IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: A259/2018

DELETE WHICHEVER IS NOT APPLICABLE

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

19/9/2019

DATE SIGNATURE

BAFANA STANLEY RADEBE **APPELLANT**

v

THE STATE **RESPONDENT**

JUDGMENT

NEUKIRCHER J

1. The appellant was charged in the Regional division of Emfuleni (held at Sasolburg) on the following offences:

   1.1 Count 1: robbery with aggravating circumstance;

   1.2 Count 2: attempted murder

2. He was found guilty on both charges and sentenced to 15 years in respect of Count 1 and 5 years in respect of Count 2. As the sentences were not ordered to run concurrently, his effective sentence is 20 years' imprisonment and he was declared unfit to possess a firearm in terms of Sec 103(1) of Act 60 of 2000.

3. The appellant was granted leave to appeal[1] in respect of the conviction and sentence on Count 2 only.

The present appeal

4. This appeal concerns the issue of whether or not the appellant was correctly convicted on Count 2 of attempted murder based on the doctrine of common purpose in circumstances where the state did not expressly aver this in the charges.

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[1] On petition by Ranchod J & Noncumsohn AJ on 14 May 2018

5 It bears mentioning, at the outset, that at the hearing *a quo*, the prosecutor conceded that a conviction in these circumstances would be irregular. Despite this, the Magistrate convicted the appellant on Count 2 based on the doctrine of common purpose.

The charge on Count 2

6. The charge reads as follows:

"That the accused is guilty of attempted murder in that upon or about 27 April 2015 and at or near Evaton, in the Regional Division of Northern Gauteng, the said accused unlawfully and intentionally attempted to kill Daggie Khana, a male person, by shooting him with a firearm."

7. The appellant pleaded not guilty in both charges and by way of plea explanation, stated that he bore no knowledge of the offences as he was at home, sick.

The facts

8. The owner of the vehicle and the complainant, his friend and the friend's sister were called to give evidence.

9. Mr Khakha explained that on 27 April 2015 at approximately 00h30 he was dropping off his friend, Oupa Matsaneng at the latter's home. He parked his vehicle facing Matsaneng's gate and when Matsaneng got out of the vehicle, Mr Khakha saw a person pointing a firearm at him. The person then called Matsaneng by his name and said to him *"is that what you want to see? Lie on the ground!"*

10. When Mr Khakha asked what was happening, the person fired a warning shot into the air.

11. Then, on his side of the vehicle, he heard another shot and he was shot in his right shoulder. That person then opened the door and Khakha got out. He then ran and he heard the two assailants get into the vehicle and drive off.

12. After this he went to Matsaneng's home where an ambulance was called and he was taken to Sedibeng Hospital for treatment.

13. The only source of light that night was the light on Matsaneng's wall and from an Apollo light approximately four or five houses away. Matsaneng was able to point out his assailant's residence to Khakha. When Khakha was taken there by the police, he pointed him out as the person who pointed the firearm at Matsaneng. But the police only discovered a toy gun after conducting a search.

14. It is important to note that Khakha stated he was able to see the appellant's face as it was not covered.

15. Matsaneng then gave evidence. He could identify the appellant as he knew him from his childhood. As he stated *"[he] was born and grew up in front of me."* Although he did not see what was happening on the driver's side of the vehicle, he said that he heard the second gunshot. He also said that when Khakha stopped outside his house, he saw two people and one moved around the vehicle to the driver's side and the appellant called him by his name when he ordered him out of the vehicle.

16. Matseneng's sister was inside the house when she heard the two gunshots. She ran to the dining room window and saw two people next to the vehicle. One was standing with his back to her, but the appellant was facing her and she could identify him. She testified that she knew the appellant *"... because he grew up in front of my eyes, his mother is my friend."*

17. The appellant confirmed that he knew both Matsaneng and his sister. He denied his involvement in either charges and stated he became ill on 24 April. On 26 April he was at his uncle with his girlfriend and a friend, one Bafana where they watched a movie on a laptop. His uncle left them at about 01:30 to go sleep and approximately an hour later his girlfriend went to bed and he joined her about thirty minutes later. He only woke up after 10:00 that morning.

18. His evidence was that he bumped into Matseneng about two days later but nothing was said about the robbery and attempted murder – they just greeted each other and walked on.

19. His friend, Bafana Radebe, (both have the same name) was called as a corroborating witness. He stated that on Saturday 27 April the appellant's wife called him to say the appellant was very ill and she needed help to get him to a clinic but he could not get to her immediately:

    19.1 when he got there, he, the appellant and appellant's wife *"Sam"* sat watching a movie on a laptop. The uncle arrived later;

    19.2 he denied that appellant committed the robbery and stated he was with him;

19.3 in cross-examination they suddenly watched three to five movies and he denied the uncle joined them or sat drinking and watched the movie with them – he said that was a lie. He also denied appellant's girlfriend watched the movie with them.

20. The appellant's girlfriend also gave evidence. She stated that she was with appellant the entire day in question. According to her, Bafana (the previous witness), a Mr Lazi and Sam and his uncle arrived during the day – Mr Lazi first, then Bafana and Sam arrived together.

21. She left the group (Lazi had went home before appellant joined them all) at +-23h00 – 00h00 and she saw appellant at +-05h00 when she woke up and he was still in bed with her.

The Judgment

22. Given the obvious material contradictions in the appellant's and his witnesses evidence regarding his version, the Magistrate correctly rejected the appellant's version.

23. What he states regarding the issue of the common purpose is the following:

> "*At the scene of the crime two suspects appeared. One pointed Oupa with a firearm, while the other suspect shot the driver of the motor vehicle and pulled him out of the vehicle. Both suspects entered the motor vehicle and drove away. Therefore, both suspects acted in concert. They had the*

common purpose to rob and shoot the victims of robbery. The matter in issue is one of identification."

24. The Magistrate then convicted appellant on attempted murder (Count 2)

The appellant's personal circumstances

25. Those placed on record were: he is 36 years old and left school in Grade 10. He is unmarried and is the sole provider of his 14 year old child and his mother is unemployed – she receives a child grant. He was unemployed at the time of the arrest and made ends meet by selling clothing – he earned +- R2 000 per month, he was in custody awaiting trial for 13 months and he did not personally inflict injury during the commission of the offence.

26. All that was said, when imposing the sentence of 5 years' imprisonment in respect of Count 2, is the following:

"Count 2 the sentence is being arbitrarily reduced because there are 2 Counts. In Count 2 accused is to undergo 5 years' imprisonment."

27. However, leading up to this it is clear that the Magistrate took into account the personal circumstances of the appellant: the fact that he'd been in prison awaiting trial, the interests of the society, the trauma suffered by the victims, the loss of the complainant's vehicle and other property and the fact that he had previous convictions[2].

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[2] On 29 July 2004 for rape: 10 years' imprisonment; on 4 March 2005 for assault – R600 or 60 days wholly suspended; on 11 June 2010 for possession of drugs and dagga – he was cautioned and discharged

28. The Magistrate found:

> *"And I can correctly say that you are a person for whom there is no hope of rehabilitation. The previous prison terms you were given is a mirror to look yourself in that mirror and to correct your ways…And your conduct in this case says that you smashed that mirror, you do not want anything that corrects, that rehabilitate (sic) that reforms you. You went out to commit a serious offence where you did not care even if other people die (sic)."*

29. I find it difficult to fault the Magistrate in his reasoning either in respect of the conviction on common purpose or the sentence on count 2.

Re "Common Purpose"

30. In S v Legoa[3], Cameron JA (as he then was), stated:

> '[13] *The 1997 minimum sentencing legislation requires for its application that an accused person must have been 'convicted of an offence referred to' in the Schedule".*

As to whether or not the charge sheet should set out the facts he stated:

> *"[20] Under the common law it was therefore 'desirable' that the charge sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was however not essential. The Constitutional Court has emphasized that*

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[3] 2003 (1) SACR 13 (SCA)

under the new constitutional dispensation, the criterion for a just criminal trial is 'a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.' The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific right's set out in the sub-section of the Bill of Rights' criminal trial provision. One of those rights is 'to be informed of the charge with sufficient detail to answer it.' What the ability to 'answer' a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase the sentencing jurisdiction under the 1997 statute should be clearly set out in the charge sheet."

31. Mr Coezter has argued that the essence of the doctrine of common purpose has been defined as:

> *"that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them is imputed to the others."*[4]

[4] Snyman; Criminal Law; 4th edition; page 261

32. He submitted that *dolus* (at least in the form of *dolus eventualis*) was proven beyond reasonable doubt as a result of the following:

32.1 the appellant himself was armed with a firearm;

32.2 he discharged that weapon;

32.3 he actively participated in the robbery[5] to its conclusion;

32.4 it is evident that the robbery was pre-planned;

32.5 the conclusion to be drawn from the facts is that the appellant foresaw and reconciled himself with the possibility that a person might be shot during the commission of the robbery where both robbers were armed with forearms[6].

33. I therefore find that the conviction on Count 2 is correct.

34. Counsel for the appellant also referred to S v Moswathupa[7] where it was held that:

> *"...where multiple offences need to be punished, the Court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a Court must not lose sight of the fact that the aggregate penalty must not be unduly severe."*

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[5] As alleged in Count 1

[6] S v Mbatha & another 1987 (2) 272 (A) at 283 – 284
S v Mgedezi & others 1989 (1) SA 687 (A)

[7] 2012 (1) SACR 259 (SCA)

35. It was submitted that the cumulative sentence of 20 years' is *"disturbingly inappropriate"*[8] – I do not agree. A *quo,* the State asked for a term of 8 years' imprisonment. The Magistrate took all factors into account including that the complainant was shot during the commission of this crime, and only imposed a sentence of 5 years.

36. Thus, in my view, given all the circumstances of this case, there is no reason to interfere with the Court *a quo,* and in my view, the failure to order the concurrent serving of the two sentences, in this matter, is not sufficient reason to interfere with the sentence.

Order

37. Thus the following order is made:

The appeal in respect of conviction and sentence on Count 2 is dismissed.

NEUKIRCHER J

JUDGE OF THE HIGH COURT

MKHAWANE AJ

ACTING JUDGE OF THE HIGH COURT

[8] S v Salzwedel 1999 (2) SACR 586 (SCA)

Date of hearing: 4 September 2019

Date of judgment: 10 September 2019

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