavern and the appellant was in the street. The appellant said he should not ask him questions as if he was a police officer. They had an argument and he walked away. The appellant then came running to him and they walked further together.

[11] While they were walking, the appellant showed him his hand and said that he had shot himself and that that would not change what had happened because the police officer also wanted to shoot him. They then proceeded to the place of Oupa, being one Ismael Mokoena, who must be the brother-in-law to whom the appellant referred. He wanted to tell Mokoena what had happened but was scared, thinking that the appellant would shoot him as well. He ended up saying to Mokoena that there had been a fight and that he just wanted to come and greet him. He and the appellant then left Mokoena's place, his intention being to go back home in Winterveldt. When he reached home, he knocked but there was no response. He then proceeded to the appellant's place together with his girlfriend. The police arrived during the night and kicked the door open and arrested him. He denied having any weapon in his possession. He had previously slept in the appellant's room, especially when they had been out together and had returned late at night.

[12] He did not know where the police found the firearm, but he saw the firearm in their possession when he was arrested. He told the police that the appellant had left during the day and that he was going to his girlfriend in Soshanguve. He was asked by his legal representative during his evidence in chief what the appellant had given him before the appellant told him that he was going to his girlfriend's place. His answer was that the appellant had left the firearm together with his bloodstained clothes with him. This evidence, of course, contradicts his earlier evidence that he did not have any firearm in his possession and confirms the appellant's evidence in this regard.

[13] Kgareng accompanied the police to the Ga-Rankua hospital. There constable Chauke approached him and said that the appellant had told them that he had left the firearm with Kgareng. This was a reference to the murder weapon. Kgareng admitted that this was true and they then proceeded to his parental home where he showed the police where the firearm was. He was confronted by the police about the fact that there were no bullets in the firearm. He told the police that he had seen bullets in the appellant's room. He testified that he had seen the bullets inside an air freshener container at the time when he was there with his girlfriend.

[14] He was asked in cross-examination about the Z88 firearm. He said that the appellant had taken the Z88 with him when he said that he was

going to his girlfriend in Soshanguve. This evidence cannot be be true in light of the fact that the Z88 was found by the police under the pillow of the bed on which he was sleeping.

[15] The court *a quo* found that it did not really matter whether the appellant shot officer Sedimo and Kgareng then removed his Z88 firearm, or *vice versa*. The court found that that was exactly the evidence testified to by Sehwapa and that that evidence in effect makes both accused guilty of murdering the deceased as the one who did not fire the shot associated himself with the crime by removing the policeman's firearm and running away together with the other who had fired the shot. The court found that, as such, the evidence proved beyond any doubt a common purpose amongst the two perpetrators of killing the deceased and robbing him of his firearm.

[16] In *S v Mgedezi and Others,*[1] the findings in the judgment of Botha JA are correctly summarized in the headnote as follows:

"In the absence of proof of a prior agreement, an accused who was not shown to have contributed causally to the killing or wounding of the victims (*in casu*, group violence on a number of victims) can be held liable for those events on the basis of the decision in *S v Safatsa C and Others* 1988 (1) SA 868 (A) only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have

[1] 1989 (1) 687 (AD)

been aware of the assault on the victims. Thirdly, he must have intended to make common cause with those who were 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 the others. Fifthly, 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 the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.
Inherent in the concept of imputing to an accused the act of another on the basis of common purpose is the indispensable notion of an acting in concert. From the point of view of the accused, the common purpose must be one that he shares consciously with the other person. A 'common' purpose which is merely coincidentally and independently the same in the case of the perpetrator of the deed and the accused is not sufficient to render the latter liable for the act of the former."

[17] In my respectful view, the trial court misdirected itself in finding common purpose between the appellant and Kgareng. The independent witness Sehwapa was not able to say which of the two men that he saw did the shooting. His evidence was that he presumed that it was the person who had grabbed the deceased by his clothes. His evidence was not, as was found by the court *a quo*, that one person shot the policeman and the other removed his firearm. If that had been his evidence, a finding of common purpose would have been in order. The appellant's version, however, was that the deceased was shot by Kgareng and that it

was also Kgareng who robbed the deceased of his firearm. The appellant's version of the incident, to which I have referred in more detail above, is reasonably possibly true and cannot be rejected despite the evidence of Sehwapa or of Kgareng. On the appellant's version, he did not make common purpose with the actions of Kgareng, neither did he manifest that he shared a common purpose with Kgareng of murdering and robbing the deceased by himself performing some act of association with the conduct of Kgareng. He also did not intend the deceased to be killed, and did not foresee the possibility of him being killed or perform his own act of association with recklessness as to whether or not death was to ensue.

[18] For the same reasons, common purpose cannot be found in respect of the robbing of the deceased's firearm or the murder weapon. It follows that there was also no common purpose in respect of the possession of the two firearms and ammunition.

[19] It was submitted on behalf of the State that common purpose can be found if regard is had to the subsequent conduct of the appellant and Kgareng to which I have referred above. In my view, there is no merit in this argument. To accept the argument, would ignore more than one of the prerequisites for a finding of common purpose as laid down in *Mgedezi.*

[20] It was submitted in the alternative on behalf of the State that in the event of the appeal against the conviction of the appellant on the basis of common purpose being upheld, he should be convicted of being an accessory after the fact. There is also no merit in this argument. An accessory after the fact is someone who unlawfully and intentionally, after the completion of a crime, associates himself or herself with the commission of the crime by helping the perpetrator or accomplice to evade justice.[2] The appellant did nothing to help Kgareng to evade justice. Kgareng was arrested by the police as a result of information which they received and while the appellant was in hospital.

[21] In the result, I would uphold the appeal and make the following order:

[a] The conviction of the appellant by the court *a quo* is set aside

[b] The order of the court *a quo* in respect of the appellant is replaced with the following order:

"Accused no. 2 is found not guilty and is discharged"

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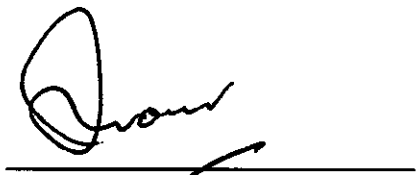
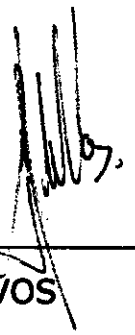
[2] See *S v Morgan and Others* 1993 (2) SACR 134 (A) at 173j – 174e.



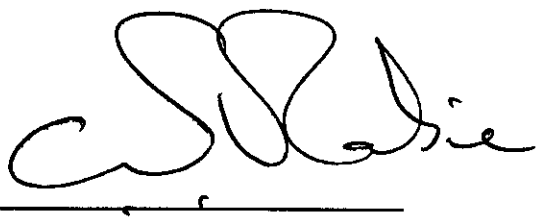
J W LOUW
JUDGE OF THE HIGH COURT

I agree



H J DE VOS
JUDGE OF THE HIGH COURT

I agree and it is so ordered



C P RABIE
JUDGE OF THE HIGH COURT

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